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Editorial

In October 2015, the Faculty of Law at ELTE University hosted the Greek-Hungarian Symposium on Private International Law and Private Law for the second time in the history of this long-standing cooperation between the University of Athens and ELTE. The academic cooperation between the law faculties of the two universities goes back to the eighties, and since then has given rise to continuous cooperation and shared thought, both at the level of informal contacts and through symposiums held either in Greece or in Hungary. On the Hungarian side, the spiritual father and the driving force of the cooperation was the late Professor Ferenc Mádl, thanks to whom the contacts between the two universities remained alive over the past decades. It is with the hope of nurturing this tradition further that the fourth symposium was organised. The focal point of these meetings has always been private international law and EU law, and this time scholars from the two respective countries exchanged their views on the recent European trends experienced in these fields.

The October conference focused above all on developments in EU law and on its impact on the respective national laws in the field of private international law and private law. The conference was even more topical due to the entry into force in August 2015 of the Succession Regulation, to the withdrawal in January that same year of the promising Commission proposal on the Common European Sales Law and to the still ongoing negotiations on the draft Regulation on the free circulation of public documents. Most of the papers contained in this volume primarily intend to reflect on these current changes and challenges at the European level. Some express criticism or a somewhat sceptical approach, while others seem to be more optimistic. What they have in common is that they draw attention to the sometimes irreconcilable divergences rooted in the national legal cultures or to the differing interests of Member States, which make the acceptance and the eventual adoption of new EU measures difficult, often impossible, even where moving ahead in the field of cooperation in civil matters or in issues of private law closely linked to the establishment of the internal market would in principle be welcomed and have clear added value. Other papers in the volume are connected to the current reform of private international law in Hungary; they also reveal substantial issues of European law, mainly as far as the impact of European instruments and their intrusion on national law in this specific field is concerned.

Besides the conference contributions on the harmonisation of private international law and on the development of European law, a special aspect of transnational law is presented in this volume too: a separate study is devoted to the prospective role of the UNIDROIT Principles of International Commercial Contracts in legal education.

Both faculties believe that the cooperation will not only persist is the future but will even intensify and will be entertained by the younger generation the same way as it was nursed by those who called it into life.

Athens – Budapest, 2016 May

Prof. Spyridon Vrellis *Prof. Miklós Király*

Symposium

Spyridon Vrellis*

The *Professio Iuris* in EU Regulations**

I Introduction

The *current* so-called *professio iuris,* i.e. the party autonomy in private international law, or otherwise the possibility/power of those involved to choose the law applicable to a relationship, has deep roots in a remote past. The main source of inspiration for the choice-of-law possibility by a person, especially in the field of contractual obligations, is considered to be Charles Dumoulin (Molinaeus) in the 16th century.[1] Party autonomy, besides the contractual obligations where it has had a relatively long tradition in national conflict-of-laws systems and international instruments, extended its domain over the last decades to other relations too.

The aim of this paper is to overview the innovative – to some extent – adoption of the *professio iuris* by some of the EU Regulations regarding patrimonial, family and succession matters. There is no intention to present a complete and exhaustive analysis of this phenomenon but rather an attempt to touch upon two main problems and make comments on the issue at hand.

These problems exclusively concern choice-of-law and not choice-of-court rules, even though a choice-of-law agreement may have considerable effects on a court's jurisdiction. It is worth mentioning, for example, Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[2] (hereinafter: Succession Reg). According to it, a court of a Member State whose law had been chosen by the deceased shall have jurisdiction under some conditions or even exclusive jurisdiction on any succession matter,

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** This study is based on a report (by the author) for the 4th Greek-Hungarian Symposium on Recent Trends in European Private Law and Private International Law, held on October 9, 2015, at ELTE Law School, Budapest. The author wishes to thank Dr. A. Matakou for a careful review of the English text.

1 F. Meili, 'Argentraeus und Molinaeus und ihre Bedeutung im internationalen Privat- und Strafrecht' [1895] NiemeyerʼsZ 363-380, 367; Max Gutzwiller, *Geschichte des Internationalprivatrechts: Von den Anfängen bis zu den grossen Privatrechtskodifikationen* (Helbing & Lichtenhahn Vertrag 1977, Basel und Stuttgart) 69 ff, 78.

2 [2012] OJ L201/107.

if the parties so agreed, on one hand, while, on the other, a court already seised may, under certain conditions, decline its jurisdiction if the law chosen by the deceased to govern his/her succession is the law of another Member State.[3]

II How Broad is the Party's Autonomy?

Regarding this question, one may discern two different answers on the basis of the preponderant nature of each relationship.

1 Relationships with Preponderant Patrimonial Character

In those Regulations where, patrimonial elements are preponderant, party autonomy is very large. Parties can choose any law of any State, Member or non-Member of the EU.

a) Contractual obligations

This very extended party autonomy is established in Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter: Rome I Reg),[4] which replaced in principle[5] the Rome Convention 80/934/ECC of 19 June 1980 on the law applicable to contractual obligations.[6]

b) Non-contractual obligations

(ba) This is also the case in Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter: Rome II Reg),[7] regarding many, but not all of the non-contractual obligations falling within its scope.[8] The insertion of party autonomy in Rome II Reg may be an important innovation; however, it seems rather difficult to envisage a frequent use of it in practice. This Regulation does give to the parties involved in a delictual obligation the possibility to choose (with reasonable certainty depending on the circumstances of the case and without prejudicing the rights of third parties) the law of any country as applicable to that obligation (the abuse of this freedom reserved),

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[3] See art 5-7.

[4] [2008] OJ L177/6.

[5] But see art 24 para 1 of Rome I Reg.

[6] OJ L266/9.10.1980; entered into force 1 April 1991; hereinafter: *Rome Convention on contractual obligations.*

[7] [2007] OJ L199/40.

[8] The *professio iuris* is excluded in cases of infringement of intellectual property rights (art 8 para 3), of unfair competition and of acts restricting free competition (art 6 para 4, with a slight exception in the last case in favour (under conditions) of the *lex fori,* i.e. of the law of the court seised [art 6 para 3 *(b)*]. The Regulation does not offer any explanation for this exception. It simply affirms (recital no 22) that 'in cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.' One may wonder why the victim should not be able to do the same, if he/she sustained the damage (any damage arising from any tortuous act) in more than one country.

albeit under strict conditions, either 'by an agreement entered into after the event giving rise to the damage occurred'[9]; or 'where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.'[10] The recitals of the Regulation do not offer us any convincing explanation regarding either the adoption of the *professio iuris* or the conditions imposed.

(bb) On the contrary, a far greater practical effectiveness would be achieved and greater justice would be satisfied, if Rome II Reg would dare, against many objections from various sides, to give *to the victim,* who is the weak party in a delictual obligation, some possibility to choose the applicable law[11] (choosing, for example, between the *lex loci damni, or* the *common habitual residence* of the parties, which usually are the laws designated by Rome II Reg as applicable in the absence of choice,[12] or the *lex loci actus*).[13] Notwithstanding that 'protection should be given to weaker parties',[14] this has not been done, the Regulation having reserved the possibility of choosing, instead of the law of the *locus damni,* the *lex loci actus* (i.e. the law of the country in which the event giving rise to the damage occurred), exclusively in cases involving environmental damage.[15] In my view, it is a thousand pities that this has not been done.

2 Relationships with a Preponderant Personal or Family Character

a) What are the relationships concerned?

A different answer to the question on the broadness of party autonomy is to be found in those Regulations where important personal or family elements overshadow patrimonial elements. In all these matters, the power of the persons involved to choose the applicable law is restricted to some degree. The relations belonging to this second category have to do with:

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[9] Art 14 para 1 (a).

[10] Art 14 para 1 (b). At this point, the main difference between the two Regulations is that, as far as contractual obligations are concerned, in Rome I Reg (art 3) the choice may be made before or after the conclusion of the contract without any prior condition required.

[11] Cf. Spyridon Vrellis, 'La protection de la Vie Privée et de la Réputation Dans le Domaine des Règles de Conflit des Lois: Aspects Comparatifs,' in *Future of Comparative Study in Law: The 60th anniversary of The Institute of Comparative Law in Japan, Chuo University* (Series of the Institute of Comparative Law in Japan, vol. 81, Chuo University Press 2011, Tokyo, 505-523) 514-517.

[12] The main, unless otherwise provided for some specific torts, connecting factors in Rome II Reg are the country in which the direct damage occurred (the *locus damni*) and the place of the common habitual residence of both, the person claimed to be liable and the person sustaining damage (art 4 paras 1-2). Regarding liability for damages caused by an industrial action, an exception to the *lex loci damni* is adopted: the law of the country where the action is to be, or has been, taken, is designated as applicable (art 9).

[13] With regard to environmental damage, Rome II Reg provides that, instead of the law of the *locus damni,* which is applicable according to art 4 para 1, 'the person seeking compensation for damage [may] choose [...] to base his or her claim on the law of the country in which the event giving rise to the damage occurred' (art 7).

[14] Recital no 31.

[15] See n 13.

aa) Maintenance obligations

Council Regulation (EC) no 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereinafter: Maintenance Reg),[16] quite correctly adopted by reference The Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter: The Hague Protocol).[17] This Protocol was the upshot of a very long and fruitful experience within the frame of The Hague Conference on Private International Law after its first Convention of 1956.[18]

ab) Divorce and legal separation

Council Regulation (EU) no 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter: Divorce Regulation),[19] made a bold step, recognising that 'spouses should be able to choose the law of a country with which they have a special connection or the law of the forum as the law applicable to divorce and legal separation […]'.[20]

ac) Matters of succession to the estates of deceased persons

When the Succession Reg adopted the *professio iuris* in succession matters, it had already forerunners in national legislations, such as Switzerland as from 1987, Italy, Belgium and other countries, as well as in the Hague Convention on the Law applicable to succession to the estates of deceased persons of 1 August 1989 (not yet in force) (hereinafter: The Hague Succession Convention).

ad) Matrimonial property regimes

In these matters it seems rather easy to insert choice of law in the conflict of laws area, as The Hague Convention on the law applicable to matrimonial property regimes of 14 March 1978 (hereinafter: The Hague Matrimonial Property Regimes Convention)[21] had already done, since the spouses have at their disposal the choice among various matrimonial regimes in domestic law.[22] The European Union has drafted two Council Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions, in matters of *matrimonial property regimes* on one hand (hereinafter: Proposal on matrimonial property regimes)[23] and in matters of the

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16 [2009] OJ L7/1.

17 Entered into force 1 August 2013.

18 See text to n 41ff.

19 [2010] OJ L343/10.

20 Recital no 16.

21 Entered into force 1 September 1992.

22 Various solutions in domestic private international laws and The Hague Convention of 1978 are indicated by Andrea Bonomi, 'Les régimes matrimoniaux en droit international privé compare', in Andrea Bonomi, Marco Steiner (eds), *Les Régimes Matrimoniaux en Droit Comparé et en Droit International Privé : Actes du Colloque de Lausanne du 30 septembre 2005* (Comparativa vol. 76, Librairie Droz 2006, Genève, 59-75) 62-66.

23 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' Interinstitutional file: 2011/0059 (CNS).

property consequences of registered partnerships[24] on the other (hereinafter: Proposal on registered partnerships).[25]

b) Some observations

Regarding the Regulations of that personal and family category four observations suffice.

ba) The connecting factors

The connecting factors used by the conflict-of-laws rules for designating the applicable law in the absence of choice by the parties, e.g. in particular the habitual residence and the nationality, sometimes the *forum* (= the court seised) too, are the same elements also offered to the parties, using some flexibility, for choosing the applicable law. Nevertheless, the Regulations follow various models of flexibility, combining them in various ways; I shall go through them in a kind of elementary synthesis.[26] For the sake of clarity I shall simplify to some extent the adopted rules, which as a matter of fact are often quite complicated, because of the distinctions, conditions, and exceptions contained therein.

First model: Some Regulations retain as connecting factors some elements *common to the persons involved.* As such, they designate as successively applicable the laws of the *common habitual residence* of the parties or their *last common habitual residence* (as is the case in divorce),[27] or even their *first common habitual residence* after a certain event (e.g. the celebration of the marriage according to the Proposal on matrimonial property regimes),[28] or

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[24] 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships' Interinstitutional File: 2011/0060 (CNS).

[25] The most recent versions of the Proposals seem to be those of November 10 2014. References will be to these very versions. The scope of the Proposals should include all civil-law aspects of matrimonial property regimes/the property consequences of registered partnerships, both their daily management and liquidation, in particular as a result of the couple's separation or the death of a spouse/partner (recital no 11). Both Proposals exclude from their scope, among other issues, maintenance obligations and the succession to the estate of a deceased spouse/partner [art 1 para 3 *(b)* and *(d),* and art 1para 3 *(c)* and *(e),* respectively]. The European Commission submitted on March 2, 2016 a 'Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples covering both matters of matrimonial property regimes and the property consequences of registered partnerships': COM (2016) 108 final, 2016/0061 (NLR).

[26] The technical presentation of the applicable law differs from one Regulation to another: One group of Regulations establishes *primo loco* the *professio iuris* and then, in the absence of choice, the objectively designated applicable laws; on the contrary, another group designates first objectively the applicable laws and after that it continues to the law chosen by the parties. Both approaches are acceptable; it seems nevertheless more logical to prefer the first approach where the parties have a very large power to choose the law of any State (even subject to some general restrictions), and follow the second model where the power of the parties is quite restricted, being considered rather as an exception to the general rule which designates the applicable law objectively. From this point of view, the Divorce Reg or the Proposals on matrimonial property regimes and on registered partnerships, to the extent that party autonomy is restricted, are not quite right when stating as *primo loco* applicable the law chosen by the spouses / partners.

[27] Divorce Reg art 8 *(a)* and *(b).*

[28] The Proposal on matrimonial property regimes designates as applicable, in a scale of succession, *primo loco* the law of the State of the spouses' first common habitual residence after the celebration of the marriage or, failing that, *secundo loco* the law of the State of the spouses' common nationality at the time of the celebration of the marriage or, failing that,

their *common nationality*[29] at a particular time (at the time the Court is seised, according to the Divorce Reg;[30] at the time of the celebration of the marriage, according to the Proposal on matrimonial property regimes).[31]

Instead of the above laws, the parties have the possibility to choose the law of the State of the *habitual residence of the spouses / future spouses / partners / future partners* at the time this choice is made (according to the Divorce Reg[32] and the Proposals on matrimonial property regimes[33] and on registered partnerships);[34] *or of the habitual residence of one of them* at the time this choice is made (according to the Proposals on matrimonial property regimes and on registered partnerships),[35] or the law of the nationality of *either* party at the time this choice is made (this is the case in the Divorce Reg[36] and the said Proposals);[37] or, in maintenance obligations, the law of the habitual residence of the debtor instead of that of the creditor, which is in principle applicable to these obligations in the absence of choice.[38]

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tertio loco the law of the State with which the spouses jointly have the closest connection at the time of celebrating their marriage, taking all the circumstances into account (art 20a para 1). Cf. the initial Commission's Proposal for this Regulation [COM (2011) 126/2], art 17 para 1. According to the Commission's Explanatory Memorandum, under art 17, 'these criteria are designed to reconcile the life actually lived by the couple, especially the establishment of their first common habitual residence, and the need to be able to easily determine the law applicable to their matrimonial property regime.' – The Proposal on registered partnerships establishes in principle as applicable the law of the State under the law of which the registered partnership was created (art 15 para 1; see the exception to this rule in para 2 of the same article).

29 With regard to a State with two or more systems of law or sets of rules but lacking rules that designate the applicable law in such cases, the Regulations follow various solutions regarding the problem of what is the applicable law of nationality: (i) 'any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection' [Divorce Reg art 14 *(c)*; therefore parties choosing the law of the State of the nationality of one of them are advised to indicate at the same time which territorial unit's law they have agreed upon (recital no 28)]; (ii) in the absence of internal conflict-of-laws rules, any reference to the law of the State of the nationality of the deceased shall be construed as referring to the law of the territorial unit with which the deceased had the closest connection [Succession Reg art 36 para 2 *(b)*]. The Hague Conference prefers that the reference to the nationality be construed as referring to the territorial unit of the habitual residence (*The Hague Matrimonial Property Regimes Convention* art 16 para 2) and, in the absence of such an habitual residence, the unit with which the person (the deceased) had his/her closest connection [*The Hague Succession Convention* art 19 para *(b)*].

30 Art. 8 *(c)*.

31 See n 28. Art 20a para 2 adds, that the law of the spouses' common nationality shall not apply if they have 'more than one common nationality at the time of the celebration of the marriage'; this latter rule recalls art 15 para 2 of *The Hague Matrimonial Property Regimes Convention.*

32 Art 5 para 1 *(a)*.

33 Art 16 para 1 *(b)*.

34 Art 15-03 para 1 *(a)*.

35 See n 33 and 34 respectively.

36 Art 5 para 1 *(c)*.

37 Proposal on matrimonial property regimes art 16 para 1 *(c)*; Proposal on registered partnerships art 15-03 para 1 *(b)*, adding in letter *(c)* the law of the State under whose law the registered partnership was created.

38 See The Hague Protocol art 3 para 1 and art 8 para 1 *(b)*.

Second model: The parties may choose, among other laws, one of the laws provided in absence of choice, e.g. the law of the State where the Court is seised (i.e., the law of the *forum*), which is the last in the scale of those successively designated as applicable laws in matters of divorce,[39] ignoring all previous laws; or they may choose, among other laws, the law of the State under the law of which the registered partnership was created (which is the basic rule in the absence of choice of law by the partners in matters of property consequences regarding registered partnerships)[40].

Third model: Sometimes party autonomy is enlarged. This has happened in matters of maintenance obligations and succession:

(i) As already mentioned, Maintenance Reg adopted The Hague Protocol[41] by reference. This decision is quite correct. The Hague Conference had a very long and fruitful experience of maintenance obligations. Since its first Convention of 24 October 1956 *sur la loi applicable aux obligations alimentaires envers les enfants*[42] the Conference has showed a clear intention to favour the beneficiary of maintenance (the weaker party, in general). The insertion of party autonomy is an innovation of the Protocol, consisting in particular of offering adults capable of defending their interests some power to choose the applicable law.[43] As A. Bonomi indicates,[44] the innovation has two variations: a procedural agreement enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes of a specific procedure (art 7), and an option regarding the applicable law, that may be exercised at any time by adults capable of defending their interests, subject to certain conditions and restrictions (art 8).

Regarding the latter variation, it is provided,[45] that, on one hand, the parties who are adults and in a position to protect their interests may choose, among other laws, the national law *of either party* at the time of designation, (instead of the law of their common nationality, which is applicable under circumstances where there is no choice); or the law of the State of the habitual residence *of either party* at the same time, i.e. of the debtor (instead of the law of the habitual residence of the creditor, which is in principle the applicable law in absence of choice by the

[39] See art 5 para 1 *(d)* and art 8 *(d)* of the Divorce Reg.

[40] Art 15-03 para 1 *(c)*, and art 15 para 1 of the Proposal on registered partnerships; an exception is provided in art 15 para 2.

[41] See II.2. *a) aa).*

[42] Entered into force 1 January 1962. This Convention has been followed and in principle replaced by the Convention of 2 October 1973 on the law applicable to maintenance obligations (entered into force 1 October 1977). Both Conventions have been modernised, more than 50 years after the first instrument, by the Protocol mentioned in the text.

[43] While in the Convention of 1956 choice-of-laws agreements were unknown, since the creditor was exclusively *a child* who absolutely needed protection, the Protocol explicitly establishes, under set conditions, such agreements. On the *professio iuris* according to the Hague Protocol, see Spyridon Vrellis, 'Basic principles of the Hague Protocol on the law applicable to maintenance obligations,' in *Essays in honour of Philippos Doris vol. I* (Ant. N. Sakkoulas Publishers 2015, Athens, 103-124) 108-113 [in Greek].

[44] *Explanatory Report on the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (by Andrea Bonomi) para 20.

[45] See art 8 para 1.

parties). On the other hand, the spouses and ex-spouses may choose either the law designated by them as applicable or the law in fact applied to their property regime, or, respectively, to their divorce or legal separation (instead of the law of the habitual residence of the creditor or of their last common habitual residence, otherwise most probably applicable in the absence of choice).

(ii) Regarding matters of succession, where the extent of the *professio iuris* is more restricted than in other relations,[46] the Succession Reg,[47] after having established as a general rule the application of the law of the State in which the deceased had his habitual residence at the time of death,[48] offers to the *de cujus* the possibility to choose, as applicable to his succession as a whole, instead of that law, 'the law of the State whose nationality he possesses at the time of making the choice or at the time of death';[49] and, if the *de cujus* possesses multiple nationalities, he 'may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.'[50] In such a way the options of the *de cujus* are increasing.[51]

Fourth model: The critical time to identify the connecting factors is different where there is a choice of law by the parties than in the absence of choice: The critical time is therefore that of the choice of law agreement and not the time the court is seised, in divorce cases, nor the time of the celebration of the marriage, in matrimonial property cases; in cases of succession to the estates the critical time is a*lternatively* either the time of making the choice or the time of death instead of *exclusively* the time of death in the absence of choice.[52]

bb) The modification of the choice

(i) Regarding the problem of the possibility of persons involved in a relationship modifying the choice of the applicable law already made by them, one may discern three different (or eventually different) solutions in the Regulations.

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[46] The choice of the law of the testator's habitual residence (at the moment of choice), or of the *lex rei sitae,* or of the law applicable to matrimonial property regimes, is excluded; A. Bonomi in Andrea Bonomi, Patrick Wautelet (avec la collaboration d'Ilaria Pretelli et Azadi Öztürk), *Le droit européen des successions: Commentaire du Règlement no 650/2012 du 4 juillet 2012* (Bruylant 2013, Bruxelles) (under art 22) 311-316, paras 32-41.

[47] The Succession Reg also governs maintenance obligations arising by reason of death [art 1 para 2 *(e), a contrario*]; regarding this category of maintenance obligations, see Bonomi (n 46) (under art 1) 86-88, paras 31-34.

[48] Art 21 para 1; this rule is accompanied by an escape clause (art 21 para 2). On difficulties arising in determining the habitual residence, see recitals nos 23-24. According to *The Hague Succession Convention* (art 3), a simple habitual residence is not sufficient for designating the applicable law; nationality of or a long residence in the State of the habitual residence has to be added to this aim; otherwise 'succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.'

[49] Art 22 para 1; cf. *The Hague Succession Convention,* art 5 para 1: 'A person may designate the law of a particular State to govern the succession to the whole of its estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State *or had his habitual residence there*' [emphasis added].

[50] Art 22 para 2.

[51] Due to space restrictions, specific rules (art 24ff of the Succession Regulation) regarding dispositions of property upon death, agreements as to succession, declarations concerning acceptance or waiver of the succession etc., are not dealt with herein.

[52] See text to n 27ff and 46ff.

(i-a) A first group of Regulations affirms explicitly the power to modify the choice of law already made (albeit, to a varying extent, with different wording). The pioneer of this solution is Rome I Reg, following the solution adopted by the Rome Convention on contractual obligations. Art 3 para 2 of Rome I Reg explicitly gives to the parties the right to choose the applicable law, even after the conclusion of their contract, modify their choice afterwards, and choose different laws for various parts of their contract *(dépeçage):* 'The parties may at any time agree to subject the contract to a law other than that which previously governed it, *whether as a result of an earlier choice made under this Article or of other provisions of this Regulation* […]' [emphasis added]. This clearly means that the parties have the possibility not only to modify the law which is objectively designated as applicable by the Regulation in the absence of choice, but also to modify their own choice.

The same solution is adopted in divorce and legal separation matters, the Divorce Reg using a different wording with identical meaning: 'an agreement designating the applicable law may be concluded and *modified* at any time, but at the latest at the time the court is seised' [emphasis added];[53] and also in matrimonial property regimes, and in the property consequences of registered partnerships.[54]

(i-b) Less clear is the answer of the question at hand in succession and in maintenance matters.

The Succession Reg deals with the requirements as to the form of any *modification or revocation* of the choice of law governing the succession.[55] In so doing, it implies, although not explicitly formulated, that the Regulation allows a testator to modify or to revoke the choice of the law governing the succession to its estates.[56] Moreover, in view of both the testator's right to choose the applicable law not at a specific time and the wish of domestic material rules to keep a human being free to formulate his last will until the last moment of his life, it seems correct to admit that the Regulation itself allows the modification or the revocation of the choice; otherwise it should have explicitly excluded such a possibility.[57]

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[53] Art 5 para 2. This is provided 'without prejudice to paragraph 3', according to which 'if the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding […]'.Thus, the Divorce Reg sets a time limit to the possibility of the parties to designate the applicable law or to modify their choice (i.e. the time the court is seised), unless the *lex fori* allows them to do that later (during the course of the proceeding). In Rome I there is no such an *a priori* time limit to the parties' agreement; all depends on the *lex fori;* nevertheless the result will usually be identical in practice.

[54] Proposal on matrimonial property regimes, art 16 para 1; Proposal on registered partnerships, art 15-03 para 1: The spouses or future spouses / partners or future partners may agree to designate, or to change the law applicable to their matrimonial property regime / to the property consequences to the institution of the registered partnership. The term *change* has to be interpreted as referring to both the modification of an objectively applicable law and a previous choice-of-law agreement.

[55] According to art 22 para 4, 'any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death'. Cf. art 5 para 3 of *The Hague Succession Convention.*

[56] See recital no 40 last sentence (n 72).

[57] According to Bonomi (n 46) 329-330, para 74, without a specific rule in the Regulation, one has to find the answer of the question *in the chosen law.*

The Hague Protocol (adopted by the Maintenance Reg) does not touch upon the question of the modification or revocation of the choice-of-law agreement. It states, however, that 'notwithstanding Articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation [….] *d)* the law designated by the parties as applicable […] to their divorce or legal separation'.[58] Since the spouses may subsequently modify their choice (already made) of the law applicable to their divorce and legal separation[59] and, to the extent that they have such a possibility, they necessarily can submit a maintenance obligation to the law subsequently chosen by them for their divorce, even though in the past they had chosen for the maintenance obligation the law previously chosen by them for their divorce.[60] If they were unable to modify their first agreement designating as applicable to the maintenance obligation the law chosen by them earlier for their divorce, this rule of the Protocol would then become inoperative.[61]

(i-c) A different approach is adopted by Rome II Reg. On the issue at hand, Rome II Reg remained silent. One could wonder why the parties, who under the conditions provided for in art 14 para 1 'may agree to submit non-contractual obligations to the law of their choice', should be excluded from modifying this choice. The Regulation does not offer us any explanation for this silence. Recital no 31 simply states that 'to respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation […]'. The respect of the principle of party autonomy equally leads to the parties' power to modify their choice. Legal certainty, in its turn, is not diminished by such a power. On the opposite side, one could argue in favour of refusing the parties' power to modify their choice, that the creators of Rome II did not say anything on this point on purpose, in order to debar the parties from modifying their choice, although they knew (or ought to have known) the solution of the Rome Convention on contractual obligations.

The Hague Protocol remains silent too, with regard to the particular designation of the law applicable for the purpose of a particular proceeding provided in art 7 para 1, according to which '[…] the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation'. Nothing is said about modification or revocation of such a designation of the applicable law. Nevertheless, to refuse such possibilities seems more compatible with the aim of art 7 para 1.

(ii) Usually the modification of a choice-of-law agreement shall be effective only for the future, at least in the meaning that it should not adversely affect the rights of third parties deriving from the law previously applicable. This is provided for in Rome I Reg,[62] and in the Proposals

[58] Art 8 para 1.

[59] See text to n 53.

[60] Vrellis (n 43) 110.

[61] In the Explanatory Report on the Protocol (n 44) para 124, the changeableness of the choice by the parties is considered as obvious: 'The law chosen by the parties is intended to govern the maintenance obligations between the parties from the time of the choice and until such time, if applicable, as they choose to cancel or modify it'.

[62] See art 3 para 2 *in fine*.

on matrimonial property regimes[63] and registered partnerships,[64] even when the spouses / partners openly agree to make this change of applicable law retrospective.

Rome II Reg on the other hand, having being silent on the issue of the modification of a choice-of-law agreements, simply states that the choice itself 'shall not prejudice the rights of third parties'.[65] Equally silent on this point remain the Divorce and the Succession Reg (although they both allow the possibility of modifying a former choice of applicable law),[66] as well as the Hague Protocol.

bc) The validity of the professio iuris

(i) Substantive validity

The law chosen by the parties governs the existence and substantive validity of the choice; the right of a person to rely upon the law of the country in which he has his habitual residence, in order to establish that he did not consent, is, however, reserved.[67] This was already provided by the Rome Convention on contractual obligations and reiterated in Rome I Reg,[68] in the Divorce Reg,[69] in the Proposals on matrimonial property regimes[70] and on registered partnerships,[71] as well as (obviously without the reserve) in the Succession Reg.[72] On the contrary, Rome II Regulation and the Hague Protocol do not include any specific rule on this point; consequently one might argue that national conflict-of-laws rules govern the issue at hand. In the Explanatory Report on the Protocol (n 44), para 152 states, however, that

> […] these issues [existence and validity of the agreement, effect of a possible defect of consent] will have to be settled according to the law applicable to the designation agreement made between the parties, but that law is not expressly determined by the Protocol. The preferred solution for dealing with this deficiency is to consider that these issues will be governed by the law designated by the parties. This approach, consisting of subjecting the validity of the *optio legis* to the law that would apply if the agreement between the parties were valid, is very common in international instruments recognizing party autonomy, in particular as regards the existence and validity of consent. Its main advantage is to ensure that these issues are determined in a uniform manner in the various Contracting States to the Protocol.

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63 See art 16 paras 2-3.

64 See art 15-03 paras 2-3.

65 See art 14 para 1 *in fine*.

66 See text to n 53 and text to n 55-57.

67 See text in III.2.*b) bb)* (iii).

68 See art 3 para 5 and art 10 para 1.

69 See art 6 para 1.

70 See art 19a para 1.

71 See art 15-05 para 1.

72 See art 22 para 3. 'A choice of law under the Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law' (recital no 40).

(ii) Formal validity

Two main approaches of this problem appear in the Regulations.

(ii-a) Regarding the formal validity of a choice-of-law agreement, Rome I Reg,[73] followed by Rome II,[74] states that the choice shall be made expressly or demonstrated clearly/with reasonable certainty by the terms of the contract or the circumstances of the case. That the choice of law shall be made *expressly* in a declaration is required by the Succession Reg[75] and by The Hague Protocol[76] as well. However, this general requirement is followed in Rome I (not in Rome II) and in the Succession Reg by conflict-of-laws rules.

According to Rome I Reg, the formal validity 'of the consent of the parties as to the choice of the applicable law' is governed in principle[77] by the law applicable to the substance of their contract or the law of the country where it is concluded; in the case of an agreement concluded between persons being at the time of conclusion in different countries, by the law governing its substance or the law of either of the countries where either of the parties or their agent is present at the time of conclusion; or by the law of the country where either of the parties had his habitual residence at that time.[78]

The Succession Reg, in turn, after having stated that 'the choice shall be made expressly in a declaration', adds that such a declaration shall be made 'in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition'.[79] In order to check the formal validity of the choice of law on the succession, one has to apply the law which governs the formal validity of dispositions of property upon death, established in art 27 of the Succession Reg, i.e., the *lex loci actus* or the *lex patriae* or the *lex domicilii* or the law of the habitual residence of the testator, either at the time when the declaration of the choice was made or at the time of death or, where immovable property is concerned, of the State in which that property is located.[80]

(ii-b) The informed choice of the parties is a basic principle of the Regulations.[81] In order to facilitate such an informed choice and ensure legal certainty, as well as better access to justice, a material rule is established in some matters: the contract has to be 'expressed in writing, dated

[73] See art 3 para 1.

[74] See art 14 para1 *in fine*.

[75] See art 22 para 2.

[76] See art 7, regarding only a particular proceeding in a given State; above II 2 *b) i (i-c)*.

[77] But regarding e.g. consumer contracts, see art 11 para 4.

[78] See art 3 para 5 and art 11 paras 1-3.

[79] See art 22 para 2; cf. art 5 para 2 of *The Hague Succession Convention*. 'A choice of law should be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law' (recital no 39).

[80] Regarding the formal validity of any modification or revocation of the choice of law in succession, see art 22 para 4 and art 27 para 2 of the Succession Reg; cf. art 2 of *the Hague Convention* of *5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions* (entered into force 5 January 1964).

[81] See for example, recital no 18 of the Divorce Reg: 'The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable

and signed by both parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing'. This is the case in the Proposals on matrimonial property regimes[82] and registered partnerships,[83] in the Divorce Regulation[84] and in the Hague Protocol (although with not exactly the same wording).[85] The requirement to make the contract in writing means, in my view, that an implicit choice of the applicable law by the parties is not acceptable, since the protection of the parties needs a clear knowledge by them of the consequences of their choice.[86]

While the Hague Protocol is limited to the above material rule, other instruments combine it with some private-international-law rules: The Divorce Reg,[87] and the Proposals on matrimonial property regimes[88] and on registered partnerships[89] establish the following rules: *(a)* If the law of the Member State in which the parties have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply. *(b)* If the parties are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those States. *(c)* If only one of the parties is habitual resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

III Are there Restrictions to Party Autonomy?

The basic distinction between Regulations where patrimonial elements are preponderant, the power of the parties being very extensive on one hand, and those where important personal or family elements overshadow patrimonial elements, the power of the parties being more or less restricted with regard to the pool of laws out of which the choice may be done on the other, is already mentioned [in II 1 and II 2 *a)*]. Besides that, several other restrictions to party autonomy are provided for in both categories.

law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses […].'

82 See art 19 para 1.

83 See art 15-04 para 1.

84 See art 7 para 1.

85 According to art 8 para 2 of the Protocol, 'such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.'

86 Regarding the Hague Protocol see, however, M. Andrae, 'Zum Beitritt der Europäischen Gemeinschaft zum Haager Protocoll über das Unterhaltskollisionsrecht' [2010] GPR 196ff, 201.

87 See art 7 paras 2-4.

88 See art 19 paras 2-4.

89 See art 15-04 paras 2-4.

1 General Restrictions

One general restriction regarding the function of the conflict-of-laws rules in general, party autonomy included, is due to the *ordre public* clause,[90] or the *overriding mandatory rules (règles d'application immediate* according to the well-known terminology of Ph. Francescakis), referred to by almost all instruments, albeit with some variations.[91] Both may in fact counteract the choice of law made by the parties.

2 Specific Restrictions

Some Regulations provide various other more specific but very interesting restrictions to party autonomy: Some of them aim at limiting the abuse of freedom; other at protecting third parties or even one party, either because the latter is vulnerable or due to the circumstances or because of the gravity of the act at hand.

a) Restrictions to the abuse of a very large party autonomy

Rome I and Rome II Reg, in order to prevent the *abuse* of the very large party autonomy established by them, provide *two* limitations to that autonomy, using almost the same wording. Both have the same justification and goal: they reject the abuse of that autonomy. At the same time, they have a not fully identical but a similar effect: they transform the nature of the choice, each of them in a somewhat different way. In the place of what is called in German practice *international privatrechtliche Verweisung,* i.e. a designation of a law as applicable to the contract, they establish a *materiellrechtliche Verweisung,* i.e. a contractual clause.

First limitation: Where all other elements relevant to the situation at the time of the choice (according to Rome I),[92] or at the time when the event having given rise to the damage occurred (according to Rome II)[93] are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the *jus cogens* of that other country. In such a case, the content of the *chosen law* is submitted to *conformity control with the* jus cogens *of that other country, the law of which, moreover, is designated as applicable in the absence of any choice.*

Second limitation: Where all other elements relevant to the situation at the time of the choice (according to Rome I),[94] or at the time when the event having given rise to the damage occurred (according to Rome II)[95] are located in one or more Member States, the parties' choice of applicable law, other than that of a Member State, shall not prejudice the application of the com-

[90] Rome I art 21; Rome II art 26; Divorce Reg art 12; Succession Reg art 35; Proposals on matrimonial property regimes art 23 and on registered partnerships art 18; The Hague Protocol art 13.

[91] Rome I art 9; Rome II art 16; Succession Reg art 30; Proposals on matrimonial property regimes art 22 and on registered partnerships art 17.

[92] See art 3 para 3.

[93] See art 14 para 2.

[94] See art 3 para 4.

[95] See art 14 para 3.

munitarian *jus cogens*, as implemented in the Member State of the *forum*. In that case, the content of the *chosen law* is under conformity control with the Community *jus cogens,* as implemented in the Member State of the *forum (even though the* lex fori *is not the applicable law).*[96]

b) Restrictions aiming at the protection of parties

Regarding *the protection of parties,* some distinctions are necessary:

ba) Restrictions aiming at the protection of third parties

The rights of *third* parties set a limit to the choice-of-law agreement, according to Rome II Reg, where it is explicitly stated that the choice of law by the parties 'shall not prejudice the rights of third parties'.[97]

The same orientation is to be found, but in a different way, in the Proposal on matrimonial property regimes: while it states that the law applicable to that regime shall determine (inter alia) the effects of the regime on a legal relationship between a spouse and third parties, it nevertheless goes on by stating that 'the law that governs the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law'.[98] This rule is reiterated in the Proposal on registered partnerships regarding the property consequences on a legal relationship between a partner and third parties.[99]

bb) Restrictions aiming at the protection of one party

This kind of restriction to party autonomy is due to the particularly delicate situation of the creditor or to the gravity of the specific act or to the circumstances of the case.

(i) The vulnerability of the creditor

An illustrative example is offered by The Hague Protocol. According to it, the chosen law 'shall not apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest'.[100]

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[96] Calliess in Gralf-Peter Calliess (ed), *Rome Regulations: Commentary on the European Rules on the Conflict of Laws* (Wolters Kluwer Law & Business 2011, The Netherlands) 85, in art 3 Rome I mn 57, correctly remarks: 'This seems to be convenient for the judge but leads to unpredictable results in case of minimum harmonization Directives which are transposed quite differently throughout the Member States.'

[97] See art 14 para1 *in fine.*

[98] See art 20aa letter *(f),* art 20 b para 1; cf. art 9 of *The Hague Matrimonial Property Regimes Convention:*
'[…] the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless (1) any requirements of publicity or registration specified by that law have been complied with, or (2) the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.'

[99] See art 15 a letter *(f),* art 15 b para 1.

[100] See art 8 para 3, which reiterates the definition of a vulnerable adult already established in art 1 para 1 of *the Hague Convention of 13 January 2000 on the international protection of adults* (entered into force 1 January 2009).

(ii) The gravity of the specific act

In maintenance obligations again, according to The Hague Protocol, 'the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation' of the applicable law.[101] Both for the sake of legal certainty and avoidance of undue use of the party autonomy, the law of the State of the habitual residence of the creditor at the time of the choice-of-law agreement is exclusively applicable, even though it would not have been applicable in the absence of choice (for example, in the event of a change of the creditor's habitual residence)[102].

(iii) The circumstances of the case

The protection of one of the parties is often safeguarded in the following way: in order to establish that he did not consent to the choice of law agreement, a party may rely upon the law of the country in which he has his habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the chosen law.[103] However, especially in maintenance obligations, 'unless at the time of the designation [of the applicable law] the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead *to manifestly unfair or unreasonable consequences* for any of the parties.'[104]

IV Concluding Remarks: Goals and Achievements

1 Regulations Rationale

This report cannot be concluded without a fundamental general remark regarding the legal basis, or rather the legal and moral justification of the rules on applicable law adopted by the Regulations discussed.

In all of them one finds the same boring wording of fixed ideas: 'The objective of maintaining and developing an area of freedom, security and justice.'[105] A magniloquent language,

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[101] Art 8 para 4. This restriction to the party autonomy is applicable not only where the creditor renounces his right to maintenance and this renouncement is accompanied by the choice of a law permitting the renouncement, but also where the parties have chosen a law not providing maintenance at all (in other words, where the choice of law implicitly includes a renunciation of the right to maintenance). See Explanatory Report on the Protocol (n 44) para 150; Vrellis (n 43) 111 n 37.

[102] Vrellis (n 43) 111-112, with comments against the different position of Andrea Bonomi, 'The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations' (2008) 10 YPIL 333-357, 356-357.

[103] See Rome I Reg art 3 para 5 and art 10 para 2; Divorce Reg art 6 para 2; Proposals on matrimonial property regimes art 19 a para 2, and on registered partnerships art 15-05 para 2.

[104] Art 8 para 5 of the Hague Protocol. This restriction does not constitute an escape clause [as it is usually qualified; see, for example, Explanatory Report on the Protocol (n 44) para 151; Bonomi (n 102) 357], but rather a limit to party autonomy for reasons of substantive justice known in material domestic law as well. The element of *proximity,* of the manifestly closer connection which justifies and *legalises* an escape clause does not exist here. See Vrellis (n 43) 112 n 39.

[105] Recital no 1 of all Regulations mentioned in the text at hand.

unfortunately without much real content! As a matter of fact, *first,* the area referred to is one of legalism rather than of justice; *second,* it is well known that freedom is reduced where the number of rules of law increases, since there is an internal rivalry between law and freedom; in the European legal order there exist too many rules, so that the freedom of human beings becomes excessively limited, despite the usual pretentions to the contrary; *finally,* security has not much to do with the law applicable to divorce or to succession etc., unless under *security* is meant legal certainty and predictability of the applicable law; in any event, from a general point of view, security at any cost may be proved detrimental, to a less or higher degree, to other important values, interests or principles.

The above-mentioned allegedly fundamental objective but one not achievable by the Regulations is accompanied by the true Community concern underneath, which is: to adopt measures appropriate *for the proper functioning of the internal market.* This is, indeed, the genuine objective of the Regulations. The Regulations 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*' [emphasis added].[106] This 'proper functioning of the internal market', as one can read in the recital no 6 of Rome I and Rome II Regulations, 'creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'. However, all these are objectives of private international law in general, beyond the expectations of any internal market. Predictability and certainty are goals in every legal system, as well as an international harmony of solutions through the harmonisation of conflict-of-laws rules: these have long constituted a *desideratum* of private international law at a global level. As a matter of fact this is the adventure in which The Hague Conference on Private International Law has been involved since the end of the 19th century. To insist on the functioning of the internal market runs, in my view, the risk of focusing on the market itself and neglecting the real needs of human beings and the demands of justice.

Recital no 7 of the Succession Reg clarifies even further the goal of the EU Regulations. It states: 'The proper functioning of the internal market should be facilitated by *removing the obstacles to the free movement of persons* who currently face difficulties in asserting their rights in the context of a succession having cross-border implications' [emphasis added].

The orientation towards the internal market, envisaged by these Regulations in areas where personal and family factors play the main role as contrasted to patrimonial ones, expresses the exclusively materialistic (and therefore inevitably erroneous) background of the Union. It is a great pity that a Union of States with long and high level cultural traditions is not able to surpass such an elementary level of legislative policy and go in search of higher values in regulating private law relations.

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[106] Recital no 1 of Rome I and Rome II Reg; Divorce and the Succession Regulations and the Proposal on matrimonial property regimes as well adopt measures 'particularly when necessary for the proper functioning of the internal market' (recital no 1), or (in Maintenance Reg, recital no 1) 'in so far as necessary for the proper functioning of the internal market'.

2 Comparison with The Hague-Conference Conventions

Quite different at a global level is the mentality within The Hague Conference on Private International Law. For the Conference, facility and freedom of circulation are internationally established *simple facts, not goals to achieve.* This freedom creates problems and difficulties for persons. The goal of the law in general and private international law in particular is to wipe out or to diminish the difficulties and solve the problems for the sake of human beings, *safeguarding at the same time the interests and the foundation of international law and legal order.*

This is absolutely clear, when one has a look at the Hague analogous Conventions.[107] It is easy to ascertain from the Explanatory Report on The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations,[108] that the main concern in negotiating this Convention was not to facilitate divorce, but 'matters being as they are and since divorces exist and are even increasing in number, […] to limit the social consequences of th[e] *unfortunate* phenomenon [of divorce] by recognizing its existence' [emphasis added], and to harmonize the choice of law rules in order to satisfy 'the requirements of security and stability in family matters, […] *for the sake of private interests involved, even if this means some sacrifice of their freedom of action*' [emphasis added]; to show 'respect for rights acquired in foreign countries [which] is the very foundation of international law'.[109]

To the contrary, the Divorce Reg establishes party autonomy in the fields of divorce and legal separation in order not to limit the social consequences of the 'unfortunate phenomenon' of divorce etc., but achieve a specific objective: 'Increasing the mobility of citizens [which] calls for more flexibility and greater legal certainty'.[110]

3 Illustrative Examples

This fundamental divergence in terms of mentality between The Hague Conventions and the EU Regulations on the issue at hand has a concrete and specific impact on the content of the choice-of-law rules included in these texts. Two examples suffice to prove it.

a) Succession to the estates

In succession matters, the Hague Convention of 1989 art 5 para 1 offers to the testator the possibility of designating as applicable (among other laws) the law of his habitual residence at the time of the designation. Why, during the Sixteenth Session of the Conference Commission II did shift the viewpoint expressed previously by the Special Commission and decide to give the testator such an additional option? The Explanatory Report on this Convention[111] gives the answer:

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[107] See, for example, Explanatory Report on The Hague Succession Convention (by Donovan W.M. Waters), paras 12ff.

[108] Entered into force 24 August 1975.

[109] See Explanatory Report on The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations (by P. Bellet, B. Goldman) para 3.

[110] See recital no 15.

[111] See n 107 at para 61.

> […] the primary cause of this shift of opinion seems to have been the realization that, if the date of designation were permitted, the *de cujus* might plan his matrimonial property arrangements and his provisions for succession to his estate freely, knowing which law will apply to each and being able to have the same law apply to both. In the nature of things a designation of the law that will be the nationality law or the habitual residence law (particularly the latter) on his eventual date of death is not conducive to the best state planning for the *de cujus*. This is one reason why *inter vivos* dispositions, with perhaps the reservation of life interests to the disposer, are so very popular and increasingly used in lieu of will disposition in the common law jurisdictions […].

The Succession Reg on the other hand in art 22 para 1 allows the designation by the testator only of the law of his nationality at the time either of making the choice or of his death, without explaining the exclusion of choosing the law of the habitual residence at the time of choice.[112] Recital no 38 simply states that 'this Regulation should enable citizens to organize their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share'. One may wonder why the habitual residence at the time of designation would not be considered as *a connection between the deceased and the law chosen,* and why the designation of such a law as applicable would be suspected to conceal a fraudulent intention. Besides this, the testator can always choose as his last habitual residence an appropriate State whose law, as applicable in absence of choice, would frustrate *the legitimate expectations of persons entitled to a reserved share.* The persistence of the Europeans institutions in the free movement of persons has probably prevented them from granting the testator the option of designating as applicable the law of his habitual residence at the time of designation, while they allowed the designation of the law of the nationality at the same time: The possibility of having provided for succession to his estate in conformity with the law of his habitual residence at that time, would possibly complicate a testator's decision to subsequently change his habitual residence.

b) Matrimonial Property Regimes

The Proposal on matrimonial property regimes has taken a strict position, in favour of the unity of the applicable law. In art 15 it states that the law applicable to a matrimonial property regime after or without any choice by the spouses, 'shall apply to all assets falling under that regime, regardless their location'.[113] The Proposal arrived at such a strict principle of unity in matrimonial property regimes inspired by the idea 'to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market' and 'to avoid the fragmentation of the

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[112] It has to be recalled that, in the absence of choice, the law applicable to succession is the law of the habitual residence of the deceased *at the time of death* (art 21 para 1). Bonomi (n 46) 311, para 33, considers that exclusion as *particulièrement regrettable.*

[113] Cf. the Proposal on registered partnerships art 15-02.

matrimonial property regime [for reasons of legal certainty]'. It strangely excluded them from choosing the *lex rei sitae,* although this very law usually has the closest connection with those regimes. The EU Commission had recognised that 'immovable property has a special place in the property of couples, and one of the possible options would be to make it subject to the law of the country in which it is located *(lex situs),* thus allowing a measure of dismemberment of the law applicable to the matrimonial property regime'. It considered however that

> […] this solution is, […], fraught with difficulties, particularly when it comes to the liquidation of the matrimonial property, in that it would lead to an undesirable fragmentation of the unity of the matrimonial property (while the liabilities would remain in a single scheme), and to the application of different laws to different properties within the matrimonial property regime. The Regulation therefore provides that the law applicable to matrimonial property, whether chosen by the spouses or, in the absence of any such choice, determined under other provisions, will apply to all the couple's property, movable or immovable, irrespective of their location.[114]

The Hague Matrimonial Property Regimes Convention adopted the same starting point, stating in articles 3 and 6 that the law designated as applicable by the spouses (before or during marriage respectively) 'applies to the whole of their property'. However, the same articles proceed with an exception: 'Nonetheless, the spouses, whether or not they have designated a law […], may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovable which may subsequently be acquired shall be governed by the law of the place where such immovables are situated'. This is an important derogation from or even perhaps a distortion of the principle of the unity of the matrimonial property regime, which may create difficulties.[115] Nevertheless, in The Hague Conference the prevailing opinion was that *it is useful* 'to give to the spouses the option to harmonize their matrimonial property regime with the solutions of the *lex rei sitae* of the immovables', in choosing the law that, at least in case of an immovable, necessarily governs the ownership and other rights *in rem,* and 'will effectively be the only one applied'.[116]

Refusing this possibility, the Proposal: *(a)* deprives spouses of this useful option; *(b)* it ignores a well-known general principle of private international law advanced by W. Wengler,[117] i.e. the application to the point at hand of the *stronger law (l'ordre juridique le plus fort),* leading to conformity with the law of the State capable to impose in practice its own view regarding the applicable law (i.e. the *lex rei sitae* on immovables); *(c)* it deprives a court of a Member State from the possibility to apply the *lex fori* (its own law), notwithstanding that *(i)* this court has, for the ground alone of location of immovable property in that State, subsidiary jurisdiction

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[114] See Commission's Explanatory Memorandum, under art 15 [COM(2011) 126 final of 16.3.2011, 2011/0059 (CNS)]; cf. recital no 18b of the Proposal.

[115] Alfred E. von Overbeck, 'Explanatory Report' in *Conférence de La Haye de droit international privé, Actes et documents de la Treizième session, tome II : Régimes matrimoniaux* 329-377, 357-358, para 124.

[116] Ibid 359-360, paras 133-134, 137.

[117] Wilhelm Wengler, 'Les principes généraux du droit international privé et leurs conflits', (1952) 41 Rev. crit. DIP 595-622, 613-614.

according to art 6; *(ii)* this law would be anyhow applicable as *lex rei sitae* to rights in immovable property; and *(iii)* this law would be applicable to the matrimonial property regime regarding this very immovable, if the parties could designate it as applicable to the latter. For a court, it would be a good and convenient solution to apply its own law to both, the right in property in immovable and the matrimonial regime regarding that immovable.[118]

[118] Court's convenience is a relevant factor to the choice by the judge of the applicable (rule of) law; see *Restatement Second, Conflict of laws,* para 6 (2) *(g)*, referring to the 'ease in the determination and application of the law to be applied.' Its importance, however, has not to be exaggerated.

Miklós Király*

The Rise and Fall of Common European Sales Law

I Introduction

While the UNIDROIT Principles have occupied their well-deserved places in Lex Mercatoria for a long time, the fate of its possible regional counterpart, the Common European Sales Law, is more than uncertain. The prospects and hurdles of harmonisation of European contract law have been detected and described by Professor Bonell in his seminal study, 'The CISG, European Contract Law and the Development of World Contract Law'.[1] This paper would like to revisit this issue, paying tribute to the outstanding oeuvre of Professor Bonell.

In April 2010 the European Commission (Commission) set up an expert group with a promising mandate to assist in the preparation of a Common Frame of Reference of European contract law, including consumer and business law.[2] After an astonishingly short period of time, after twelve meetings within twelve months, the expert group published its *'Feasibility Study',*[3] actually a set of rules on general contract law. Based on this work, a draft Regulation on Common European Sales Law (CESL) was disclosed by the Commission in October 2011.[4] One could suppose at that time that the longed-for dream of creating a European Contract law would be fulfilled very soon. This was the first time that the EU had promulgated a comprehensive draft law on sales, and so the project became more than a fascinating research subject for eminent scholars. However, in December 2014, the newly appointed Commission, 'clearing the decks'[5], withdrew the existing proposal for a CESL in the Annex of its Work Programme. The diplomatically phrased

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1 Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of World Contract Law' (2008) 56 The American Journal of Comparative Law pp. 1-28.

2 Commission Decision of 26 April 2010 setting up the Expert Group of a Common Frame of Reference in the area of European contract law.(2010/233/EU) OJ 27/4/2010, L105/109.

3 A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback. 03.05.2011.

4 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels 11.10.2011. COM (2011) 635 final.

5 See website of the EU Commission: http://ec.europa.eu/priorities/work-programme/index. Consulted on 13 August 2015.

reason offered for the withdrawal was to prepare a 'modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market'[6].

However, the new initiative for contractual rules on online sales – focusing on an important but a much narrower field – is clearly different from the idea of a Common European Sales Law. This U-turn raises important questions. What has gone wrong? Is it the end of a 'Grand Illusion', despite all the resolutions of the European Parliament on a European Civil Code, later on contract law[7] and several Communications green papers and progress reports[8] from the Commission? Are there any lessons to be learned for future plans to harmonise private law in Europe? Looking back to the exercise retrospectively, it is obvious that there were several layers of problems, and even a few of them could have been sufficient to derail the CESL project.

II A Divided Academic Community

Drawing up the Draft Common European Sales Law was predated by a decade of careful preparation on the side of the Commission, starting in 2001[9] with its first Communication on European Contract law, which was followed by other documents. However, even a decade later, the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses[10] offered altogether six scenarios for future

[6] Commission Work Programme 2015, A New Start, Strasbourg, 16.12.2014, COM (2014) 910 final. Annex II: List of withdrawals or modifications of pending proposals, item 60. The Commission has withdrawn altogether 80 earlier Proposals.

[7] Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26.6.1989, p. 400; Resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States,, OJ C 205, 25.7.1994, p. 518.; Resolution of 15 November 2001 on the approximation of the civil and commercial Law of the Member States, OJ C 140 E, 13.6.2002, p. 538.; Resolution of 2 September 2003, OJ C 76 E, 25.3.2004, p. 95.; Resolution of 23 March 2006 on European contract law and the revision of the acquis: the way forward; OJ C 292 E, 1.12.2006, p. 109.; Resolution of 7 September 2006 on European contract law, OJ C 305 E, 14.12.2006, p. 247.; Resolution of 12 December 2007 on European contract law, OJ C 323E, 18.12.2008, p. 364.; Resolution of 3 September 2008 on the common frame of reference for European contract law, OJ C 295E, 4.12.2009, p. 31; Resolution of 8 June 2011 on policy options for progress towards a European contract law for consumers and businesses, OJ C 380E 11.12. 2012, p. 59; Legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law [COM (2011)0635 – C7-0329/2011 – 2011/0284(COD)] (Ordinary legislative procedure: first reading).

[8] Communication from the Commission to the Council and the European Parliament on European Contract Law. Brussels, 11.07.2001. COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. 15.3.2003. COM (2003) 68 final; and Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004, COM (2004) 651 final. Furthermore, A Green Paper from the Commission on policy options for progress towards a European Contract law for consumers and businesses was published in 2010. 1.7.2010. COM (2010) 348 final.

[9] There is no room here to cover in detail the academic efforts related to the preparation of a European contract law and work of the European Parliament. For a more detailed account see Eva Maria Kieninger, 'Kodifikationsidee und Europäisches Privatrecht' (2012) 4 Rechtswissenschaft pp. 406-431 (pp. 411-418) Miklós Király, *Unity and Diversity. The Cultural Effects of the Law of the European Union* (Eötvös University Press 2011, Budapest, 304 p.) pp. 171-196.

[10] 2010. 1.7.2010. COM (2010) 348 final.

development, from simple publication of the results of the expert group via setting up an optional instrument to a Regulation establishing a European contract law. At the end of 2010, the Commission decided to support the idea of making the Common Frame of Reference (CFR) an optional instrument, which could be chosen by the parties as a European legal regime for their contractual relationship.

This long hesitation of the European Commission regarding the goals and proper means of harmonisation probably mirrored the division of the academic community, businesses and stakeholders on the necessity and desirable methods of harmonisation of contract law in the EU. The arguments supporting harmonisation have been well known for decades, from the needs of the internal market, supporting cross-border transactions and decreasing transaction costs to consumer protection and re-establishing the legal unity of Europe that once upon a time existed.[11] The weaknesses of the fragmentary or *'pointillist'* harmonisation method[12] of consumer contract law in the EU have led to justified criticism, too.[13] However, quite strong counter-arguments were available as well, emphasising the competition between legal systems,[14] existence of other barriers to trade[15] and the role of party autonomy and international arbitration[16] and protection of different legal cultures and their traditional variety in Europe.[17] Even the real decrease in transaction costs as a result of harmonisation has been questioned.[18]

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[11] These arguments were fully elaborated in the subsequent revised editions of the major volume published under the title 'Towards a European Civil Code' since 1994. The fourth edition of this international classic: Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius, Chantal Mak, Edgar du Perron (eds), *Towards a European Civil Code* (Kluwer Law International 2010 Nijmegen) 1184 p.

[12] Hein Kötz, 'Rechtsvereinheitlichung – Nutzen, Kosten Methoden, Ziele' [1986] RabelsZ pp. 1-18 (pp. 3,5), and Lajos Vékás, 'Privatautonomie und ihre Grenzen im Gemeinschaftsprivatrecht und in den postsozialistischen Kodifikationen' in Cordula Stumpf, Friedemann Kainer, Christian Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht, Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff zum 70 Geburtstag am 29. September 2015* (Nomos Verlagsgesellschaft 2015, Baden-Baden 1615 p., pp. 98-103) p. 102.

[13] Pierre Legrand, 'A diabolical idea' in Arthur Hartkamp, Martijn W. Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, *Towards a European Civil Code, Kluwer Law International* (2004 Nijmegen, 847 p.) pp. 245-272.

[14] Hugh Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 (3) European Review of Private Law pp. 353–356, Jules Stuyck, 'European consumer law after the Treaty of Amsterdam: Consumer policy in or beyond the internal market?' (2000) 37 (2) Common Market Law Review pp. 367–400.

[15] For example *(i)* divergent national technical provisions; *(ii)* unusual procedures of testing and authorisation; *(iii)* discriminatory state subsidies; *(iv)* different systems of value-added tax.

[16] Daniela Caruso, *The Missing View of the Cathedral: the Private Law Paradigm of European Legal Integration,* [Jean Monnet Working Papers 9, 1996 Cambridge (Mass.): Harvard Law School] p. 51.

[17] Wilhelm Brauneder, *Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?* Address before Centro di studi e ricerche di diritto comparato e straniero in Rome, 1997, especially pp. 4–8. In agreement, Brauneder cites the critical study of Pio Caroni, 'Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus.' [1994] Die Zeitschrift für Neuere Rechtsgeschichte (ZNR) pp. 85–101.

[18] On the different approaches see Fernando Gomez, 'Some Law and Economics of Harmonizing European Private Law' in Hartkamp, Hesselink, Hondius, Mak, du Perron (n 11) pp. 401-426 (pp. 412-414.) Furthermore, Eric A. Posner: *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition* [The Law School, the University of Chicago, Institute for Law and Economics Working Paper No 597 (2D Series), 2012].

As such, support for a European contract law was not unanimous – to put it mildly – amongst scholars, lawyers and stakeholders.

III Proliferation of Sources

Over the past decades, the Vienna Convention for International Sales of Goods (CISG) and the UNIDROIT Principles have become major sources and examples of approximating contract law. In Europe, the parallel efforts of scholars to pave the way of harmonisation in this area resulted in a proliferation of drafts,[19] a 'bewildering variety'[20]. The Principles of European Contract Law (PECL)[21] were published in 2000 and 2003, an outstanding result of the decade of work by the *Lando Commission.* However, before the PECL could achieve its full impact on scholarship and law-making,[22] the European Commission funded a three-year research programme for the preparation of the Common Frame of Reference (CFR). According to the Commission, the CFR could fulfil a number of different roles.[23] The final result of the academic co-operation and network was published in 2009 as a Draft Common Frame of Reference (DCFR)[24]. Naturally, the DCFR took the provisions of UNIDROIT Principles and PECL into account; there is a great degree of similarity between them but they are by no means identical.[25] Besides these truly pan-European academic exercises, other contributions, such as the

[19] Bonell (n 1) pp. 11-12.

[20] Reinhard Zimmermann, 'The Present State of European Private Law' (2009) 57 The American Journal Of Comparative Law pp. 478-512 (478). Similarly, Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Martinus Nijhoff Publishers 2010, Leiden/Boston 274 p.) p. 67.

[21] Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II.* (Kluwer Law International 2000, The Hague, London, Boston) xlviii + 561 p.; Ole Lando, Eric Clive, André Prüm and Reinhard Zimmerman (eds), *Principles of European Contract Law, Part III.* (Kluwer Law International 2003, The Hague, London, Boston) xxxv + 291 p.

[22] 'As a result, it is fair to say that shortly after the publication of their final version, the European Principles in a certain sense already belonged to the past, the hope being that they would be revived in a broader framework some tine in the future', Bonell (n 1) p. 11.

[23] According to the Commission, the CFR could have fulfilled a number of different of roles. [Points 2.1.1–2.2.2 of COM (2004) 0651 final.] First and foremost, by laying down the fundamental principles of contract law, clarifying legal terms and even providing model rules, it could provide guidance on the review of EU rules, for instance, on the directives on consumer transactions. It could also afford a clear theoretical basis for the future adoption of EU acts. Further, the CFR could be used by the legislators of the Member States and courts of arbitration.

[24] Christian von Bar, Eric Clive and Hans Schulte Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline edition. Sellier, European Law Publishers 2009, Munich) p. 643. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Full edition, Volumes I–VI, Sellier, European Law Publishers 2009, Munich).

[25] Michael Joachim Bonell, Roberta Pelleggi, 'UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: a Synoptical Table' (2009) 3 Uniform Law Review pp. 437-554.

preparatory work and proposal[26] made by the French *Association Henri Capitant*[27] were deeply rooted in national legal culture and offered a different approach and solutions. As a result of this development, the Expert Group had to face not only the diversity of national contract laws but also a kind of superabundance of proposals for harmonisation and their different textual layers.[28]

The traditional differences between legal systems and legal cultures emerged time and time again in the expert group, leading to classical disputes on choosing the preferable solutions, even more so because the different traditions and approaches were mirrored by the different contract law principles, from PECL to DCFR. For example there was a long discussion on the concept of contract as a 'juridical act'. On one hand, the UNIDROIT Principles and the PECL do not contain a definition of contract; they start pragmatically with rules on conclusion of contracts;[29] on the other hand, the DCFR refers to contracts as '[…] bilateral or multilateral juridical acts'[30] This definition was problematic since the abstract concept of juridical act is not known in all legal systems of the EU. Finally the dilemma was solved in the following way, the text of the Draft CESL referred only to the freedom of contract of the parties[31] and the definition on contract was offered by the Proposal of the Regulation, which dropped the concept of 'juridical act'[32] and emphasised only the existence of an agreement between the parties.

IV The Legal Base Problem

When assessing the feasibility of legal approximation, it must always be borne in mind that the European Union has no general power to legislate: it is obliged to find a particular provision in the Treaty on the Functioning of the European Union (TFEU) that affords legal ground for adopting any EU act. The EU has a kind of diffused or piecemeal authorisation in this respect. In the case of CESL, the decisive choice was between Article 114 and 352 TFEU as a legal base. Article 114 lends scope for adopting measures by a qualified majority in the Council of Ministers to establish and ensure the functioning the *internal market.* Article 352 TFEU, might seem to

[26] Principes Contractuels Communs, Projet de Cadre Commun de Référence, Association Henri Capitant des Amis de la Culture Juridique Française Société de Législation Comparée, Paris, 2008, 868 p.; Terminologie Contractuelle Commune, Projet de Cadre Commun de Référence, Association Henri Capitant des Amis de la Culture Juridique Française Société de Législation Comparée, Paris, 2008, 538 p.

[27] Association Henri Capitant des amis de la culture juridique française, www.henricapitant.org.

[28] Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner and Reinhard Zimmermann, 'The Proposal for a Regulation on a Common European Sales Law' (2012) 16 (3) The Edinburgh Law Review pp. 301-357, (pp. 305-307).

[29] UNIDROIT Principles 2010 Art 1.1. and PECL Article 2:101.

[30] DCFR 'II – 1:101: Meaning of 'contract' and 'juridical act' (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement, whether express or implied from the conduct, which is intended to have legal effect as such. It may be unilateral, bilateral and multilateral.'

[31] CESL Art. 1.

[32] Art. 2 Definitions (a) '"contract" means an agreement intended to give rise obligations or other legal effects'.

confer a general legislative power;[33] nevertheless, the Union legislature has to be aware of a serious limitation before adopting any act by recourse to Article 352 TFEU as its legal base. This is the requirement of unanimity, clearly stated in the text, which is very difficult to achieve since it practically creates a veto power for any Member State. It therefore could not have been a preferable alternative for the Commission.

According to the proposal of the Commission the CESL, had the goal of working as a *'second contract law regime within the national laws of each Member State'*[34]. This innovative, although somewhat complicated, approach[35] is worth further analysis. The choice of the CESL as secondary contract law regime presupposes that a national law has been already selected according to the rules of private international law, more precisely according to Regulation Rome I[36] in the EU. This prior selection of the governing national law can be the result of the choice of the parties[37] or is determined as the applicable law in the absence of choice.[38] Although the selection of the CESL can be reached in practice at one stroke, logically it includes two steps, first designating a legal system of a Member State and then within this national law choosing the CESL.[39] This regime is characterised as a *'Vorschaltlösung'* by Mankowski.[40]

Based on this solution, one can consider the CESL as a dormant or latent secondary contract law within national laws.[41] The Regulation on CESL would build the optional rules into national legal systems – in an abstract sense. Only the choice of the parties triggers or activates the application of the CESL – their decision can make the CESL a real secondary contract law involved in their transactions.

Perhaps the sensitivity of the legal base issue was one of the reasons for presenting the CESL as a 'second contract law regime' instead of a sui generis 28th European legal regime,[42] since

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[33] In so far as it lays down that if action by the Union should prove necessary within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

[34] COM (2011) 635 final, recital (9): 'This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law.'

[35] Martijn Hesselink, 'How to opt into the Common European Sales Law. Brief Comments on the Commission's Proposal for a Regulation' (2012) 20 (1) ERPL pp. 195-211, p. (p. 198). Eidenmüller et al. (n 28) p. 313

[36] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) OJ L177, 04/07/2008 pp. 0006 – 0016.

[37] Art. 3 of Regulation Rome I.

[38] Art. 4 of Regulation Rome I.

[39] Hesselink (n 35) p. 199.

[40] 'Zum CESL komme Man im Prinzip nur, wenn Art 3 oder 4 Rome I-VO zum Recht eines Mitgliedstaates führe. Die Kommission will also das IPR in Gestalt der Rom I-VO Vorschalten. Sie wird eine Vorschaltlösung.' Peter Mankowski, 'Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht' (2012) 3 RIW pp. 97-105 (p. 100).

[41] Unlike CISG rules backed by a ratified Convention.

[42] As it was foreseen by Regulation Rome I earlier in its Preamble paragraph (14).

without presenting CESL as the harmonisation of national laws Article 114 could not be considered as a proper legal base. However this solution is still problematic. Art 114 does not have a solution for 'optional instruments' which would not harmonise the law of the Member States in a strict sense, but as sui generis European rules existing parallel to national laws. Article 352 could be a proper reference for the adoption of such instruments, although at a heavy price to be paid, namely the unanimity requirement during the decision-making of the Council of Ministers of the EU. A veto right enjoyed by any Member State can easily block the adoption of even a well-prepared proposal in a Union of 28 Member States.

Before the publication of the CESL there was not sufficient time to discuss and digest all aspects of the advantages and disadvantages of the 'second national contract law regime concept' and to analyse all the nuances of the *'Vorschaltlösung'.* This solution came as a surprise to the academic community, although it had far reaching consequences for the role of Regulation Rome I as well.

Although Preamble paragraph (14) of Regulation Rome I had foresaw that: 'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.' However, the CESL was not presented as a sui generis European legal instrument, a 28th legal regime, but a second contract law regime, carefully implanted in the legal system of each Member State.

This approach effectively 'neutralised the effects' of Art. 6 (2) of Rome I on consumer contracts, which prescribes that 'a choice (of law) may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.' According to the Commission, if the CESL were a uniform part of the legal systems of each Member State, there would be no existing higher protection. In the wording of the CESL proposal, '[t]he latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country.'[43] This argument may have sounded very logical, but it was not convincing at all for consumer organisations, which had strong fears of losing the existing level of consumer protection provided by the laws of the Member States.

[43] COM (2011) 635, p. 6.

V Consumer Protection v. Lex Mercatoria

Consumer protection has been always a corner-stone of harmonisation of contract law within the European Union. As far as consumer contracts are concerned, reference to the fundamental economic freedoms also fares well in arguments. Union-level legislation on consumer protection admittedly *aims at integration:* it must contribute to the free movement of goods and services.[44] The free movement of the factors of production is established not only through the export-import transactions of traders, but also through the deals made between private persons (consumers) and traders coming from other Member States. Consumer transactions thus play an emphatic role in creating the internal market – which is purportedly jeopardised by the differences between the legal systems of the Member States, which make consumers feel uncertain about their rights with regard to cross-border transactions. This is the why the Union seeks to establish a common hard core of norms, 'a uniform set of fair rules'.[45] Finally, this intention has been boosted further by developments in electronic trade, which make it even easier to access the sales systems of traders established in other Member States.

It has however been pointed out by several observers that, in relation to consumer transactions concluded in traditional ways, language barriers and the difficulties in maintaining contact after concluding contracts deter consumers more from cross-border shopping than any differences in national contract laws that consumers perhaps do not sense as much as trade buyers.[46] In addition, the directives in effect on consumer transactions provide for so-called minimum harmonisation, allowing for significant differences between the laws of the Member States.[47]

It is therefore not surprising that a special emphasis was put on the interests of consumers during the preparatory work of the CESL. Since national laws were already harmonised – at least to a certain extent – by directives on consumer contracts in the EU, the CESL – as a second national contract law regime – had to offer the same or even a higher level of protection for consumers than under the directives, the existing consumer acquis. (This was not an easy task, since the preparation of the CESL ran parallel with the work of the proposal on the new Consumer Rights Directive (CRD), the content of which was a kind of moving target for the Expert Group.)[48] During the drafting process and even later, very detailed tables were prepared on the national laws, in order to show that a CESL is even more advantageous for consumers than

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[44] Stephen Weatherill, *EC Consumer Law and Policy* (Longman 1997, London, New York) pp. 36-39.

[45] Preamble paragraph 2 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. For a detailed discussion of the directives on various consumer transactions, see Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), *EC Consumer Law Compendium* (Sellier European Law Publishers 2008, Munich) 529 pp.

[46] 'Editorial Comments' (1997) 34 Common Market Law Review p. 210.

[47] The European Commission itself admits this, see point 50 of its communication 'A more coherent European Contract Law' [COM (2003) 68 final].

[48] Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

the laws of the Member States, and an academic research project on this topic was supported by the Commission.[49] The exclusion of Article 6 (2) of Regulation Rome I[50] was intended to be counterbalanced by a high level of consumer protection offered by CESL. A special instrument, a so called 'standard information notice'[51] was drafted to provide adequate guarantees during the process of choosing the CESL. Despite this, consumer organisations remained unconvinced regarding the need to create an optional European contract law. On the other hand, what was too little for the consumer organisations was too much for business. Representatives of business and academia found the "standard information notice" an uneasy and awkward solution,[52] unnecessarily increasing traders' costs. The CESL's competition with EU directives and national laws led to an undesirable solution.

One might argue that the CESL should have focused at first only on B2B transactions, not extending its scope to B2C contracts; however, in that case, one of the main pillars supporting the creation of a European contract law would be removed from the structure. Moreover, there is no need to create a European contract law only for cross-border transactions between traders, since there is no special European law merchant; separate from global *Lex Mercatoria,*[53] the UNIDROIT Principles are always available for international B2B transactions.

Probably similar challenges had to be met by the PECL earlier. However, it was a slightly different situation, being a private codification, a cooperation amongst eminent scholars outside the formal law-making machinery of the EU. As such, presumably there was a broader leeway for policy choices supporting consumer interests.

VI Unconvinced Member States

The majority of Member States have never been enthusiastic about the CESL; they had a rather reserved attitude, to some extent reflecting the above indicated concerns of consumers, business and scholars and the debates concerning the proper legal base and legal nature of the draft. Although the CESL was presented as an 'innocent' optional instrument for cross-border transactions, the CESL was considered by the Member States – perhaps rightly so – as a competitor to their national contracts laws, traditionally a precious part of their Civil Codes. Several Member States emphasised that proof of the high cost of legal diversity in the field of contract law was still missing.

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[49] Martine Behar-Touchais, *Comparison of mandatory consumer protection provisions in the Common European Sales Law proposal and six national laws.* (HR, HU, NL, PL, RO, SE), 2014, 119 p. The research was based on national reports.

[50] See above.

[51] 'The contract you are about to conclude will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross-border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection. These rules only apply if you mark your agreement that the contract is governed by the Common European Sales Law.'

[52] Eidenmüller et al. (n 28) pp. 321-322.

[53] 'Likewise, the idea of a specifically European *lex mercatoria,* as opposed to the international *lex mercatoria* or *lex mercatoria tout court,* seems rather awkward', Bonell (n 1) p. 16.

In addition to it, a new wave of re-codification of national civil laws has been still on the way in several Central and Eastern-European countries as a result of their return to market economy system in the early 1990s. For example, the new Romanian Civil Code entered into force in 2011, the Czech and the Hungarian ones in 2014. This recodification of civil law is still on the way in Poland and Slovakia.[54] In these countries, the elaboration of a 'second contract law regime' had little appeal for law-makers.

VII Time Pressure and Changing Priorities

The proposal on CESL published in September 2011 consisted of two major parts: a draft Regulation[55] containing the *'chapeau rules',* dealing with such issues as its objective, scope, definitions, optional nature, cross-border contracts etc. and its Annex I. on the actual rules of contract law.[56] The expert group was responsible for the preparation of the latter, more precisely for drafting a first version (a Feasibility Study) of it.

In 2010, the preparation of the CESL was put high on the Agenda of the European Commission – perhaps not independently from the declining aspirations related to drafting an all-embracing, maximum harmonisation EU directive on consumer contracts (CRD).[57] However, the high political priority meant high time pressure as well – since the draft rules had to be prepared within one year, which made the exercise almost 'mission impossible'. Finally the expert group was able to meet this deadline; its members submitted excellent and very inspiring preparatory papers – but this rush had an unavoidable impact on the maturity and clarity of the rules. Due to the time pressure, some areas were not covered, such as illegality and immorality, representation, plurality of debtors and creditors, assignment and set-off and the determination of the language of the contract.[58] There were other requirements to be satisfied as well: the new optional law had to be reasonably short[59] and easily understandable for laymen. It is obvious that these external considerations – despite the good intentions behind them – were alien to the carefully polished dogmatics and terminology of contract laws, which have been the result of several hundred years of development.

During the preparation phase of the draft, the position of the Commission changed on important issues. In April 2010 the aim of the work was thought to be twofold: to create a 'tool-box' for law makers, providing the Union with a non-binding set of fundamental principles, definitions and model rules to be used for the revision of existing legislation and to ensure greater coherence and quality in the law making process; moreover, to make 'progress towards

[54] Vékás (n 12) p. 100.
[55] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.
[56] Plus there is an Annex II containing the so called Standard Information Notice.
[57] Regarding the criticism on full harmonisation see Boele-Woelki (n 20) p. 61.
[58] Draft CESL Regulation [COM (2011) 635 final] recital (27), critically Eidenmüller et al. (n 28) pp. 308-309.
[59] Around 150 Articles.

an optional European Contract Law'[60]. A few months later, the tool-box function was dropped and the focus moved towards the support of an optional instrument as a 28th legal system of contract law.[61] Finally, when the draft Regulation on CESL was promulgated, this was already considered as a 'second contract law regime' within the legal systems of the Member States of the EU.[62] These important conceptual changes, carrying underlying uncertainties, had an impact on the work of the expert group, too.

VIII Concluding Remarks

It seems that the original hesitation of the European Commission regarding the possibility and method of harmonising contract law was justified. Despite all the preparatory work and invested energy, the time was not ripe for a Regulation promulgating an optional instrument as a 'second contract law regime' of the Member States. This goal has proved to be overambitious and premature. Perhaps a Commission recommendation on European Contract law – offering only model contract rules, a tool-kit for the law-makers for the Member States and the EU, could have had a better chance of success at this stage of development.

Several problems should be solved before a truly European optional contract law can emerge. First of all, more empirical data are needed on the magnitude of the cost of the variety of contract laws in Europe. There is surprisingly little hard evidence in this respect, although the decrease of transaction costs would be the very basis of the exercise. It will be difficult to persuade business people and Member States without convincing statistics.

It is necessary to clarify the legal base: at present, as was explained above, neither Article 114 nor 352 is ideal. Therefore, an amendment of the TFEU, expressly facilitating – without the high threshold of a unanimity requirement – the adoption of new instruments creating a sui generis European legal regime in certain fields parallel to national laws, could pave the way towards the adoption of a future CESL. Creating a better legal base could pave the way towards the choice of CESL in the sense of private international law, according to the approach of Regulation Rome I, abandoning the overly complicated concept of 'second contract law regime' and the detour via national laws.[63]

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[60] Commission Decision of 26 April 2010 setting up the Expert Group of a Common Frame of Reference in the area of European contract law.(2010/233/EU) OJ 27/4/2010, L105/109, recitals 2, 5 and 6.

[61] At that time the EU had 27 Member States, Croatia still being in the phase of accession to the EU, so the CESL could be considered as the 28th legal regime.

[62] 'The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.' Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels 11.10.2011. COM (2011) 635 final. p. 4. Similarly in p. 6, p. 8-9 and 11.

[63] Eidenmüller et al. (n 28) p. 356.

The clarification of the position of a new European contract law towards EU consumer law, more precisely towards the directives on consumer contracts, also seems to be unavoidable. It will not be easy to find the right equilibrium between the patterns of international commercial law, developed for B2B transactions and the approach of consumer protection driven EU contract law, tailor-made for B2C contracts. Preserving the applicability of Article 6 (2) Regulation Rome I, which guarantees the protection offered to consumers by the laws of the Member States, could temper the worries of consumer organisations and the pressure to create the highest level of consumer protection ever. In this respect, the proper approach on private international law and consumer protection are clearly interrelated.

Despite all these uncertainties, one day the project of European contract law may come back to the legislative agenda. The idea is not completely forgotten; the CESL remains one of the reference texts for European contract law. The forty year long history of the preparation of the Statute of the European Company (SE), which quite suddenly brought results,[64] may console those who supported and still support the development of CESL. However, in order to achieve this goal, political and institutional support and clear and visionary guidance are needed. The fate of European contract law depends on the institutional dynamics and future of the EU, too.

[64] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L294, 10.11.2011.

Chrysafo Tsouka*

Simplifying the Circulation of Public Documents in the European Union – Present and Future Solutions

I The Genesis of a New Legislative Instrument of EU Law

1. Following the results of the Eurobarometer on civil status, in 2010 the European Commission[1] launched a debate on all the public documents that require administrative formalities for them to be used outside the Member State in which they were issued. These formalities include proof of authenticity or a certified translation. The purpose of this initiative was no less than finding the possible ways to simplify the existing legal framwork. The traditional way of authenticating public documents designed for use abroad is *legalisation.* Another formality, which simplifies the traditional legalisation process, consists of the provision by the State issuing the document of an authentication certificate called an *apostille.* The apostille has the same objective as legalisation but involves a simplified procedure. An apostille is provided by the competent authorities only of the State which issued the document. Intervention by the authorities of the Member State in which the document is presented is no longer necessary. According to the EC, although the apostille facilitates the movement of public documents compared with the legalisation procedure, it also requires administrative steps and involves some loss of time and a quite considerable cost, which varies greatly from one Member State to another.

2. In the framework of the Green Paper on this matter, published the same year by the Commission, the eventual recognition of the effects of civil status records[2] was also examined. This document was the subject of a public consultation.[3] As important as the solutions of the Proposal that followed this Green Paper may be, the latter is also interesting, at least from

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1 http://ec.europa.eu/public_opinion/archives/eb/eb74/eb74_en.pdf

2 Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records COM(2010) 747 final' (http://ec.europa.eu/justice/policies/civil/docs/com_2010_747_en.pdf).

3 For the reactions to the Green Paper see http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm.

a methodological point of view: in fact, among other solutions mentioned in this context, is also cited the recognition[4] of the effects of certain types of civil status. We could cite the example of a registered partnership concluded in Member State A: if the method of recognition was adopted, the relationship thus created should be recognised in all the other Member State, at least concerning its existence, if not its results. It is evident that such a development would be very important for European private international law, becauseconflict of laws rules would then be of less 'utility'. The method in question is not only a subject of thoretical discussion – ECJ case law has also adopted the same approach in matters related to civil status.[5] Two recents ICCS Conventions have adopted the method of recognition regarding the name[6] and the registered partnership,[7] too. As detailed below, this alternative was not retained in the framework of the Proposal on promoting the free movement of citizens and businesses by simplifing the acceptance of certain public documents in the European Union, because European lawmakers decided not to regulate questions concerning the content of public documents.

II The Proposal for a Regulation on Promoting the Free Movement of Citizens and Businesses by Simplifing the Acceptance of Certain Public Documents in the European Union[8]

1. The public consultation on the aferomentioned Green Paper resulted, indeed, in a Proposal for a Regulation aiming at ensuring the simplification of the circulation of public documents.[9] As already observed, in this context the idea of the recognition of the effects of civil status documents was rejected. It is not difficult to understand why such a solution, implying the application of the method of recognition, was not finally adopted: such an approach would oblige the Member States to accept as valid a relationship legally created in another Member State whithout applying the national rules of private international law and perhaps against the fundamental legal concepts of each Member State.[10]

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[4] See on this matter Paul Lagarde (dir.), *La reconnaissance des situations en droit international privé* (Editions A. Pedone 2013).

[5] Case C-148/02 *Garcia Avello v Belgian State* ECR I-11613, Case C-352/06 *Stefan Grunkin, Dorothee regina Paul* ECR I-07639, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* ECR I-13693.

[6] *Convention on the recognition of surnames* (signed in Antalya on 16 September 2005).

[7] *Convention on the recognition of registered partnerships* (signed in Munich on 5 September 2007). For this Convention see Paul Lagarde, 'La convention de la CIEC sur la reconnaissance des partenariats enregistrés' in *Lebendiges Familienrecht Festschrift für Rainer Frank* (Verlag für das Standesamtwesen 2008, Frankfurt am Main) 125-138.

[8] Proposal for a Regulation of the European Parliament and the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [COM(2013) 228 final].

[9] On this Proposal see Paul Lagarde, 'The Movement of civil-status Records in Europe, and the European Commission's Proposal of 24 April 2013' (2013/2014) 15 Yearbook of Private International Law 1-12. See also Chr. Kohler, 'Towards the Recognition of Civil Status in the European Union' op. cit. 13-29.

[10] This will be the case when national public order is contrary to European fundamental values, as expressed either in the Charter of Fundamental Rights of the European Union or in the European Convention on Human Rights.

2. The legal basis of this initiative is explained in the Explanatory Memorandum:

> This proposal is based on Article 21(2) TFEU which empowers the European Parliament and the Council to adopt provisions with a view to facilitating the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the free movement of citizens. Thus, removing these obstacles would facilitate the exercise of the free movement of citizens as foreseen in Article 21(2) TFEU. This Article is combined with Article 114(1) TFEU which empowers the European Parliament and the Council to adopt measures for the approximation of the provisions which have as their object the establishment and functioning of the internal market. Administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the full enjoyment of the internal market freedoms of EU businesses as described in Article 26(2) TFEU and referred to in Article 114(1) TFEU. It is therefore the suitable complementary legal basis to cover public documents used by EU businesses in cross-border scenarios within the internal market.[11]

3. The actual Proposal provides for a dispensation from legalisation or a similar formality and for the simplification of other formalities related to the acceptance of certain public documents issued by authorities of the Member States (article 4). It also establishes Union multilingual standard forms concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking (article 1). As to the scope of the future Regulation, article 2 provides that this Regulation will apply to the acceptance[12] of public documents which have to be presented to the authorities of another Member State, specifying at the same time that it does not apply to the recognition of the content of public documents issued by the authorities of other Member States.

4. For the purpose of the Regulation, 'public documents' means documents issued by the authorities of a Member State and having formal evidentiary value relating to: *(a)* birth; *(b)* death; *(c)* name; *(d)* marriage and registered partnership; *(e)* parenthood; *(f)* adoption; *(g)* residence; *(h)* citizenship and nationality; *(i)* real estate; *(j)* legal status and representation of a company or other undertaking; *(k)* intellectual property rights; *(l)* absence of a criminal record (article 3).

5. Another interesting point of the Proposal is the obligation imposed to on national authorities to accept non-certified translations of public documents issued by the authorities of other Member States (article 6 para 1).[13]

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[11] COM(2013) 228 final 10.

[12] The term 'acceptance' caused serious criticism based on the similarity of this expression with the notion of recognition, apparently excluded from the scope of the Regulation.

[13] It should however be noted that, according the second paragraph of the same article, 'Where an authority has reasonable doubt as to the correctness or quality of the translation of a public document presented to it in an individual case, it may require a certified translation of that public document. In such a case, the authority shall accept certified translations established in other Member States'.

6. In case of reasonable doubt as to the authenticity of a public document, the authorities of the Member State in which a public document is presented may submit a request for information to the relevant authorities of the Member State where these documents were issued. To that end, the national authorities may use the Internal Market Information System (established by Regulation 1024/2012)[14]. The Internal Market Information System is a software application accessible via Internet, developed by the Commission in cooperation with the Member States in order to assist Member States with the practical implementation of information exchange requirements laid down in Union acts, such as in this Regulation. It allows templates of national public documents to be collected in its repository and these will also help the authorities to become familiar with the documents of other Member States, including on their linguistic aspects,. Furthermore, the proposal contains detailed rules concerning the designation, functions and meetings of the central authorities. Among others, the central authorities provide and regularly update best practices on preventingpublic document-related fraud.

7. The proposal establishes Union multilingual standard forms in all official languages concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking. The Union multilingual standard forms will be available to citizens and companies or other undertakings in parallel and as an alternative to the national public documents on a voluntary basis and given the same formal evidentiary value as the simular public documents issued by the authorities of the issuing Member State. If a Union multilingual standard form has been established for a particular public document, the authorities of a Member State must issue such a form upon request if an equivalent public document exists in that Member State. The question of which authorities issue which forms falls under the national law of each Member State. They must be issued under the same conditions (e.g. as regards the fees) as the equivalent public document existing in that Member State. These standard forms do not produce legal effects as regards the recognition of their content in the Member States where they will be presented.

III Towards a New Legislative Text on the Circulation of Public Documents in the EU?

1. The above very briefly exposed solutions have been strongly criticised by the Member States. The scope of the Regulation was judged excessively broad, mostly because of the very complicated system for verification of a public document's authenticity. Equally dangerous was considered the fact that even an unofficial translation must in principle be accepted. On the other hand, the system of multilingual standard forms established by the Regulation provoked the reactions of the Member States which are at the same time Member of the International

[14] Regulation (EU) No 1024/2012 Of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

Commission on Civil Status and have ratified the ICCS Conventions, because the latter also provide for an exchange of information on civil status and have established standard forms to that end. Finally, as to the verification of the authenticity of public documents, the Member States could not understand, why the system of the Hague Convention on the Apostille should be replaced by another, more complicated, system which will create a considerable burden for national Administrations and indirectly increase the cost of the free movement of documents at the citizens' expense. In other words, the Member States were not keen to abandon the existing solutions, which they judged sufficiently satisfactory.

2. After many discussion and modifications of the initial text, the Council, on 3 December 2015 has confirmed the political agreement reached during a trilogue between the Presidency (Luxembourg), the European Parliament and the European Commission on 13 October 2015. After the usual legal-linguistic revision, the text will be put to a vote in second reading at a plenary session of the European Parliament.

3. In the new text the purpose of the Regulation is still the simplification of the circulation of public documents within the European Union. At the same time the Internal Market Information System (IMI) remains the basic tool for information exchange regarding a document's authenticity. Nevertheless, several other rules have been drastically modified. Consequently, the whole system to be used to facilitate the free movement of documents within the European Union is almost completely different. As will be detailed below, its main characteristics are the recognition (and the acceptance) of the different systems existing in the international arena as to the circulation of public documents as well as the decisive role of the citizen concerned regarding the system to be finally applied.

4. More specifically, after the first reading of the Proposal in Council, the scope of the future Regulation has been mainly limited to public documents concerning the civil status, more precisely to public documents concerning birth, name, marriage, divorce, legal separation or marriage annulment, registered partnership, dissolution or annulment of a registered partnership, parenthood, adoption, domicile and residence, and nationality.[15] On the other hand the nature of the multilingual standard forms has changed: as stipulated in a new article 8, they shall be used as a translation aid attached to the national public document without having an autonomous legal value.[16]

5. More importantly this is the purpose of the Regulation which has changed: as set in article 1 (2), 'this Regulation shall not prevent a person from using other systems applicable in a Member

[15] It is however to note that, according to article 2, applies also to public documents, the primary purpose of which is to establish the absence of a criminal record, provided that such public documents are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality. 'This Regulation also applies to public documents the presentation of which may be required from citizens of the Union residing in a Member State of which they are not nationals when those citizens wish to vote or stand as candidates in elections to the European Parliament or in municipal elections in their Member State of residence, under the conditions laid down in Directive 93/109/EC and Council Directive 94/80/EC respectively'.

[16] See also article 1 (3).

State on legalisation or similar formality'. This solution is further explained in a recital, according to which 'As regards the Apostille Convention, while Member States' authorities should not require an Apostille when a person presents to them a public document covered by this Regulation and issued in another Member State, this Regulation should nevertheless not prevent Member States from issuing an Apostille in the event that a person requests it'[17].

6. As to the understanding of the document's content, the new version of the Proposal indirectly recognises the need for a certified translation: article 6 stipulates that

> A translation shall not be required where: (a) the public document is in the official language of the Member State where the document is presented or, if that Member State has several official languages, in the official language or one of the official languages of the place where the document is presented or in any other language that that Member State has expressly accepted; or (b) a public document concerning birth, a person being alive, death, marriage, including capacity to marry and marital status, registered partnership, including capacity to enter into a registered partnership and registered partnership status, domicile and/or residence or absence of a criminal record is accompanied, in accordance with the conditions set out in this Regulation, by a multilingual standard form, provided that the authority to which the public document is presented considers that the information included in the multilingual standard form is sufficient for processing the public document.

If one this terms is not fullfilled, then there is a need for a certified translation as it results form the wording of article 6 (2).[18]

7. As important as the aforementioned elements may be, one should not overlook the technicalities of the system established by the Regulation, as they may influence in a negative manner the quality of the solutions to be applied. Although it is not possible here to describe this system in its entirety, even a few elements of this nature permit an understanding of the complexity of the system in question.

8. As regards the multilingual standard forms, though not of an obligatory nature,[19] one must underline the necessity to complete them not only in the official language of the Member State in which the multilingual standard form is issued but also in the official language in which the public document to which the multilingual standard forms is attached is to be presented. On the other hand, the excessive length of the multilingual forms should be stressed, even concerning civil status acts, which in many national laws are characterised by their extreme briefness. This is the inevitable effect of the nature of the multilingual standard forms as

[17] Recital 5.

[18] According to this rule, 'A certified translation made by a person qualified to make such translations under the law of a Member State shall be accepted in all Member States'.

[19] Article 7 (1) provides indeed that 'Public documents concerning birth, a person being alive, death, marriage, including capacity to marry and marital status, registered partnership, including capacity to enter into a registered partnership and registered partnership status, domicile and/or residence and absence of a criminal record communicated by the Member States in accordance with point (c) of Article 24(1), shall, upon request by the person entitled to receive the public document, be accompanied by a multilingual standard form established in accordance with this Regulation'.

translation aids and the subsequent will of the Member States to fully reproduce, in the standard form, the content of the concerned national document, even when many of the national inscriptions are of no interest to the Authorities of the State where the document (and the multilingual standard form) is to be presented. Article 9, relative to the content of multilingual standard forms reflects this situation.

9. Another expression of the complexity of the system provided for by the future Regulation concerns the request for information and administrative cooperation. Even though the articles of the new version of the Proposal dedicated to that matter have not suffered major modifications, it is not allowed to disregard the length of the whole procedure. According to article 14 (5) 'The authorities shall reply to requests for information made under this Article within the shortest possible period of time and in any case within a period not exceeding five working days or 10 working days where the request is processed through a central authority. In exceptional cases where the time limits referred to in the first subparagraph cannot be adhered to, the receiving authority and the requesting authority shall agree upon an extension of the time limit'.

IV Institutional Problems

1. From the above, it is obvious that one of the main problems that arose from the EU initiative in question is the relationship between the future Regulation and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, as well the ICCS Conventions. At first, the Proposal for a regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents provided for that this Regulation shall, as between Member States, take precedence over Conventions concluded by them in so far as such Convention concern matters governed by this Regulation.[20]

2. The reason for the negative reactions of the Member States on that matter as mentioned above was that the Conventions in question have been applied for many years or even decades with mostly satisfactory effects. Replacing them with a more complicated system does not seem convenient for either citizens or national administrations. Moreover, this is not the only or the most important problem which arises as regards the relationship between the Regulation and existing international Conventions. More significantly, the discussion in that respect also presents an institutional dimension related to the eventual exclusive external competence of the European Union on the matters regulated by the Regulation.

3. Pursuant to the Opinion of the ECJ 1/13[21] of 14 October 2014, it is not excluded that the European Union acquires exclusive external competence, including the right to accept the accession of a third State to the aforesaid Conventions. This would be an evolution which Member

[20] Article 18.

[21] In Govaere, 'Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 Common Market Law Review 1277-1307.

States were not ready to allow. To that end, the new article 19 of the revised text of the Proposal provides that 'this Regulation shall not preclude Member States from negotiating, concluding, acceding to, amending and applying international agreements and arrangements with third countries concerning legalisation or similar formalities of public documents on matters covered by this Regulation issued by the authorities of Member States or third countries concerned, nor from deciding on the acceptance of the accession of new Contracting Parties to such agreements and arrangements to which one or more Member States or may decide to become party'.

4. Another element one must take into account as regards the problem of the external competence of the European Union regarding the circulation of public documents is that the multilingual standard forms shall not include any of the following: extracts from civil status records, verbatim copies of civil status records, multilingual extracts from civil status records, multilingual and coded extracts from civil status records or multilingual and coded civil status certificates.[22] In the light of this situation, it is clear that the subject matter of the Regulation and the ICCS Conventions is not the same. If this were the case, the European Union (and not the Member States) would be the only competent body for the Conventions in question.

V Conclusion

1. Certainly, no one can predict the outcome of the 'bargaining' between the Council and the European Parliament. It is however evident that the EU has abandoned its initial target, which was the 'circulation' of the legal relations within the EU, for the sake of creating, ultimately, a complicated administrative mechanism that is supposedly designed to facilitate the lives of citizens and generally those living in the EU territory. However, this aim seems to be achieved to a greater degree within the existing legal framework of international organisations, such as the Hague Conference on Private International Law with the creation of the electronic Apostille and the International Committee of Civil Status, together with the creation of an electronic platform for the implementation of Committee's Conventions on the exchange of personal situation-related information. In this sense, the Regulation under consideration represents a step backwards in relation to these achievements, to the detriment of both citizens and administrations. This is why the Regulation's Proposal allows the person concerned to choose the applicable system for themself.

2. As stated before, national Authorities are not permitted to encourage the application of another system facilitating the international circulation of public documents. Nevertheless, because of the difficulties that may be caused by the solutions to be adopted in the European Union as to that matter, it could not be excluded (at least at the early stage of the Regulation's application) that the persons concerned will be deterred from using the solutions laid down in the European Union.

[22] Article 8 (2).

Dimitrios-Panagiotis L. Tzakas*

Reforming Jurisdiction in Contract
A Success Story or a Painful Compromise?

One of the cornerstones of EU law is the principle of autonomous interpretation. As the ECJ ruled in the *Linster* case: 'The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question.'[1] From this perspective, the definition of specific notions stipulated in EU legislative acts should not depend upon the understanding of the same or similar notions as entailed in the lex fori, the law applicable on the merits of the case or any other national law of an EU or third country. In the context of the Brussels I Regulation,[2] the ECJ[3] upholds the validity of this approach by stressing the interest in ensuring the Regulation's full effect, such that reference should be made principally to its general scheme and objectives.

However, it is largely known that there is always an exception to every rule. One of the most striking cases can be found in the EU rules relating to a court's jurisdiction in matters of contract. The reason that this exception is so prominent relates to its coverage of one of the most common jurisdictional rules in the field of international trade relations. Furthermore, its very nature seems to contravene the policy objectives underpinning the enactment of the Brussels Convention, namely putting uniform rules in place as well as ensuring transparency and predictability relating to the jurisdiction of national courts. Despite these aims, the ECJ

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1 Case C-287/98, *State of the Grand Duchy of Luxembourg v B. Linster et al.* [2000] ECR I-6917, para. 43. See also Case 327/82, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* [1984] ECR 107, para. 11.

2 Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12 (16.1.2001) 1.

3 Case 189/87, *Athanasios Kalfelis v Banque Schröder, Münchmeyer, Hengst & Co.* [1988] ECR 5565, para 16; Case C-295/95, *Jackie Farrell v James Long* [1997] ECR I-1683, paras 12-3; Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767, para 12; Case C-440/97, *GIE Groupe Concorde et al. v The Master of the vessel Suhadiwarno Panjan et al.* [1999] ECR I-6307, para 11; Case C-347/08, *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* [2009] ECR I-8661, para 35. See also Case C-433/01, *Freistaat Bayern v Jan Blijdenstein* [2004] ECR I-981, para 24; Case C-419/11, *Česká spořitelna, a.s. v Gerald Feichter,* unrep., para 25.

recognised in its landmark ruling in *Tessili Italiana*[4] that the words and legal concepts drawn from civil, commercial and procedural law could be regarded either as having their own independent meaning and, thus, being common to all EU Member States, or as referring to the substantive rules of the law applicable to the merits of the case. The Court concluded that neither of these two options is mutually exclusive.

The following paper discusses the main features of the reform of jurisdictional rules relating to contractual disputes and evaluates the subsequent case law of the ECJ. Starting with an analysis of the former provisions in the Brussels Convention and their shortcomings *(I)*, attention is then shifted to the policy *rationale* underpinning the EU Commission's reform plans *(II)*. Emphasis is given to ECJ case law on the new rule found in Article 5(1)(b) Brussels I Regulation and, in particular, to the main notions that made judicial intervention necessary *(III)*. In light of these findings, the paper analyses the reasoning of the relevant jurisprudence and evaluates the effectiveness of the new regime *(IV)*.

The paper does not scrutinise in-depth the *ratione materiae* scope of application of jurisdiction in contract. For the sake of completeness, it is sufficient to note that the concept of 'matters relating to contract' within the meaning of Article 5(1)(a) Brussels I Regulation is, pursuant to the Court,[5] to be interpreted independently by reference to the Regulation's scheme and purpose, in order to ensure that it is applied uniformly in all Member States. Therefore, the notion at issue cannot be taken to refer to how the legal relationship in question is classified by the relevant national law. Furthermore, it is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[6] Therefore, application of the rule under which special jurisdiction is provided for matters relating to a contract presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.[7] In contrast, it is settled case-law that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) Brussels I Regulation covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)(a).[8]

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[4] Case 12/76, *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473, paras 10-1.

[5] See in particular *Česká spořitelna* (n 3), para 45; Case C-548/12, *Marc Brogsitter v Fabrication de Montres Normandes EURL et al.,* unrep., para 18 and 21. See furthermore Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357, paras 19-20; Case C-27/02, *Petra Engler v Janus Versand GmbH* [2005] ECR I-481, para 33; Case C-543/10, *Refcomp SpA v Axa Corporate Solutions Assurance SA et al.,* unrep., para 22.

[6] See also J. von Hein, 'Der europäische Gerichtsstand des Erfüllungsortes (Art. 5 Nr. 1 EuGVVO) bei einem unentgeltlichen Beratungsvertrag' (2013) 33 IPRax 54, 55-6.

[7] Case C-51/97, *Réunion européenne SA et al. v Spliethoff's Bevrachtingskantoor BV et al.* [1998] ECR I-6511, paras 17-20; *Tacconi* (n 5) paras 22-3; *Engler* (n 5) para 50-1; *Česká spořitelna* (n 5) para 46-7; C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG*, unrep., paras 23 and 25; Case C-147/12, *ÖFAB, Östergötlands Fastigheter AB v Frank Koot et. al.,* unrep., para 33; Case C-375/13, *Harald Kolassa v Barclays Bank plc,* unrep., paras 39 and 41.

[8] *Kalfelis* (n 3) paras 17-8; Case C-261/90, *Mario Reichert et al. v Dresdner Bank AG* [1992] ECR I-2149, para 16; *Réunion européenne* (n 7) paras 22-4; *Tacconi* (n 5) para 21; *OTP Bank* (n 7) para 26; *Brogsitter* (n 5) para 44; *Kolassa* (n 7) para 44.

I Jurisdiction in Contract under the Brussels Convention – The Shortcomings of the Tessili Jurisprudence

Before analysing the new rule on jurisdiction in contract introduced by the Brussels I Regulation, a short analysis of the jurisprudence relating to the former provision seems necessary. The concept of 'obligation' entailed therein refers to an obligation which arises under a contract and the non-performance of which is the basis of the action.[9] The same test applies where the plaintiff has asserted the right to be paid damages or has sought dissolution of the contract on the ground of the wrongful conduct of the other party.[10] If several claims are raised by the same action, such that various obligations are at issue, the principal obligation should be decisive.[11] Ancillary obligations are held as inappropriate to determine jurisdiction of the Member State courts pursuant to the maxim *accesorium sequitur principale*.[12] However, this approach does not apply with regard to an obligation consisting of an undertaking not to do something (such as an obligation of exclusivity and non-competition), provided that it is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. For such factual situations, the Court ruled that Article 5(1) Brussels I Regulation is not applicable since the place of performance cannot be determined.[13] Therefore, jurisdiction is to be established only by application of the general rule of the defendant's domicile.

Furthermore, the place of performance of the afore-mentioned principal obligation is to be found in accordance with the law governing this obligation, pursuant to the conflict rules of the court before which the proceedings have been brought.[14] As to this aspect, the ECJ[15] recognises that the place of performance depends on the contractual context of the obligations in question and that the contract laws of the Member States have very divergent views as to the place of performance. However, the Court[16] underlines that there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seised, since the conflict rules enabling determination of the law applicable to the contract have been

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[9] Case 14/76, *A. De Bloos SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497, paras 11-5; Case 266/85, *H. Shenavai v K. Kreischer* [1987] ECR 239, para 9; Case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913, paras 23-4; Case C-256/00, *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)* [2002] ECR I-1699, para 44; *Česká spořitelna* (n 3) para 54. Cf. also Case C-533/07, *Falco Privatstiftung et al. v Gisela Weller-Lindhorst* [2009] ECR I-3327, paras 47 *et seq.*

[10] See *De Bloos* (n 9) para 14; *Shenavai* (n 9) para 9; Case C-420/97, *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR I-6747, para 31.

[11] *Shenavai* (n 9) para 19.

[12] See also the case law of the Hellenic civil courts as reported by E. Vassilakakis, 'Die Anwendung des EuGVÜ und der EuGVO in der griechischen Rechtsprechung' (2005) 25 IPRax 279, 280.

[13] *Besix* (n 9) paras 45 *et seq.*

[14] Case 12/76, *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473, paras 13 and 15; *Custom Made Commercial* (n 9) para 26; *GIE Groupe Concorde* (n 3) paras 19, 29 and 32; *Leathertex* (n 10) para 33; *Besix* (n 9) paras 33 and 36; *Česká spořitelna* (n 3) para 54. Cf. also *Falco Privatstiftung* (n 9) paras 47 *et seq.;* OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRax 74, 78. As to the case law of the Hellenic civil courts see E. Vassilakakis (n 12) pp. 279-280.

[15] *GIE Groupe Concorde* (n 3) para 17.

[16] *GIE Groupe Concorde* (n 3) para 30.

standardised by the Convention of 19 June 1980 on the Law applicable to Contractual Obligations *(Rome I Convention)*[17]. According to this instrument, a national court is precluded from hearing the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the applicable conflict rules, one of those obligations is to be performed in the *forum* State and the other in another Member State.[18] However, in the event that the relevant contractual obligation has been, or is to be, performed in a number of places, jurisdiction to hear and determine the case cannot be conferred on a court where any one of those places of performance happens to be located.[19] Accordingly, in a case characterised by a multiplicity of places of performance of the contractual obligation at issue, a single place of performance has to be identified. In principle, this will be the place presenting the closest connection between the dispute and the court having jurisdiction.[20]

This approach did not preclude an exercise of private autonomy by the parties to the extent that a designation of the place of performance was allowed under the provisions of the applicable national law. Therefore, if the parties to the contract are permitted by the applicable law to specify the place of performance of an obligation, that agreement is sufficient to establish jurisdiction in that place.[21] However, the ECJ repeatedly underlined that whilst the parties are free to agree on a place of performance for contractual obligations, they are nevertheless not entitled to designate – with the sole aim of specifying the courts having jurisdiction – a place of performance having no real connection with the reality of the contractual relationship at issue.[22]

II The Policy Rationale Underpinning the New Rule of Article 5(1) Brussels I Regulation

The reasoning of the court and its persistence in adhering to the *Tessili Italiana* jurisprudence was widely criticised[23] particularly due to the fact that it constituted a *petitio principii.* Furthermore, the Court's reasoning could not ensure the aspired predictability or the implementation of uniform solutions within the EU, since jurisdiction would always remain dependent upon the character of the claim raised as an 'obligation of dispatch'. Therefore, the EU Commission invoked the policy *rationale* underpinning facultative jurisdiction in contract and sought to introduce an alternative connecting factor, based on the model of French law (Article 46 ncpc).

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17 OJ L266 (9.10.1980) 1.
18 *Leathertex* (n 10) para 40.
19 *Besix* (n 9) para 28.
20 *Besix* (n 9) para 32.
21 Case 56/79, *Siegfried Zelger v Sebastiano Salinitri* [1980] ECR 89, para 5; Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-911, para 30; *GIE Groupe Concorde* (n 3) para 28; *Česká spořitelna* (n 3) para 55.
22 *MSG* (n 21) paras 31 *et seq.*; *GIE Groupe Concorde* (n 3) para 28; *Česká spořitelna* (n 3) para 56.
23 See J. Kropholler, *Europäisches Zivilprozeßrecht* (8th edn, Verlag Recht und Wirtschaft 2005), Art. 5, paras 23-6; S. Leible, 'Art 5 Brüssel I-VO' in T. Rauscher, *Europäisches Zivilprozeßrecht vol. I,* (2nd edn, Sellier 2006), p. 173-4.

In particular, Recital 6 of the Brussels I Regulation explicitly refers to the objective of free movement of judgments in civil and commercial matters, which makes it necessary and appropriate to enact common and uniform rules governing jurisdiction by means of an EU legal instrument that is binding and directly applicable.[24] Furthermore, Recital 11 underlines the exceptional character of the provisions establishing special and facultative jurisdiction and, thus, stipulates the need for highly predictable rules. For that reason, only a few exceptions from the principle that jurisdiction is generally based on the defendant's domicile and must always be available on this ground should be allowed. This is only the case in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different connecting factor.[25] The latter is based on the recognition of a close link between the court and the action, as well as on the aspiration to facilitate the sound administration of justice. Additionally, it has to be borne in mind that the Brussels I Regulation seeks to strengthen the legal protection of persons established in the EU, by, on the one hand, enabling the plaintiff to identify easily the court in which they may sue and, on the other hand, allowing a generally well-informed defendant to make a reasonable assumption of the court before which they may be sued.[26]

In light of these acknowledgments, the reform of the rules governing jurisdiction in contract should be based on the *rationale* of enacting rules providing, at least, a higher degree of transparency than that of the previous regime. As the ECJ[27] notes, the reason for establishing facultative jurisdiction for contract-related litigation is the objective of proximity, which is substantiated by the existence of a close link between the contract and the court called upon to hear and determine the case. Therefore, the national courts for the place of performance of the obligation in question are presumed to have a close link to the contract.[28] In this context, the Commission Proposal[29] invokes the policy reason of obviating the need for reference to the private international law rules of the State whose courts are seised. Specific reference is made to the afore-mentioned ECJ ruling in *Tessili,* which is regarded as a shortcoming that has to be remedied. To that end, the place of performance of the obligation underlying the claim raised is to be given an autonomous definition in two specific categories of contracts: the sale of goods and the provision of services.[30]

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[24] See also Case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, unrep., paras 18-19.

[25] See also Case C-469/12, *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH,* unrep., para 20.

[26] See Case C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827, paras 24-5; Case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, para 20; *Falco Privatstiftung* (n 9) para 22.

[27] *Color Drack* (n 26) paras 22-23; Case C-204/08, *Peter Rehder v Air Baltic Corporation* [2009] ECR I-6073, para 32; Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121, para 22; *Falco Privatstiftung* (n 9) para 24; *ÖFAB* (n 7) para 41; *Corman-Collins* (n 24) para 31.

[28] See furthermore *Custom Made Commercial* (n 9) paras 14 *et seq.*

[29] Proposal of 7.9.1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 final. See, furthermore, Case C-381/08, *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255, paras 52-53; P. Mankowski, 'Mehrere Lieferorte beim Erfüllungsortgerichtsstand unter Art. 5 Nr. 1 lit. b EuGVVO' (2007) 27 IPRax 404, 405.

[30] *Refcomp* (n 5) para 20.

The new rule entailed in Article 5(1)(b) Brussels I Regulation provides, with regard to the sale of goods, for the jurisdiction of the Member State courts where, under the contract, the goods were delivered or should have been delivered. For the provision of services, the courts of the Member State where, under the contract, the services were provided or should have been provided are identified as being competent. In both cases, the rule may be displaced by an explicit agreement on the place of performance.[31]

III The ECJ Case Law on the New Rule

The afore-mentioned policy reasons underpinning the introduction of the rule entailed in Article 5(1)(b) militate in favour of the autonomous interpretation of the notions entailed therein.[32] In this context, the ECJ[33] invokes the need to reinforce the primary objective of unifying jurisdictional rules whilst ensuring their predictability. However, this task is combined with a significant amount of uncertainty relating to two specific issues, namely the specification of the scope of the new provision and the interpretation of the enacted connecting factor. Although the first issue constitutes an unavoidable consequence of Article 5(1)(b)'s very nature as *lex specialis,*[34] the second set of problems seem to directly contravene the aspirations of the EU Commission. In particular, the principle of party autonomy combined with the rapidly changing modern business environment creates significant problems impeding the achievement of the main aims pursued by the Brussels I Regulation, namely transparency and predictability. Not coincidentally, in the thirteen years following the entry into force of the new rule, the ECJ has not infrequently – in roughly ten cases – has been called on to clarify the new rule and provide guidance for the national courts.[35] In this regard, the Court has stressed at least four times[36] the fact that the enacted Brussels I Regulation did not include any specific provision as to the issue raised and that, therefore, specific clarifications and guidance for the national courts were required. One could argue, of course, that ten cases are not many, especially when considering the common character of the contracts at issue. However, it has to be borne in mind that well-advised parties include jurisdiction and choice-of-law clauses in their contractual

[31] See M. Lehmann, A. Duczek, 'Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGVVO – besondere Herausforderungen bei Dienstleistungsverträgen' (2011) 31 IPRax 41, 48-9.

[32] See A. Metzger, 'Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO', (2010) 30 IPRax 420, 421; R. Wagner, 'Die Entscheidung des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO – unter Berücksichtigung der Rechtssache Rehder' (2010) 30 IPRax 143, 144.

[33] *Color Drack* (n 26) para 24; *Air Baltic Corporation* (n 27) para 33; *Car Trim* (n 29) para 49; *Corman-Collins* (n 24) para 32; *Krejci Lager* (n 25) para 22. Cf. also *Wood Floor* (n 27) para 23; *Falco Privatstiftung* (n 9) para 26.

[34] See *Corman-Collins* (n 24) para 42; *Brogsitter* (n 5) para 28; OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRax 74, 77.

[35] See, in particular, the cases *Color Drack* (n 26); *Falco Privatstiftung* (n 9); *Air Baltic Corporation* (n 27); *Car Trim* (n 29); *Wood Floor* (n 27); Case C-87/10, *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR I-4987; *Krejci Lager* (n 25); *Corman-Collins* (n 24); Case C-47/14, *Holterman Ferho Exploitatie BV et al. v Friedrich Leopold Freiherr Spies von Büllesheim*, unrep., paras 55 *et seq.* Cf. also *Brogsitter* (n 5) para 28.

[36] See, for instance, the cases *Color Drack* (n 26) para 17; *Falco Privatstiftung* (n 9) para 19; *Car Trim* (n 29) paras 30 and 51.

relations. As such, the room for applying Article 5(1)(b) Brussels I Regulation is limited to the very few cases where the parties have abstained or neglected to insert such clauses.

1 Notion of a 'Contract for the Sale of Goods'

At the outset, it has to be noted that a contract for sale is not defined in the Brussels I Regulation. This absence creates a significant amount of ambiguity, since it remains debatable whether the parties' will to transfer the property over goods should be decisive or, instead, the mere exchange or even the mere handing-over of goods for money.[37] The ECJ gives consideration to the obligation which characterises the contract under scrutiny.[38] Under this approach, the fact that the mere supply of a good has been agreed upon is decisive. Such classification may viably be applied to a long-term commercial relationship between two economic operators, provided that it is limited to successive agreements, each having the object of the delivery and collection of goods. This conclusion is, however, outweighed in the case of a typical distribution agreement, the precise aim of which is to regulate the future supply and provision of goods between two economic operators. In such a contract, specific contractual provisions can be found that relate to the distribution of the goods sold by the grantor.[39]

Of particular note is the determination of specific criteria in order to distinguish between a sale of goods and the provision of services. In *Car Trim,*[40] the ECJ had to address hybrid contractual relations involving the supply of goods in situations where the customer has specified certain requirements with regard to the provision, fabrication and delivery of components to be manufactured or produced. Right from the start, the Court notes that the new rule is silent as regards both the definition and the distinguishing features of those two types of contract in the context of a sale of goods simultaneously involving a provision of services. The specificity of the case relied on the fact that the seller was obliged under the contract to manufacture or produce the goods in compliance with certain requirements specified by the buyer, regard being had to the fact that such manufacture or production, or a part thereof, could also be classified as a 'service'. In this context, the Court gave specific consideration to three specific factors (paras. 35 *et seq.*): *(i)* the scope of specific EU (such as Directive 1999/44/EC[41] and Directive 2004/18/EC[42]) or international legislative acts (such as the United Nations Convention on Contracts for the International Sale of Goods, largely known as the 'CISG', and the United Nations Convention on the Limitation Period in the International

[37] OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRax 74, 78.
[38] *Car Trim* (n 29) para 32; *Corman-Collins* (n 24) para 35.
[39] *Corman-Collins* (n 24) para 36.
[40] Case C-381/08, *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255.
[41] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L171 (7.7.1999) 12.
[42] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L134 (30.4.2004) 114. See now Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94 (28.3.2014) 65.

Sale of Goods) and, in particular, their stance as to contracts for the supply of consumer goods to be manufactured or produced;[43] *(ii)* the origin of the raw materials used for the production of the goods at issue and, specifically, the circumstance whether the purchaser supplied the manufacturer with these materials; and finally *(iii)* the supplier's liability regime and, in particular, the issue whether they could be held responsible for the quality of the goods and their compliance with the contract.[44]

2 Notion of a 'Contract for the Provision of Services'

Since the Brussels I Regulation does not define the concept of a contract for the provision of services,[45] the ECJ gives consideration to the obligation which characterises the contract at issue.[46] Of importance is the fact that the characteristic obligation of the contract at issue consists of the provision of services. Therefore, the Court endorses an understanding of the concept implying, at the least, that the party who provides the service carries out a particular activity in return for remuneration.[47] The first criterion was elaborated in *Corman-Collins*[48] as requiring the performance of positive acts, rather than mere omissions. As to the second criterion, namely the remuneration paid as consideration for an activity, the Court underlined that this is not to be understood strictly as the payment of a sum of money. In fact, any kind of commercial advantage could be considered as remuneration provided that it represents an economic value.[49]

In the case of a licence agreement, namely a contract under which the owner of an intellectual property right grants its contractual partner permission to use the right in return for remuneration, the Court explicitly declined to interpret 'services' under the meaning of either Article 50 EC (now Article 57 TFEU) or any secondary EU legislation (such as the EU Directives on value added tax – VAT), other than the Brussels I Regulation.[50] Based on this reasoning, the Court highlighted the narrow interpretation of the rules on jurisdiction in contract. Of further note was the lack of any activity on the part of the owner of an intellectual property right which could qualify as a service, since they merely undertake to permit the licensee to exploit that right freely. In light of these findings, the ECJ reached the conclusion that a licence agreement

[43] See A. Metzger (n 32) pp. 421-2; G. Mongiò Erdelbrock, 'The concept of place of delivery according to Article 5(1)(b) of the Brussels I Regulation in the case of distance selling', (2006) 5/6 EuLF I-228-9.

[44] A. Metzger (n 32) p. 422.

[45] See *Falco Privatstiftung* (n 9) para 19. As to the diverging approaches of Member State laws see M.C. Pitton, 'L'article 5, 1, b dans la jurisprudence franco-britannique, ou le droit comparé au secours des compétences spéciales du règlement (CEE) n° 44/2001' (2009) 136 Clunet 853, 855-7.

[46] *Car Trim* (n 40) para 32; *Corman-Collins* (n 24) para 34.

[47] *Falco Privatstiftung* (n 9) paras 29-32; *Krejci Lager* (n 25) para 26; *Corman-Collins* (n 24) para 37; *Holterman*, (n 35) para 57. See also OLG Saarbrücken, Decision of 16.2.2011 (2013) 33 IPRax 74, 78.

[48] Case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, para 38.

[49] *Corman-Collins* (n 48) para 39-40. See furthermore J. von Hein (n 6) pp. 56-9.

[50] *Falco Privatstiftung* (n 9) paras 33 *et seq.* See also M. Brinkmann, 'Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO' (2009) 29 IPRax 487, 489-490; A. Metzger (n 32) p. 420.

does not constitute a contract for the provision of services and, hence, falls under the general rule of Article 5(1)(a) Brussels I Regulation.[51]

The Court reached the opposite conclusion with regard to exclusive distribution agreements which have been conceived as framework agreements, that lay down the general rules applicable to future relations between a grantor and a distributor as to their obligations of supply or provision and that prepare subsequent sale agreements.[52] The activity test was deemed to have been fulfilled, since the characteristic service provided by the distributor is involved in increasing the distribution of the grantor's products. Furthermore, as a result of both the supply guarantee it enjoys under the exclusive distribution agreement and its involvement in the grantor's commercial planning, in particular with respect to marketing operations, the distributor is able to offer clients services and benefits that a mere reseller cannot.[53] The remuneration criterion was also filled through the grantor's selection of the distributor. That selection, which is a characteristic element of this type of agreement, confers a competitive advantage on the distributor in that they have the sole right to sell the grantor's products in a particular territory or, at the very least, in that a limited number of distributors enjoy this right. Moreover, the distribution agreement often provides assistance to the distributor in the form of access to advertising, the communication of knowhow by means of training or even payment facilities.[54]

The same has been deemed to apply to contracts concerning the management of a company[55] or the storage of goods.[56] In the latter case, the ECJ has held that a predominant element of such contracts is the warehouse keeper's undertaking to store the goods concerned on behalf of the counterparty. Accordingly, such commitment entails a specific activity consisting of, at the least, the reception of goods, their storage in a safe place and their return to the other party in an appropriate state.[57]

3 Place of Delivery of the Goods

As far as the definition of the concepts of 'delivery' and 'place of delivery' is concerned, the ECJ accurately notes that the Brussels I Regulation is silent.[58] Indeed, a 'pragmatic determination of the place of enforcement' pursuant to the EU Commission aspiration stipulated in its Proposal of 7 September 1999 is deemed to be based on purely factual criteria. For that reason, the Court[59] elaborates a hierarchy as to the circumstances that have to be deemed decisive in order to identify the place of delivery. Claiming highest importance are the provisions of the contract which have to be understood without reference to the substantive law applicable to

[51] Cf. however P. Mankowski, (2009) 64 JZ 959-960.
[52] *Corman-Collins* (n 48) para 28.
[53] *Corman-Collins* (n 48) para 38.
[54] *Corman-Collins* (n 48) para 40.
[55] *Holterman* (n 35) paras 57-8.
[56] *Krejci Lager* (n 25) paras 24 *et seq.*
[57] *Krejci Lager* (n 25) para 27.
[58] *Car Trim* (n 40) para 32.
[59] *Car Trim* (n 40) paras 54 *et seq.; Electrosteel* (n 35) para 16.

the contract. However, this approach does not preclude recourse to usages which – especially if they are collected, explained and published by recognised professional organisations and are widely followed in practice by traders – play an important role in the non-governmental regulation of international trade or commerce. For that reason, national courts must take into account all the relevant terms and clauses in the contract at issue, including, as the case may be, the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms, in so far as they enable the place of delivery to be clearly identified.[60] Nevertheless, it has to be ascertained whether the place mentioned in the contract is used only to spread the costs and risks relating to the carriage of the goods or whether it is also the place of delivery of the goods.[61] In the absence of such clauses, the ECJ holds, as most consistent with the origins, objectives and scheme of the Brussels I Regulation, the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination. This criterion meets both the objective of proximity and the principle aim of a contract for the sale of goods, namely the transfer of those goods from the seller to the purchaser.

However, the most striking and lively debated issue relates to sale of goods contracts providing for several places of delivery.[62] In its first ruling in *Color Drack*,[63] which dealt with several places of delivery located within a single Member State,[64] the ECJ explicitly argued that the new rule by itself does not enable the referred question to be answered. Although the Court affirmed the applicability of the relevant provisions in such a case, it expressed considerable reservations as to the question whether concurrent jurisdiction could be conferred in favour of all domestic courts for any place where goods were or should have been delivered (para 37). Consequently, the Court did not regard the place where any of the several deliveries has occurred as pivotal, but only the place with the closest connecting factor between the contract and the court having jurisdiction. This closest connecting factor will, as a general rule, be at the place of principal delivery, which must be determined on the basis of economic criteria (para 40).[65] As the Court[66] recognised in a later case, the main argument in favour of the economic criteria approach is dependent on distinct and quantifiable economic operations that can be traced to the deliveries of goods to different locations. In case of doubt, each of the places of delivery has a sufficiently close link to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction. In any other case, the plaintiff is entitled to sue the defendant in the court of the place of delivery of their choice (para 42).[67]

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60 *Electrosteel* (n 35) paras 21-2.
61 *Electrosteel* (n 35) paras 23-5.
62 As to the differentiation between several contracts and several places of delivery under a single contract see P. Mankowski (n 29) p. 405.
63 Case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699.
64 As to the application of the jurisprudence in case of several places of delivery located in several Member States, see P. Mankowski (n 29) pp. 411-2.
65 See also *Wood Floor* (n 27) para 31. Cf. also BGH, Decision of 2.3.2006 (2006) 59 NJW 1806-8.
66 *Air Baltic Corporation* (n 27) para 42.
67 See also *Air Baltic Corporation* (n 27) paras 34-5.

4 Place Where a Service is Rendered

The reasoning of the Court in the afore-mentioned *Color Drack* ruling could be deemed to apply *mutatis mutandis* at least where services are rendered in several places located within a single Member State. Indeed, in *Air Baltic Corporation*[68] the ECJ ruled that the factors at issue are also valid with regard to contracts for the provision of services, including where such provision is not effected in one single Member State. Therefore, where services are provided at several places in different Member States, a differentiated approach cannot be applied since the determination of exclusive jurisdiction for all claims arising out of such contracts cannot satisfy the objectives of proximity and predictability, which are indeed pursued by the centralisation of jurisdiction in the place of the provision of services.[69] Therefore, the closest connecting factor between the contract in question and the court having jurisdiction is ascertained as being in the place where, pursuant to the contract under scrutiny, the main provision of services is to be carried out (para 38). This approach necessitates an in-depth analysis of the services whose provision corresponds to the performance of obligations arising from a contract to transport passengers by air. These are the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, the disembarkation of the passengers in safe conditions at the place of landing and at the time scheduled in that contract. From that point of view, places where the aircraft may stop over do not have a sufficient link to the essential nature of the services resulting from that contract. Accordingly, the ECJ reached the conclusion that the places of departure and arrival of the aircraft should be decisive, since the words 'places of departure and arrival' must be understood as being agreed in the contract of carriage entered into with the sole airline which is the operating carrier (paras 40-1).[70]

This approach not only satisfies both the criterion of proximity and the requirement of predictability, but it is also in line with the hierarchy of factual circumstances that the Court elaborated in the context of identifying the place of delivery of the goods sold. Therefore, the predominance of the contractual terms – including the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms – is valid with regard to contracts for the provision of services as well. However, the ECJ[71] explicitly recognises the peculiarities of the latter category of contracts and acknowledges that air transport consists, by its very nature, of services provided in an indivisible and identical manner extending from the place of departure to the place of the aircraft's arrival. For that reason, a part of the service

[68] *Air Baltic Corporation* (n 27) para 36. See also *Wood Floor* (n 27) para 25.
[69] See also *Wood Floor* (n 27) para 27.
[70] See also A. Staudinger, 'Streitfragen zum Erfüllungsortgerichtsstand im Luftverkehr' (2010) 30 IPRax 140, 141; R. Wagner (n 32) pp. 146-7.
[71] *Air Baltic Corporation* (n 27) para 42. See furthermore A. Staudinger (n 70) p. 141; R. Wagner (n 32) p. 146.

separate from the principal service that has to be provided in a specific place cannot be distinguished in such types of contract on the basis of economic criteria.

In its subsequent ruling in *Wood Floor,* the Court upheld this reasoning and elaborated on this analysis with reference to the specifics of commercial agency contracts related to the territories of several Member States. The ECJ explicitly acknowledged that the approach followed in its judgment in *Color Drack* should also be applicable *mutatis mutandis* to the present dispute (paras 31-2). Accordingly, the 'place of performance' must be understood as the place with the closest connecting factor, which, as a general rule, will be the place of the main provision of services (para 33). In order to reach this conclusion the Court gives particular consideration to the definition of commercial agency embodied in Article 1(2) Directive 86/653/EEC[72] and emphasises the fact that it is the commercial agent who performs the obligation which characterises that contract and who provides the services for the purposes of Article 5(1)(b) Brussels I Regulation. However, in order to determine the place of the main provision of these services, the ECJ does not invoke the economic criteria entailed in *Color Drack,* instead shifting attention to the provisions of the contract itself.[73] Of note is a series of factual circumstances, namely the place where the agent was – pursuant to the terms of the contract – to carry out their work on behalf of the principal, consisting in particular of preparing, negotiating and, where appropriate, concluding the transactions for which they have authority (para 38).

In the absence of such terms or if the contract provides for several places where the services at issue are to be rendered, the Court considers the place where the commercial agent has in fact primarily carried out his activities in the performance of the contract as prevailing, provided that the provision of services in that place is not contrary to the parties' intentions as described in the contract.[74] For that purpose, the factual aspects of the case may be taken into consideration, in particular the time spent in those places and the importance of the activities carried out there (para 40).[75] If the place of the main provision of services cannot be determined on the basis of the provisions of the contract itself nor on its actual performance, the ECJ holds as decisive the commercial agent's domicile, since that place can always be identified with certainty and is therefore predictable. Noteworthy also is the close link this place has with the dispute, since the agent will in all likelihood provide a substantial part of their services from there (para 42).[76] Whether this approach is to be deemed valid for other types of contracts for the provision of services remains open.[77]

[72] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L382 (31.12.1986) 17.
[73] See also *Holterman* (n 35) para 60.
[74] See, however, the criticism expressed M. Lehmann and A. Duczek (n 31) p. 46.
[75] Cf. also *Holterman* (n 35) paras 63-5.
[76] See also P. Mankowski (n 29) p. 409.
[77] M. Lehmann and A. Duczek (n 31) pp. 44-5.

IV Assessment of the Jurisprudence Considering the New Rule

The aforementioned findings make it clear that the EU legislature has indeed achieved its aim of providing an autonomous definition of the place of enforcement of 'the obligation in question' in at least the two most common types of contract. In this context, it has to be emphasised that the pragmatic determination of the place of enforcement applies regardless of the obligation in question, even where this obligation is dependent on the payment of the financial consideration for the contract.[78] A further advantage of the new rule relates to its wide scope of application, which covers all kind of contractual obligations arising out of the sale of goods or the provision of services, regardless of their very nature as primary or ancillary obligations. Negative obligations, consisting of an undertaking not to do something (such as an obligation of exclusivity and non-competition), are also encompassed by the new rule. In fact, the rule of Article 5(1)(b) Brussels I Regulation and, consequently, the autonomous connecting factor embraces all claims founded on one and the same contract. The same applies where several obligations are raised in a single action. As the ECJ accurately notes: 'By designating autonomously as 'the place of performance' the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract.'[79]

However, this achievement is also inextricably linked to significant drawbacks that could be deemed to contravene the primary policy motivations of transparency and predictability.[80] Primarily, two sets of problems can be identified: on the one hand, there exist some inconsistencies as to the reasoning underpinning the definition of the afore-mentioned terms and, on the other hand, a significant amount of ambiguity is present in respect of the specification of the criteria used by the ECJ.

In particular, in *Car Trim* the Court defined the term 'contract for the sale of goods' with reference to secondary EU legislation (such as the Directive on the sale of consumer goods and the Directive on public procurement) or international legislative acts (such as the CISG). In contrast, recourse to primary or secondary EU law (respectively, former Article 50 EC, now Article 57 TFEU,[81] and the Directives on VAT) has been rejected in *Falco Privatstiftung*. Although it can be argued that EU legislation on taxation is too specific and, thus, inadequate to allow for conclusions on the allocation of jurisdiction between the Member State courts, it needs to be observed that the Court denied recourse to primary EU law with the argument: 'The broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special jurisdiction, including the rule contained, in matters relating to a contract, in Article 5(1) of that Regulation,

[78] G. Mongiò Erdelbrock (n 43) p. I-228. See however the opposite approach for the instance of a provision of services in several places as proposed by M. Lehmann and A. Duczek (n 31) p. 48.
[79] *Color Drack* (n 63) para. 39. See furthermore *Wood Floor* (n 27) paras 23-4.
[80] R. Wagner (n 32) p. 144.
[81] J. von Hein (n 6) pp. 56-8.

which derogate from the general principle that jurisdiction is based on the defendant's domicile.'[82] However, the arguments claiming a need to interpret Article 5(1) Brussels I Regulation narrowly contradict the Court's reasoning in *Engler*,[83] where it was explicitly held that 'It follows from the foregoing that […] the concept of "matters relating to contract" referred to in Article 5(1) of the Brussels Convention is not interpreted narrowly by the Court'. In light of these findings, it does not seem convincing to exclude any recourse to notions encompassed in primary EU law when interpreting Article 5(1) Brussels I Regulation.

A further doctrinal inconsistency can be traced in disputes dealing with several places of performance. In this context, the Court has followed the pattern adopted in *Color Drack* and invokes the same hierarchy as to the factual circumstances that have to be taken into account, namely *(i)* the contractual terms,[84] and *(ii)* the place where the goods at issue were physically delivered to the purchaser at their final destination or the place where the services were rendered. In case of doubt, the Court holds economic criteria to be of greatest significance in the sale of goods whereas, with regard to contracts for the provision of services in the form of commercial agency, emphasis is given to the commercial agent's domicile. This differentiating approach[85] seems peculiar since in both cases the policy reasoning behind the adoption of the stated criterion is apparent, namely the performance of distinct and quantifiable economic operations that can be traced to the deliveries of goods or the provision of services to different locations.

Nonetheless, the Court's reluctance can be justified by the significant amount of ambiguity relating to the specification of economic criteria,[86] especially when the dispute deals with complex contracts or when recourse to the subjective or objective will of the parties leads to diverging conclusions. These findings could possibly explain the ECJ's caution in avoiding any interpretation extending the scope of the special rule entailed in Article 5(1)(b) and, thus, having an adverse impact on the effectiveness of Article 5(1)(c) and (a) Brussels I Regulation.[87] Still, the inconsistency emanating from the different treatment of the aforementioned types of contract remains of note, an inconsistency whereby the plaintiff is on one occasion granted an option to choose the competent court and on the other occasion is not.

V Concluding Remarks

In light of these observations, it seems that the aspiration to concentrate all claims emanating from a contract before a single Member State court has yielded a significant amount of ambiguity. Although autonomous interpretation may unquestionably be desirable, it may sometimes result in more complicated problems than the ones that have to be resolved. In fact,

[82] *Falco Privatstiftung* (n 9) para 37. See also B. Sujecki, (2009) 20 EWS 467.
[83] *Engler* (n 5) para 48. Cf. also Case C-180/06, *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961, para 57; P. Mankowski (n 29) p. 413; A. Metzger (n 32) p. 421.
[84] Cf. however M. Lehmann and A. Duczek (n 31) p. 43.
[85] See also M. Lehmann and A. Duczek (n 31) pp. 43-4.
[86] See P. Mankowski (n 29) 27 IPRax (2007), pp. 409-410; B. Piltz, (2007) 60 NJW1802; B. Sujecki, (2007) 18 EWS 402.
[87] *Falco Privatstiftung* (n 9) para 43. Cf. however J. von Hein (n 6) p. 58.

the aforementioned concerns are remedied only by the reality that in most cases the contracting parties will include a clause providing for the jurisdiction or, at least, the performance of the characteristic obligation (namely the delivery of the goods or the provision of services). Nonetheless, Article 5(1)(b) has withstood all the criticism[88] provoked by the frequent uncertainties in its application and has thus remained unaltered in the very recent revision of the Brussels I Regulation.[89] Therefore, it could be argued that compromises reached at EU level are usually able to stand the test of time even where intervention on the part of lawmakers appears very much needed in order to ensure transparency and legal certainty.

[88] See M. Lehmann and A. Duczek (n 31) p. 41.

[89] See Article 7(1) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351 (20.12.2012) 1.

Réka Somssich*

Cohabitation of EU Regulations and National Laws in the Field of Conflict of Laws

Since the entry into force of the Treaty of Amsterdam in 1999, the European Union is entitled to issue legislative instruments in the field of private international law. This shift of competences first resulted in the transformation (at that time called *communitarisation* or *communitisation*) of the already existing conventions adopted under the former third pillar into legislative acts[1] and at the same time led progressively to the adoption of legal instruments regulating areas that had been earlier untouched by previous conventions. Some of these instruments lay down only conflict of laws rules;[2] others exclusively provide for rules on jurisdiction, recognition and enforcement of national decisions[3] and some regulate the subject-matter concerned in a comprehensive way, containing both types of provisions.[4] Although not closely belonging

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1 See in particular the transformation of the *Rome Convention of 1980* or *the Brussels Convention of 1968* into Regulations.

2 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation).

3 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 I Regulation) later repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia) and (Brussels IIa Regulation).

4 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation), Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation).

to private international law, other important pieces of legislation had been adopted in the field of cooperation in civil matters in order to facilitate cross-border justice.[5]

Article 81(2) TFEU, on which the above instruments are based, does not specify the type of the legal measure (Directive or Regulation) to be adopted in order to ensure the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction. However, almost all of the legal acts adopted in the field of cooperation in civil matters are Regulations, i.e. directly applicable legislative acts replacing and overruling national laws, the only exception being the Directive on legal aid in cross-border disputes.[6] In the area of classical private international law, only Regulations apply. Regulation, as a type of EU act, better ensures uniform application through its uniform rules throughout the EU, thereby avoiding any fragmentation, which often occurs at the level of implementing Directives.[7] This characteristic of Regulations however does not exempt Member States from following a coherent policy when adjusting national provisions to EU Regulations.

I The Many Faces of Regulations

Regulations are legal acts peculiar to the legal system of the European Union. Under Article 288 TFEU 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. It means that Regulations penetrate national law without being transformed into a national legal instrument and thus they are self-executing by nature.[8] Moreover, already in its early case-law in 1973, the European Court of Justice (hereinafter referred to as 'the Court') made it clear that Regulations not only come into force by virtue of their publication in the Official Journal of the Communities as from the date specified in them but 'consequently all methods of implementation are contrary to the Treaty which would have the result of creating a direct effect of Community regulations and jeopardizing their simultaneous and uniform application in the whole Community'.[9] This statement was confirmed some months later in the *Variola* case.[10] In paragraph 10 of this judgment, the Court specified that 'The direct application of a Regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.

[5] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

[6] The only exception being 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.

[7] Stefania Bariatti, *Cases and Materials on EU Private International Law* (Hart Publishing 2011, Oxford) 6.

[8] Nigel Foster, *EU Law* (OUP 2015, Oxford) 42.

[9] Case 39/72, *Commission of the European Communities v Italian Republic,* par. 17.

[10] Case 34/73, *Variola v Amministrazione Italiana delle Finanze.*

By virtue of the obligation arising from the Treaty and assumed on ratification, Member States are under the duty not to obstruct the direct applicability inherent in the Regulations and other rules of Community law.'

In practical terms it means that national laws cannot reproduce or repeat provisions of EU legislation and any such reproduction would amount to a breach of EU law.

However in an opinion delivered in 1982 and addressed to Denmark,[11] the European Commission recognised that, even if reproducing the provisions of a Regulation in national legislation is objectionable, there can be situations where they might appear justified. Such is the case if the intention of the national legislator is merely to provide a comprehensive code of legislation that will be more intelligible to the reader than provisions scattered in several instruments would be and when the origin of those rules is clearly indicated.[12] This opportunity, however, should be seen as a rare exception to the general rule which is the prohibition of reproduction. It proves however that even the Commission has recognised that directly applicable Regulations and national laws cannot coexist in complete isolation from one another.

Therefore, one could think that the obligation that Regulations have imposed on Member States consists of a cautiously effected deregulation process with due regard to the consistency of national legislation. However, the situation is much more nuanced. Regulations, for instance, might invite Member States to enact national implementing measures ensuring and facilitating their effective application.[13] Such implementing measures can be either of an institutional nature, requiring the establishment of an institutional framework in charge of the application of the Regulation or of a procedural nature, laying down the procedural rules necessary for the implementation of the Regulation. Moreover, Hess and Spancken assume that these implementing provisions help to facilitate parties and courts in finding the respective legislation in European Union law.[14] More specifically, by indicating the relevant EU Regulation, the implementation of which they seek, such provisions can function as references connecting the two legal systems as well. Hess and Spancken however warn Member States, when using this technique, to avoid the risk of surpassing the stage of mere implementation by duplicating certain provisions of EU law and thereby breaching the Treaty.[15]

It is therefore, clear that Regulations impose upon Member States an uncontested obligation to repeal any national rule (whether conflicting or not) falling within the scope of the Regulation and if necessary to adopt implementing provisions as foreseen by the Regulation itself. In addition, by virtue of the case-law of the Court, Member States retain regulatory competences

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[11] Commission opinion of 22 February addressed to the Government of Denmark regarding implementation of Regulation (EEC) No 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a code of conduct for liner conferences, OJ L1982, 65/28.

[12] See also Henry G. Schermers, Denis L. Waelbroek, *Judicial Protection in the European Union* (Kluwer Law International 2001, The Hague) 606.

[13] Burkhard Hess, Stephanie Spancken, 'Operation of the Maintenance Regulation in EU Member States' in Paul Beaumont, Burkhard Hess, Lara Walker, Stephanie Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014, Oxford) 388.

[14] Hess, Spancken (n 13) 388.

[15] Hess, Spancken (n 13) 389.

insofar as the directly applicable Regulation does not regulate the subject-matter exclusively.[16] Such competences are residual competences, limited to the issues untouched by the Regulation.

The challenge Member States face when bringing their legislation in line with the EU Regulations is to find the appropriate means to interconnect – if necessary – the two legal orders through references. This challenge is even more present in the field of private international law, where EU Regulations enter a relatively closed legal area traditionally regulated by a single comprehensive act (code) or by provisions inserted into the civil code and civil procedural code.

The coherency requirement does not stem directly from EU law. EU law is not concerned with how the interrelationship with national provisions and EU regulation is technically handled by the Member State unless the regulatory solution amounts to a breach of EU law. Coherency is rather a higher ranking requirement in each legal system, working as a guiding principle for the national legislator in order to have a transparent, consistent and informative set of rules for legal practitioners, which make clear the circumstances under which they should be guided by international conventions, by directly applicable EU Regulations or national legislation.

This implied and tacit requirement is supported still further by the fact that EU Regulations which were adopted in the field of private international law behave differently, as far as their interaction with national law is concerned, according to the area they cover. The first striking difference between Regulations on conflict of laws rules and Regulations on jurisdiction, recognition and enforcement is that legal acts belonging to the first category create *loi uniforme,* meaning that the Regulation is not only applicable to legal relationships within the EU but to any matter falling under its scope even in a non-EU context, while Regulations in the second category apply only between Member States. Exceptions are mixed Regulations, containing both conflict of laws rules and rules on jurisdiction, recognition and enforcement, which are also of a universal nature, as far as jurisdictional rules are concerned.[17] In the present contribution we will focus exclusively on the interference of Regulations with national laws in the area of conflict of laws and will not deal with jurisdictional and procedural rules. Although it would clearly be of added value to scrutinise that latter category, it should be underlined that rules on jurisdiction, recognition and enforcement in several Member States are regulated in various legal acts or inserted into the civil procedural code in a dispersed manner. This very fact makes a difference to the conflict of laws rules, which are as a general rule regulated in a single piece of legislation or in a coherent, standalone chapter or book of the civil code. At the same time, in countries where all rules on private international law (both conflict of laws rules and provisions on jurisdiction and procedures) are integrated in a single code,[18] regard should also be given to the nature and number of jurisdictional and procedural rules when devising the method of interconnecting Regulations and national laws.

[16] Cases 205 to 215/82, *Deutsche Milchkontor v Germany.*
[17] See for instance Maintenance Regulation and Succession Regulation.
[18] Such countries are the Czech Republic, Hungary, Italy, Belgium, Slovenia, Croatia and Bulgaria.

II EU Regulations in the Field of Conflict of Laws

As far as Regulations adopted in the field of conflict of laws are concerned, the residual regulatory competences retained by or conferred upon the Member States can be of a different nature. Some Regulations do not regulate the area concerned in a comprehensive manner, as they explicitly exempt some issues from their scope. The Rome I and Rome II Regulations belong to this group as, although being applicable in principle to contractual obligations or non-contractual obligations in general, they both enumerate those issues they do not intend to cover.[19] In such cases, national legislators have in principle three options. They can either create specific rules only for the excluded areas, identifying them specifically; they can maintain their general rules underlining that these ones are only applicable where the relevant EU Regulations do not apply; or they can follow the 'do nothing' option, assuming that lawyers and especially judges will anyway know that national rules are only applied in so-called non harmonised areas. It should however be emphasised that, with regard to both the Rome I and II Regulations, the scope of the excluded areas is rather limited and very specific; some do not even fall under the traditional field of 'obligations', but are auxiliary to it.[20] What is relevant from a regulatory point of view is to make sure if there are issues under the traditional material scope of the law of obligations which remain in the competences of Member States and to decide whether there should be a direct or indirect reference to the fact that any rule on obligations will only apply in this narrow area (negative scope approach).

On the other hand, the Rome III Regulation, the Succession Regulation and the Maintenance Regulation making the Hague Convention on Maintenance Claims applicable throughout the EU regulate the subject-matter concerned in a comprehensive way; they do not exclude core areas, only auxiliary aspects, from their scope.[21]

However most of these Regulations contain provisions requiring or authorising Member States to adopt implementing measures necessary for the proper functioning of the EU act or where the EU legislator leaves some leeway for the national legislator to deviate from the uniform EU rules. The Rome II and Rome III Regulations both authorise Member States to determine the date until which parties can designate the applicable law. Under Article 5 (3) of the Rome III Regulation, the law of the forum may provide that that the spouses designate the applicable law before the court during the course of the proceeding and not only before the court is seized as foreseen by the Regulation in Article 5 (2). A similar but less explicit authorisation

[19] See Article 1 of the Rome I Regulation and Article 1 (2) of Rome II Regulation.

[20] See Article 1 (2) *a), b) c)* of the Rome I Regulation.

[21] In the case of the Rome III Regulation, Article 1 (2) enumerates these excluded areas from which the name of the spouses, the property consequences of the marriage, parental responsibility and maintenance obligations are the mostly connected to divorce; however, even under the laws of the Member States they have been regulated in an autonomous way, separately from defining the law applicable to divorce. Similarly, the Succession Regulation, in its Article 1 (2), contains a list of 12 issues excluded from the scope of the Regulation, most of them being only indirectly linked to inheritance except for the formal validity of dispositions of property upon death made orally [point *(f)*] especially because the Regulation is applicable to the formal validity of testamentary dispositions which are made in writing (see Article 27).

can be found in connection with Article 7 of Rome II Regulation. In the event of a non-contractual obligation arising out of environmental damage, the person seeking compensation for damage can choose to base their claim on the law of the country in which the event giving rise to the damage occurred instead of the law of the country in which the damage itself occurred. Article 7 itself is silent on the procedural implications of this kind of choice of law. It is recital (25) of the preamble and not the legal provisions of Regulation which specifies that the date until which this choice of law can be exercised should be determined by the law of that Member State.

While under the Rome III Regulation Member States are free to decide whether they avail themselves of the possibility to allow the choice of law at a later stage than the date foreseen by the Regulation and if yes, until when (optional implementation), no mandatory rule at EU level applies in the case of the Rome II Regulation; procedural aspects of the choice of law remain completely in the hands of the Member States (real implementation necessary for the effective application of the Regulation). Although not concerned with the time of the choice of law, the implementing provisions to be adopted under the Succession Regulation are similar in nature to those to be adopted under the Rome II Regulation. As Article 1 (2) *(f)* of the Regulation excludes the designation of the law applicable to formal requirements of testaments made orally from its scope, the conflict of laws rules in this field should be regulated by the national legislation. The implementation of this provision is not optional but necessary, as oral testaments in general are not excluded from the scope of the Regulation; substantial requirements concerning testaments apply to them.

It is still worth mentioning that the Rome I Regulation also contains an optional implementation provision in its Article 7 (4) *(b)* on insurance contracts with regard to insurance types for which Member States impose an obligation to take out insurance. In such cases, Member States have an option to specify that the insurance contract shall be governed by the law of the state imposing such an obligation.

Finally, not all enforcement measures necessary for the application of the above Regulations fit into the body of traditional private international laws. Implementing measures requiring the establishment of institutions or procedures that make the Regulation work in practice are of such a nature. Implementing provisions concerning, for instance, issuing the European Certificate on Succession are of this nature. They are normally found in distinct acts, not in the national Acts on Private International Law.[22] In this paper however we will only concentrate on the regulatory impact of EU Regulations on Acts on Private International Law.

EU Regulations in the field of conflict of laws have been subsequently adopted since 2001. Each newly adopted piece of legislation meant an intervention into the sphere of national private international laws, especially through the immediate penetration of the EU provisions due to

[22] See, for instance Germany where, beyond repealing the relevant provisions of the EGBGB, the German lawmaker adopted the International Succession Law Procedure Act (IntErnRWG) as a new Act specifically for the implementation of the Succession Regulation.

their directly applicable nature. Member States' primary duty linked to the entry into force of a Regulation is of course to repeal any provision of their national legislation falling under the scope of the Regulation, regardless of it being in conflict with or identical to the rules of the Regulation. If there is a comprehensive Private International Law Act or Conflict of Laws Act, Book or Chapter then, in practical terms, the impact of the Regulations is that legal acts become truncated as an important part of their substantial provisions disappear. The only provisions that can be retained or inserted are those concerning areas falling outside the scope of the relevant Regulation and those which are either necessary for the proper application or tolerated as derogating provisions. As a logical consequence of the growing number of EU Regulations, more sub-fields of the conflict of laws are Europeanised and the more truncated and less coherent the national Private International Law Acts become, and this is evidently not characteristic of traditional codes or even comprehensive acts. The main challenge for Member States is therefore how to deal with this radically changed nature of the national regulation of conflict of laws from a regulatory point of view. At a very early stage of the process, already in 2004, it was raised by some authors that, in the light of the emergence of EU Regulations, some Member States should reconsider the need to continue with the reform of their private international law.[23]

III Adjustment of National Private International Laws to EU Regulations from a Regulatory Point of View

When scrutinising Member States' national laws on private international law, the very first statement we can make is that one can distinguish roughly three larger groups of Member States. Some countries have not inserted any reference to EU Regulations into their national laws but only repealed overlapping provisions. Others contain a rather general clause on the prevailing nature of EU Regulations over the provisions of the Acts, while a third group of states use a specific and coherent system of references to make a clear interconnection with EU Regulations to the extent that interconnection is tolerated by the case-law of the Court. It seems that new reformed laws (the Czech PIL Act of 2012, the Polish PIL Act of 2009 and Book 10 of the Dutch Civil Code on Private International Law of 2011) have taken care of these aspects when reviewing their legislation and followed a rather coherent policy. This coherence is also present in the German Act on Private International Law. Below we will briefly present these models.

Book 10 of the Dutch Civil Code on Private International Law is one of the recent books of the Burgerlijk Wetboek, as it was enacted in 2011. Throughout the reform it was strongly debated whether it was worth devoting a separate book to private international law in the light of the multiplication of the sources and far-reaching competences that the EU has acquired in

[23] Katia Fach Gómez, 'Law Applicable to Cross-border Environmental Damage' (2004) 6 *Yearbook of Private International Law* 310.

this field, but in the end it was exactly the plurality of sources which intensified codification in order to bring coherence to the different sources.[24] Already in its first Article[25] the Act makes clear that '[t]he provisions of the Book and of other statutory regulations of private international law do not affect International and Community legislation that is binding for the Netherlands'. In line with EU law requirements, it is not the priority of Regulations which is declared (as it stems from EU law itself and not from national statutory provisions) but the subsidiary nature of national legislation. Article 10:1 does not identify the relevant international treaties or the EU Regulations, either. They are however both listed at the top of each thematic part under the heading 'Applicable law' or 'Definitions'[26] as an indication. Therefore the legislative technique which consists of directly referring to international texts is also used for EU Regulations.[27] The inclusion of both EU Regulations and the relevant international treaties by the Dutch legislator is a balanced approach although that might easily be explained by the fact that the Netherlands is a monist country, where international agreements do not have to be promulgated by national laws but apply directly, and in this respect they are somewhat similar to Regulations. As far as the regulation of areas falling outside the scope of the Rome I and Rome II Regulations, the solution followed by the Dutch legislator is unique as it extended the scope of the EU instruments to the areas originally excluded. Under Article 10:152, obligations falling outside the scope of application of the Rome I Regulation and the Conventions applicable as a result thereof, which obligations can be regarded as obligations arising from contract, are governed by the provisions of the Rome I Regulation accordingly. We will find a similar wording in Article 10:159 in connection with the Rome II Regulation and its application by analogy to any tortious act. It might be questioned whether it is wise to extend the scope of a directly applicable EU act by virtue of national legislation to areas which had been originally excluded from its scope by the EU legislator, but it should be underlined that the national legislator is completely free to act in the areas excluded from the scope of the Regulation and this freedom can mean to copy the already existing EU rules, either by repeating them or by explicit reference to them. Most probably the aim of the Dutch legislator was to have complete coherence between excluded and non-excluded areas by the application of identical provisions.

The Book also contains one classical implementing provision with regard to insurance contracts under the Rome I Regulation. The relevant Article[28] clearly indicates that it is implementing Article 7 of the EU Regulation.

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[24] Jan Smits, 'Coherence and Fragmentation in the Law of Contract' in Pia Letto-Vanamo, Jan Smits, *Coherence and Fragmentation in European Private Law* (Sellier 2012, Munich) 21.

[25] Article 10:1. Conventions and Community legislation remain effective. Non official English translation available at: http://www.dutchcivillaw.com/civilcodebook01010.htm.

[26] For The Succession Regulation, see Article 145; for Rome I Article 153; for Rome II Article 157 (As the Netherlands is not participating in the reinforced cooperation in Rome III, we will not find a reference to this regulation). As far as the Maintenance Regulation is concerned, it is not the Regulation itself which is referred to by Article 10:90 but the Hague Convention on the Law Applicable to Maintenance Obligations and its Protocol of 2007 which are applicable anyway, by virtue of Article 14 of the Regulation.

[27] K. Boele-Woelki, D. van Iterson, 'The Dutch Private International Law Codification: Principles, Objectives and Opportunities' (2010) 14 (3) Electronic Journal of Comparative Law 6-7.

[28] Article 10:156.

The Dutch approach seems to favour transparency and works as a clear guidance for judges, as references are attached to the relevant thematic parts. A disadvantage of such a technique might be that the national legislation has to be adjusted each time a new Regulation is published or an international treaty is ratified and a reference to the relevant EU act or international instrument must be inserted. However this requirement should not appear as an extremely heavy burden, since the adoption and entry into force of new Regulations requires the amendment of the national legislation anyway, at least to repeal the overlapping substantive provisions.

The German Introductory Act to Civil Law[29] reflects a well-considered, consistent approach as well. This Act, adopted in 1994, is the one containing the German conflict of laws rules. It is Chapter 2 which is devoted to private international law. The first Article of this Chapter (Article 3), bearing the title 'Relationship with the rules of the European Union and with international conventions' delimits the scope of the Act. It sets forth that only unless the immediately applicable rules of the European Union are relevant that the applicable law is determined by the provisions of the Act. The Article itself lists all five EU Regulations adopted in the field of conflict of laws as those directly applicable measures that are 'in particular' *(insbesondere)* relevant.[30] The phrase 'in particular' is important as it leaves the floor open to the eventual future expansion of the Regulations and makes the provision work even without any immediate amendment of the Act with regard to the entry into force of a new Regulation.[31] Of course the original purpose was to add new EU acts to the list, as was done most recently with the Succession Regulation. In this way, the negative scope of the Act is already explicitly underlined among the very first provisions. Further, in the case of Rome III and the Succession Regulation, one can identify special provisions aiming to fine-tune the explicit nature of the negative scope approach. Article 17 on the special consequences of divorce makes it clear that proprietary consequences of the dissolution of marriage which are not covered by the Act should be governed by the Rome III Regulation. This reference in fact means that where the German legislator did not define how to determine the applicable law with regard to a specific aspect of the proprietary consequences, there is no need to apply a law other than the one which is anyway applicable to the divorce by virtue of the EU rules. Based on the same logic, Article 26 designates the law determined under the Succession Regulation as applicable law as far as the form of dispositions *mortis causa* is concerned.

Interestingly, the so-called 'real implementation measures' are contained in a separate section, distinct from the thematic parts and devoted exclusively to the implementation of the Regulations listed under Article 3.[32] This section contains provisions on the deadline for choosing the applicable law under the Rome II Regulation and the Rome III Regulation and the implementing provisions on insurance contract under the Rome I Regulation.

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[29] *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB).

[30] For the non-official English translation of the Act see http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0017.

[31] Götz Schulze, 'Die EU-Verordnungen unter dem Arbeitstitel "Rom"' – Das europäische Kollisionsrecht in weltbürgerlicher Absicht' (2015) 3 Ad Legendum 186.

[32] Seventh Section, Special provisions implementing rules of the European Union According to Article 3 No 1.

It seems that the German legislator was deliberately and clearly separating the issues which fall under the negative scope from those whose which enable the smooth application of the Regulations.

The Czech Code of 2012 (covering not only conflict of laws but issues on jurisdiction and recognition and enforcement of judgments as well) chose to make the link with the Regulations in an even more direct way. Similar to the German Act, the Czech Code clarifies its scope with regard to international agreements and EU Regulations among the first provisions. Article 2 (International agreements and EU Regulations) provides that the Act should be applied with due regard to international agreements binding the Czech Republic and directly applicable Regulations of the European Union. Contrary, however, to the German Act, the Czech law does not list the relevant Regulations under Article 2 but enumerates them in a non-exhaustive way (introduced by 'for instance') in a footnote attached to the Article. One can assume that the aim of the Czech legislator was not to overcharge the text of the law with references, especially taking into account that the Czech Act overlaps with a higher number of Regulations as its scope extends to all aspects of private international law, not only conflict of laws.

Beyond the general negative scope provision, in each thematic section reference is made to the relevant Regulation and to the fact that the Act only applies where the directly applicable EU act does not apply.[33] Each time, the specific Regulation appears in a footnote. Articles 50 and 57 on maintenance claims seem anomalous as they simply refer to international agreements and directly applicable EU rules which should apply in the field concerned. The Maintenance Regulation itself appears in the footnotes again. It is evident that the negative scope approach could not be used in this case, as the Maintenance Regulation does not leave any room for the national legislator. Hence, the Czech legislator choose to indicate the applicable legal act despite that fact that it had already been listed under the first footnote attached to Article 2 and despite the fact that no national legislation has been adopted in connection with the Regulation. The new Romanian Act of 2009 follows a similar path. Chapter VII of the new Romanian Civil Code on Private International Law[34] contains in its first article, among the general provisions,[35] a subsidiarity clause, according to which the provisions of the Act apply to the extent to which international agreements or EU Regulations do not prevail. Beyond this general clause, each thematic section[36] clearly indicates where an EU Regulation should apply instead of the national rules. The title or number of the Regulation is however not displayed at these sections.

A striking difference between the German approach on the one hand and the Czech and Romanian approach on the other is that the German Act does not duplicate the negative scope provision by repeating it at each relevant article.

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[33] For Regulation Rome I and II see Article 84 and the footnote attached to it, for the Maintenance Regulation see Article 50 and 57.

[34] For the English translation of the Act see: http://licitatii-juridice.bursa-avocatilor.ro/cartea-vii-dispozitii-de-drept-international-privat-codul-civil-noul-cod-civil-republicat-2011-legea-2872009-privind-codul-civil/.

[35] Article 2.557.

[36] See Article 2.612 on Obligations in general and Article 2.640 and 2.641 in particular.

Beyond the national acts mentioned above, only the Belgian Act – reformed in 2004 – contains a general reference to the prevailing nature of the Regulations. Article 2 of the Belgian Code on Private International Law specifies that the statute applies without prejudice to international agreements, the law of the European Union and provisions of special statutes. Regulations – except the Insolvency Regulation for jurisdictional and procedural issues – are not referred to in the substantive parts.

Unlike the aforementioned, no general provision is contained on the priority of EU Regulations in the new Polish Act on Private International Law of 2011. The Act however makes sure that at the relevant parts the EU Regulations are indicated. However the Polish Act goes further than the others as it does not merely use the negative scope technique but provides which EU Regulation should apply to the specific subject-matter.[37] Again, Article 63 on Maintenance Obligations is specific, inserted as a sole Article and expressly stating that the law applicable shall be designated by the Maintenance Regulation without containing any connecting implementing or residual provision. The Polish solution, stating which Regulation shall apply, seems to go somewhat beyond being mere reference as the use of 'shall apply' suggests that it is the national law which creates the obligation to apply the Regulation, which is definitely not the case. As the case-law of the Court presented above shows, the entry into force or the application of the Regulation should be independent of any national measure.

The Austrian Act on Private International Law[38] (containing only conflict of laws rules) does not define its scope with reference of the EU Regulations either (the Act does not even have a provision setting its scope) but mentions them at the relevant provisions using the negative scope technique (the provisions only apply to issues falling outside the scope of the relevant EU Regulation). Article 35 on contractual obligations and Article 48 on non-contractual obligations use this technique, while Article 35a is a real implementing measure, referring to Article 7 of the Rome I Regulation on insurance contracts.

Although the Italian reformed Act on Private International Law of 1995[39] declares its subsidiary application with regard to international agreements,[40] no such statement is made in connection with EU Regulations. Moreover, under the provisions on contractual obligations[41] reference is still made to the Rome Convention and not to the Rome Regulation. As such, it seems that no conceptual change has been undertaken after the overall reform of 1995 following the transformation of Conventions into Regulations and the adoption of new Regulations.

The above examples show that national legislators followed different paths to adapt their acts or codes to the changed regulatory framework brought about by the Regulations. It can also be seen that reforms undertaken during the last decade could not and did not even want to avoid dealing with this challenge and all of them established their own policy on the interconnection

[37] See Article 28 for Obligations, Article 33 for non-contractual obligations and Article 63 on Maintenance Obligations.
[38] *Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht* (IPR-Gesetz).
[39] *L. 31 maggio 1995, n. 218 (1). Riforma del sistema italiano di diritto internazionale privato.*
[40] Article 2 (1) under the heading International Conventions.
[41] Article 57.

of national law with EU Regulations. Of course, it is much more difficult to implement a coherent approach without comprehensive reform and by reacting to the subsequent new pieces of EU acts, and so – except the German model – most unreformed laws have not yet introduced a consistent policy.

IV The Hungarian Decree-Law on Private International Law and its Current Reform

The Hungarian Decree-Law on Private International Law was adopted in 1979[42] after thorough academic preparatory work led by Prof. Ferenc Mádl. The Decree-Law, as a type of legal act, ceased to exist after the democratic changes in Hungary as it was an act issued by the executive branch in an area falling traditionally under the competences of the legislative authority. Decree-Laws adopted before 1989 which had not been explicitly repealed remained in force but they could only be modified by the Parliament. The Hungarian Decree-Law on Private International Law is a code-type instrument, regulating all aspects of private international law including conflict of laws rules and rules on jurisdiction, recognition and enforcement. Since its entry into force the Code has been amended several times, some of the amendments aimed clearly at adapting the provisions to the subsequently published EU Regulations.[43] However, due to the fact that no comprehensive reform had been undertaken since its entry into force, each legislative intervention followed a different approach, depending on the nature of the Regulation concerned. In the case of the Rome I and Rome II Regulations the negative scope approach was used, making it clear that the provisions of the Hungarian Code only apply if the subject-matter does not fall under the Regulations.[44] As far as the Maintenance Regulation is concerned, the relevant provisions were simply repealed[45] without any reference to the EU instrument, contrary to the outcome of the Polish or Czech Act. For the Rome III Regulation, the Hungarian legislator decided to use the option to determine the date until which spouses are free to choose the law applicable to their divorce. Here, the Code makes a clear link between the newly added provision and the Regulation by underlining that its insertion was necessary for the application of the Regulation.[46] All other provisions on divorce overlapping with the Regulation were repealed. Contrary to the above examples under the provisions on inheritance matters, no reference was made to the Succession Regulation when – beside repealing all former provisions concerning inheritance – a single paragraph was added on alternative connecting factors, designating the law under which the validity of oral statements should be

[42] Decree-Law No 13 of 1979 on Private International Law.

[43] For Regulations in the field of conflict of laws see Act IX of 2009 as far as the Rome I and Rome II Regulations are concerned, Act LXXI of 2015 for the implementation of the Succession Regulation, Act LXVII of 2011 for the Rome III Regulation, Act CXXVII of 2011 for the Maintenance Regulation.

[44] See Article 24 and Article 32 of the Decree-Law.

[45] See Articles 45-47.

[46] See Article 40.

measured.[47] The reasoning of the amending act explains this lack of reference by the fact that the Succession Regulation – unlike the Rome I and Rome II Regulations – leaves only a minor area to the national legislator and therefore no similar exclusion provision should be inserted. This approach could be easily contested by arguing that national measures adopted under the Succession Regulation are closer to implementing measures than to residual competence provisions.

It should also be added that while Article 2 of the Code has contained a specific rule foreseeing that the provisions of the Code should be applied without prejudice to international obligations from the outset, no similar rule had been later inserted for EU measures. This is also due to the fact that no comprehensive reform of the Code had been undertaken since its adoption and thus Article 2 remained untouched. At the end of the Decree-Law however, in the so-called legal approximation clause, one can retrace all the EU Regulations with which the amendments of the Code aimed to align national legislation. The legal approximation clause is a special provision that the Hungarian legislator is bound to insert by virtue of the Act of Legislation[48] and its implementing decree[49] among the closing articles of any legislative measure, the aim of which is to bring national legislation in line with EU measures, namely these Directives or Regulations.[50] Thus even in the absence of a general provision underlining the subsidiary nature of the national act, judges and lawyers in general have received adequate information on the Regulations which should be applied in parallel with or instead of the provisions of the Decree-Law.

In spring 2015 the Hungarian Government decided to review and reform the Code on Private International Law.[51] Professor Vékás, in a thought provoking paper[52] on the necessity of such a reform – published at the same time as the review process was launched – underlined that one of the major tasks of the reform should be to establish a coherent and transparent approach in handling the relationship between EU instruments and the new Act.

Therefore the reform offers a unique opportunity to review and regulate the cohabitation of EU Regulations and Hungarian private international law rules in a comprehensive manner. In that respect, the different approaches and solutions of the Member States can definitely serve as a source of inspiration.

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47 See Article 36.

48 Act CXXX of 2010 on Legislation.

49 Government Decree 302/2010. (XII. 23.) on the accomplishment of legal approximation tasks in the legislative process.

50 It should be noted that while under EU law only Directives require Member States to insert a reference when transposing them, the Hungarian requirements go much further as they oblige the national legislator by the force of the law to insert references to any EU act (not only Directives) which had to be taken into account when adopting the legislative act.

51 Government Decision 1337/2015. (V. 27.) on the codification of the new private international law rules and the setting up of a Committee on the Reform of Private International Law.

52 Lajos Vékás, 'Egy új nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 6 Jogtudományi Közlöny 295-299.

Tamás Szabados*

Challenges of the Codification of the Law Applicable to Legal Persons from the Perspective of Recodifying Hungarian Private International Law

I Introduction

The decision to recodify Hungarian private international law was taken by the Hungarian Government in 2015.[1] The changed social and economic circumstances since the time of its adoption require the revision of Decree-Law 13 of 1979 on private international law (Decree-Law) which currently includes the rules on conflict of laws, jurisdiction and certain other aspects of international civil procedure applied by Hungarian courts.[2] The creation of a new private international law act necessitates rethinking, among other issues, the conflict of laws rules determining the law applicable to legal persons. Codifying the law applicable to legal persons is undoubtedly a challenge for the Members States of the European Union (EU) in the light of the recent developments in EU law and the autonomous private international law of the Member States.

In most nations' private international law, the determination of the law applicable to legal persons takes place in the private international law act or the civil code which includes conflict of laws rules.[3] Although there are bilateral international treaties touching upon the issue of determining the law applicable to legal persons,[4] there is no broader multilateral international

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1 *A Kormány 1337/2015. (V. 27.) Korm. határozata az új nemzetközi magánjogi szabályozás kodifikációjáról és a Nemzetközi Magánjogi Kodifikációs Bizottság felállításáról* [Government Decision 1337/2015. (V. 27.) on the codification of a new private international law regulation and the creation of the Private International Law Codification Committee].

2 *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* (Decree-Law 13 of 1979 on private international law). See Lajos Vékás, 'Egy nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 6 Jogtudományi Közlöny 295-299.

3 An exception is German law, where the law governing legal persons has been determined by judicial practice.

4 For one of the most well-known examples, see: *Freundschafts-, Handels- und Schiffahrtsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika vom 29. Oktober 1954.*

convention that has entered into force in this field,[5] nor does the EU provide comprehensive provisions on the law governing legal persons.

In 2014, the European Commission (Commission) announced an open call for tender for preparing a study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter.[6] The tender is important as it may indicate that the Commission intends to consider the issue of the determination of the law applicable to companies. Nevertheless, at the moment, in the absence of an EU-level regulation, the Member States enjoy considerable room to manoeuvre in shaping the law applicable to legal persons.

The aim of this contribution is to identify the challenges faced by the Hungarian legislator in the course of recodifying private international law concerning the law applicable to legal persons. This paper intends to outline the developments in EU law and some national conflict of laws codifications in terms of the law governing legal persons in order to draw some lessons for the new Hungarian private international law act. However, the paper does not deal with the question of jurisdiction and international civil procedure concerning legal persons.

In recent years, much attention has been devoted to determining the law applicable to companies in the event of transferring the company seat and to the related judgments of the Court of Justice of the European Union (CJEU). Nevertheless, the determination of the law applicable to legal persons should be put in a broader context. The analysis must also cover questions such as the scope of the applicable law or the necessity for adopting special connecting factors.

II The Hungarian Legislation in Force and its Antecedents

As is well known, in private international law, the law governing legal persons is traditionally determined along two connecting factors: the place of incorporation and the real seat of the legal person.

Before the Second World War, Hungarian private international law followed the real seat principle. In the absence of an express provision, this could be deduced from the judiciary practice of the supreme court, known as the Curia, and certain acts[7] as well as bilateral international treaties.[8]

The law governing the legal person was the law of the state of the seat. In Hungarian private international law, the seat was determined in accordance with section 25 of Act I of 1911 on the

[5] *Hague Convention* of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions; *European Convention on the Establishment of Companies Strasbourg,* 20.01.1966; *Convention on the mutual recognition of companies and bodies corporate Bull.* Suppl. No. 2-1969 pp. 7-14.

[6] European Commission, Directorate-General Justice, Open call for tender JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter. Contract notice in 2014/S 149-267126 of 06/08/2014. Brussels, 06/08/2014 JUST/A/4/MB/ARES(2014)2599553.

[7] See for example *1875. évi XXXVII. törvénycikk, kereskedelmi törvény* (Act XXXVII of 1875 on the Commercial Code) s 217 (3).

[8] István Szászy, *Nemzetközi magánjog* (Sylvester Irodalmi és Nyomdai Intézet 1938, Budapest) 227-228.

Code of Civil Procedure (Code of Civil Procedure of 1911) which identified the seat with the place of management that is 'the centre of administration of the legal person, where the activity, legal life of the legal person is concentrated, from where the legal person carries out business.'[9] The governing law was deemed to be applied to the legal personality, the organisation of the legal person, the relations between the members and between the members and the legal person, the representation of the legal person, the rules on the preparation of the balance sheet and the dissolution of the legal person.[10]

Subsequent to the Second World War, but before the adoption of the Decree-Law, the representatives of the legal literature took different views regarding this issue. In 1948, István Szászy drew up a Bill on private international law which was finally not adopted. According to section 7 of the Bill on Private International Law:[11]

> If pursuant to this Act the domestic law or the law of the domicile of a person must be applied, an association of persons or assets with legal personality is governed by the law, in whose territory the seat of the association of persons or assets is located.
>
> This law also governs the issue whether the association of persons or assets is to be considered as a legal person.
>
> The seat is the place of the management.

Section 7 of the Bill was found among the General Provisions where, in addition to other issues belonging to the general part of private international law, the domestic law (which is identical to the personal law according to the current terminology) and the law of the domicile were determined. However, the Special Provisions of the Bill did not refer to the law applicable to legal persons, but the rules governing natural persons should have been duly applied, for example regarding legal capacity (section 39 of the Bill). The justification of the Bill refers to the fact that the rules contained in section 7 reflect the real seat principle and that the Bill relies on section 25 of the Code of Civil Procedure of 1911 concerning the determination of the seat.[12]

In the view of Miklós Világhy, the personal law must be determined based on the seat of the legal person. The seat is determined by the court taking into account all the circumstances of the case, including the main establishment, the place of management, the seat indicated in the statute and the place of formation and incorporation, so that it must coincide with the geographical location to which the activity of the legal person is most strongly linked.[13] According to Világhy, the personal law so determined covers the existence and scope of the legal personality, the personality rights, the organisation of the legal person, the relations between the members and the termination and the winding up of the legal person.[14]

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[9] Ibid 228.
[10] Ibid 231.
[11] István Szászy, *Magyar nemzetközi magánjog. Törvénytervezet és Indokolás* (Egyetemi Nyomda 1948, Budapest).
[12] Ibid 55.
[13] Miklós Világhy, *Bevezetés a nemzetközi magánjogba* (Tankönyvkiadó 1974, Budapest) 100.
[14] Ibid 100.

Ferenc Mádl, Hungary's future President and an academic specialising in private international law, stood firmly in favour of the incorporation doctrine, as most of the bilateral international treaties entered into after the Second World War followed this principle.[15] He proposed accordingly that a future Hungarian codification should follow the incorporation principle.[16]

The definite change took place, however, by the adoption of the Decree-Law which broke with the real seat theory and applies the incorporation theory as the main rule.

Section 18 of the Hungarian Decree-Law determines the law applicable to legal persons under the title 'Legal persons', pursuant to which:[17]

(1) The legal capacity, economic quality, personal rights of a legal person and the legal relations between the members thereof shall be adjudged according to its personal law.
(2) The personal law of a legal person is the law of that state in whose territory the legal person was incorporated.
(3) If a legal person is incorporated according to the laws of more than one state, or no incorporation is required according to the law applicable at the place of the seat indicated in the statute, its personal law shall be the law applicable at the place of the seat indicated in the statute.
(4) If a legal person has no seat according to its statute, or has several seats and is not incorporated in accordance with the law of any of those states, its personal law shall be the law of that state in whose territory its central management is located.
(5) *[Repealed]*

Accordingly, the main connecting factor is the place of incorporation; the place of the seat indicated in the statute and the place of the central management are only subsidiary connecting factors. The application of the subsidiary connecting factors is seldom necessary, since most often the place of incorporation can be ascertained.

The Decree-Law thus made it clear that Hungarian private international law follows the incorporation theory. Terminologically, however, no complete break was made with the earlier legal literature and István Szászy's Bill.[18] Thus, one of the subsidiary connecting factors of the Decree-Law is the place of central management *('központi ügyvezetés helye'),* which reflects the rule of the Code of Civil Procedure of 1911 and which was identified previously as the seat. According to the jurisdictional rule laid down in section 30 [currently section 30 subsection (1)] of Act II of 1952 (Code on Civil Procedure of 1952), in the event of doubt, the seat is the place of administration *('ügyintézés helye').* The acts on the company registration procedure adopted after the change of the political system provided similarly: they contained an identical provision, according to which the seat of a firm is the place of central administration *('központi*

[15] Ferenc Mádl, *Külkereskedelmi monopólium. Nemzetközi magánjog* (Közgazdasági és Jogi Könyvkiadó 1966, Budapest) 98-104.
[16] Ibid 109.
[17] Translation by the author.
[18] I owe thanks to Professor László Burián who called my attention some years ago to the terminological difference between the connecting factors applied in conflict of laws and the notions used in substantive law.

ügyintézés helye').[19] However, neither the Code on Civil Procedure of 1952, nor the companies acts nor the laws on company registration procedure nor Act V of 2013 on the Civil Code (Civil Code) contain(ed) and apply at the present the notion of the place of central management *('központi ügyvezetés').*[20]

The regulations on legal persons have remained largely untouched since 1979. The single change was the repeal of subsection 5 of section 18 of the Decree-Law by Act CXXXII of 1997 on the branches and agencies in Hungary of undertakings seated abroad.[21] The repealed subsection 5 provided that 'the personal law of the separately registered branch or establishment of the legal person is the law of that state in whose territory the branch or the establishment was registered'.

Additionally, we can find bilateral agreements which may concern the law applicable to legal persons. Thus, Decree-Law 11 of 1981 on the promulgation of the convention on the mutual legal assistance in civil matters concluded by the People's Republic of Hungary and the Republic of Italy, signed in Budapest on 26 May 1977, ensures the access to courts in the same way as for natural persons for those legal persons which were formed in the territory of one of the Contracting Parties and whose seat is in the territory of this Contracting Party.[22] We find a similar provision in the agreement on mutual legal assistance in civil and commercial matters concluded between the Republic of Hungary and the Arab Republic of Egypt signed in Cairo on 26 March 1996, as promulgated by Act CII of 1999.[23] These international agreements require the coincidence of the place of formation and the seat of the legal person. However, the text of the agreements does not determine which seat is concerned, the formal statutory seat or the real seat, although, taking the substantive and procedural company law provisions in force at the time of their adoption into account, presumably it concerns the latter. Nevertheless, the above rule has been laid down only in relation to the right of access to courts and the legal protection of legal persons.

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[19] *1989. évi 23. törvényerejű rendelet a bírósági cégnyilvántartásról és a cégek törvényességi felügyeletéről* (Decree-Law 23 of 1989 on company court registration and legal supervision of companies) s 6; *1997. évi CXLV. törvény a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról* (Act CXLV of 1997 on company registration, public company information and court registration proceedings) s 16 (1); *2006. évi V. törvény a cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról* (Act V of 2006 on public company information, company court registration and winding-up) s 7 (1) (Company Registration Act).

[20] *1988. évi VI. törvény a gazdasági társaságokról* (Act VI of 1988 on companies); *1997. évi CXLIV. törvény a gazdasági társaságokról* (Act CXLIV of 1997 on companies) (Companies Act of 1997); *2006. évi IV. törvény a gazdasági társaságokról* (Act IV of 2006 on companies) (Companies Act of 2006); *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code).

[21] *1997. évi CXXXII. törvény a külföldi székhelyű vállalkozások magyarországi fióktelepeiről és kereskedelmi képviseleteiről* (Act CXXXII of 1997 on the branches and agencies in Hungary of undertakings seated abroad).

[22] *1981. évi 11. törvényerejű rendelet a Magyar Népköztársaság és az Olasz Köztársaság között Budapesten, az 1977. évi május hó 26. napján aláírt, a kölcsönös polgári jogsegélyről szóló egyezmény kihirdetéséről* (Decree-Law 11 of 1981 on the promulgation of the *Convention on the mutual legal assistance in civil matters concluded by the People's Republic of Hungary and the Republic of Italy* signed in Budapest on 26 May 1977) art 1 (3).

[23] *1999. évi CII. törvény a Magyar Köztársaság és az Egyiptomi Arab Köztársaság között a polgári és kereskedelmi jogsegélyről szóló, Kairóban, 1996. március 26. napján aláírt Egyezmény kihirdetéséről* (Act CII of 1999 on the promulgation of the *Convention on mutual legal assistance in civil and commercial matters concluded between the Republic of Hungary and the Arab Republic of Egypt signed in Cairo on 26 March 1996*) art 1 (3).

Concerning the application of section 18 of the Decree-Law, we do not find too many court decisions. Furthermore, most of these decisions are limited to establishing that the law of the place of incorporation is applicable to the legal person in a certain question.[24]

III Challenges of the Codification of the Law Governing Legal Persons

National legislators face several challenges in codifying the law governing legal persons. I will enumerate below some briefly, perhaps the most significant challenges: ascertaining the impact of EU law on the law applicable to legal persons; the selection of the connecting factor; the determination of the scope of the applicable law; the treatment of legal persons other than companies; the cross-border mobility of companies; and the need to create special conflict of laws rules. In the codification process, regard must be paid to the development of EU private international law and to the solutions adopted in other private international law acts, as well as to the changes which occurred since the creation of the Decree-Law.

1 The Relationship between EU Law and the Laws of the Member States from the Perspective of the Law Applicable to Legal Persons and the Determination of the Connecting Factor[25]

There is no explicit provision on the determination of the law applicable to legal persons in EU law. The question of conformity of national conflict of laws rules with EU law arose primarily in relation to the freedom of establishment ensured by the Treaty on the Functioning of the European Union (TFEU).[26] In the legal literature, the question was posed whether Articles 49 and 54 of the TFEU and the related case law of the ECJ have a conflict of laws content and whether the application of one or the other connecting factor (either the incorporation doctrine or the real seat principle) follows from them. First and foremost, the question whether the real seat doctrine is in conformity with EU law emerged.

The view, according to which Articles 49 and 54 have a conflict of laws content, takes as a departure the *Centros*,[27] the *Überseering*[28] and the *Inspire Art*[29] cases. In these judgments,

[24] See *Legfelsőbb Bíróság* (Supreme Court) BH 2001. 537; *Fővárosi Bíróság* (Municipal Court of Budapest) 15.P.25457/2002/109; *Legfelsőbb Bíróság* (Supreme Court) Gf.I.30.059/5; *Fővárosi Ítélőtábla* (Budapest-Capital Regional Court of Appeal) 5.Pf.21.267/2006/12.

[25] In the course of writing this subchapter, I largely relied on my previous works: Tamás Szabados, *The Transfer of the Company Seat within the European Union – The Impact of the Freedom of Establishment on National Laws* (Eötvös Kiadó 2012, Budapest) and Tamás Szabados, 'The Transfer of the Company Seat: The Freedom of Establishment and National Laws' (2013) 2 Acta Universitatis Sapientiae Legal Studies 153-168.

[26] Consolidated version of the *Treaty on the Functioning of the European Union* [2012] OJ C 326/47 arts 49-55.

[27] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[28] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

[29] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

the ECJ – subject to some narrow exceptions – excluded the application of the restricting provisions of the host Member State to companies incorporated in another Member State, but which intended to transfer their real seat to or establish a branch in the host Member State. In the *Überseering* judgment, the Court reached the conclusion that 'where a company formed in accordance with the law of a Member State (A) in which it has its registered office exercises its freedom of establishment in another Member State (B), Articles 43 EC and 48 EC *[the current Articles 49 and 54 TFEU – added by the author]* require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (A).'[30] From the *Centros* and *Inspire Art* judgments, the conclusion may be drawn that the law of the state of incorporation must be applied to a branch established by a company incorporated in another Member State and that the host Member State may not impose additional requirements on the branch.[31]

According to the view which may be considered as dominant, Articles 49 and 54 do not have either explicit or implied conflict of laws content.[32] Neither the TFEU, nor the judgments of the ECJ determine explicitly which connecting factor should be applied by the Member States.[33] Member States are free to choose and apply one or the other connecting factor, but their application cannot result in the restriction of the freedom of establishment. The ECJ does not examine connecting factors in themselves, but together with substantive law rules. Consequently, Member States are free to apply either the incorporation doctrine or the real seat principle, but in their interaction with substantive rules they may not restrict or render less attractive the exercise of the freedom of establishment.

In Daily Mail, the ECJ pointed out that the Treaty establishing the European Economic Community[34] takes into account the differences in national legislations, including the differences between the connecting factors.[35] In the *Cartesio* judgment, the Court found that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to

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30 *Überseering,* para 95.

31 *Centros,* para 30; Inspire Art, para 101.

32 Thomas Rauscher, *Internationales Privatrecht* (CF Müller Verlag 1999, Heidelberg) 136; Horst Eidenmüller and Gebhard M. Rehm, 'Niederlassungsfreiheit versus Schutz des inländischen Rechtsverkehrs: Konturen des Europäischen Internationalen Gesellschaftsrecht' (2004) 2 ZGR 159-188, 164-166; Andreas Spahlinger, Gerhard Wegen, *Internationales Gesellschaftsrecht in der Praxis* (C.H. Beck Verlag 2005, München) 45; Ulrich Forsthoff, *Niederlassungsfreiheit für Gesellschaften: europarechtliche Grenzen der für die Erstreckung deutschen Mitbestimmungsrechts* (Nomos Verlagsgesellschaft 2006, Baden-Baden) 25-26; 53-59; Lutz Michalski, Ilja Funke, '§ 4a GmbHG' in Lutz Michalski (ed), *GmbHG Kommentar* (2nd edn, C.H. Beck Verlag 2010, München) 692-693.

33 Nadja Kubat Erk, 'The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine' (2010) 21 EBLR 413-450, 424; Péter Metzinger, Zoltán Nemessányi, András Osztovits, *Freedom of Establishment for Companies in the European Union* (Complex Kiadó 2009, Budapest) 37.

34 *Treaty Establishing the European Economic Community* (Rome, 25 March 1957).

35 Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, paras 20-21.

maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation."[36] From this, the conclusion may be drawn that the home Member State may freely choose between the incorporation doctrine and the real seat principle.[37]

Moreover, the scope of application of the freedom of establishment is limited. From the *Centros*, *Überseering* and *Inspire Art* judgments, it follows indeed that the law of the state of incorporation (with some exceptions) must be taken into account. However, these decisions concerned only a specific situation, namely the relationship between the company and the host Member State. The judgments of the ECJ may be interpreted in this context that the host Member State has to treat immigrating companies in accordance with the law of the state of their place of incorporation, but they give the Member State freedom on how to achieve this result. The judgments do not concern the relationship between the home Member State and the company, as well as companies established in third countries. In both cases, the real seat principle may continue to be applied.[38] Moreover, it is important to note that freedom of establishment is to be applied to companies within the meaning of Article 54 (2) of the TFEU. Accordingly, '[c]ompanies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.' This implies that the freedom of establishment provisions do not apply to non-profit legal persons, therefore the application of the real seat principle may be accepted concerning them.[39]

As a consequence, neither of the two connecting factors is contrary to the freedom of establishment, although, in the relationship between the company and the host Member State, the real seat principle has been largely supplanted by the incorporation doctrine. However, even in this context, it may happen that the rules of the host Member State are more favourable than the provisions of the state of the place of incorporation. In such a case, the rules of the host Member State may be applied, since they do not restrict the freedom of establishment. This means that the law of the state of incorporation gives only a standard, against which the law of the host Member State is to be measured, but there is no obligation to apply exclusively the law of the home Member State, even in the relationship between the company and the host Member State.[40]

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[36] Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* [2008] ECR I-9641, para 110.

[37] Peter Kindler, 'Ende der Diskussion über die so genannte Wegzugsfreiheit' (2009) 4 NZG 130-132, 131.

[38] Stefan Leible and Jochen Hoffmann, '„*Überseering*" und das (vermeintliche) Ende der Sitztheorie' (2002) 48 RIW 925-936, 930.

[39] Dieter Leuering, 'Von Scheinauslandsgesellschaften hin zu „Gesellschaften mit Migrationshintergrund"' [2008] Zeitschrift für Rechtspolitik 73-77, 74-75.

[40] Gerald Spindler, Olaf Berner, 'Der Gläubigerschutz im Gesellschaftsrecht nach Inspire Art' (2004) 50 RIW 7-16, 10.

As we have seen, the primary and secondary EU legal sources do not contain any provision concerning the determination of the law applicable to legal persons, although the case law of the ECJ undoubtedly touches upon the determination of the law applicable to companies. In its Stockholm Programme, the Commission urged – without any further precision – developing common rules determining the law applicable to company matters.[41] In the majority opinion of the Reflection Group on the Future of EU Company Law set up by the Commission, ensuring the transfer of seat of companies does not require the unification of the conflict of laws provisions of the Member States, but the Reflection Group called for a comprehensive and comparative analysis of the advantages and flaws of the real seat theory.[42] However, other members of the Reflection Group found EU-level regulation of the law applicable to companies to be necessary as cross-border operations may affect the law governing companies.[43] Even so, no EU legislative act has been so far adopted, neither on the transfer of seat nor more generally on the determination of the law applicable to legal persons. The single exception is Regulation No 1346/2000/EC on insolvency proceedings (EU Insolvency Regulation). According to the EU Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened *(lex fori concursus).*[44]

2 Selection of the Connecting Factor

The second challenge is the selection of the appropriate connecting factor in the light of above conclusions. The trend in recent codifications points undoubtedly towards a wider acceptance of the incorporation doctrine, even though, based on EU law, Member States are not obliged to apply this principle generally. The majority of the more recent European private international law codifications provide for the incorporation doctrine; the real seat appears at most as a subsidiary connecting factor. This is the case with the Dutch Civil Code[45] and the Czech,[46] Bulgarian[47] and Estonian Private International Law Acts.[48]

Even some Member States, which previously followed the real seat doctrine, turned towards the incorporation doctrine, at least under certain circumstances. In Austria, after the *Centros* judgment, the Austrian Supreme Court, the OGH, declared that in spite of the express provision of the Austrian Private International Law Act laying down the real seat principle, the application

41 Commission, 'Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen' COM (2009) 262 final, 14.
42 Report of the Reflection Group on the Future of EU Company Law (Brussels, 5 April 2011), 23-24.
43 Report of the Reflection Group on the Future of EU Company Law 23.
44 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 which will be repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19.
45 Dutch Civil Code art 10:118.
46 Czech Private International Law Act art 30 (1).
47 Bulgarian Private International Law Act art 56 (1).
48 Estonian Private International Law Act art 14.

of the real seat principle is contrary to the freedom of establishment, at least as far as secondary establishment is concerned, and the incorporation theory is to be applied.[49] In Germany, the amendment of the AktG[50] and the GmbHG[51] by the so-called MoMiG enabled AGs and GmbHs to transfer their real seat abroad.[52] This was previously not allowed due to the application of the real seat doctrine in a strict form. Opposite examples may also be found. Thus, the Belgian Private International Law Act of 2004[53] and the Polish Private International Law Act from 2011[54] still preserved the real seat principle. Nevertheless, even these codes lay down that if the law applicable referred to the law according to which the legal person was established, that law is to be applied.[55]

It is worth referring to the work produced by various expert groups. These principally examined the issue of the transfer of seat, but they also addressed the determination of the law governing companies in their proposals. The theses of *Arbeitskreis Europäisches Unternehmensrecht,* concerning a European directive on the transfer of seat, propose in essence that Member State should be free to opt for the incorporation or the real seat doctrine. This means that the transfer of seat must be neutral in terms of conflict of laws.[56] However, the transfer of seat cannot imply the termination of the company in the Member of origin, which follows the real seat theory, and the reestablishment of the company in the host Member State. The German Council on Private International Law *(Deutscher Rat für Internationales Privatrecht)* drew up two proposals: a proposal for an EU regulation and another proposal on the amendment of the EGBGB regarding autonomous German private international law. The law applicable is determined uniformly by the two proposals. Companies are governed by the law of the state in which they were registered.[57] If the company was not or has not yet been registered, the law of that state according to which it was organised is to be applied.[58] If the applicable law cannot be ascertained even in this way then the conflict of laws rules on the law of obligations are to be applied. If a company purports to operate under a different law, a third party acting in good faith can rely on such law.

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[49] OGH 6Ob123/99b, 15.07.1999.

[50] *Aktiengesetz vom 6. September 1965* (BGBl. I S. 1089).

[51] *GmbH-Gesetz (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) Gesetz vom 20.04.1892* (RGBl. I S. 477).

[52] *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen vom 23. Oktober 2008* (BGBl. I S. 2026).

[53] Belgian Private International Law Act art 110.

[54] Polish Private International Law Act art 17 (1).

[55] Belgian Private International Law Act art 110; Polish Private International Law Act art 17 (2).

[56] Arbeitskreis Europäisches Unternehmensrecht: Thesen zum Erlass einer europäischen Sitzverlegungsrichtlinie (2011) 3 NZG 98-99, These 4.

[57] *Vorschlag für eine Regelung auf europäischer Ebene art 2 (1); Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10 (2); Hans Jürgen Sonnenberger, Frank Bauer (ed), *Vorschlag der Spezialkommission für die Neugestaltung des Internationalen Gesellschaftsrechts auf europäischer/deutscher Ebene* (Mohr Siebeck 2007, Tübingen).

[58] *Vorschlag für eine Regelung auf europäischer Ebene* art 2 (2); V*orschlag für eine autonome deutsche Regelung im EGBGB* art 10 (3).

One of the peculiarities of the Hungarian private international law is that it refers to the 'personal law' of both natural and legal persons, a concept unknown to most private international law codes. Most private international law codes do not use this notion, but determine directly the law governing legal persons with the help of the incorporation doctrine or the real seat theory. In Hungarian private international law, the concept of personal law was used in the literature[59] and István Szászy's Bill applied the concept of 'domestic law' which had a meaning identical to personal law.[60] Moreover, there are some other private international law acts, such as the Austrian code which uses the similar concept of 'personal statute' *(Personalstatut).*[61] If the new Hungarian code will continue to apply the concept of personal law for natural persons, then it is worth retaining it for legal persons, too.

In Hungarian private international law, the personal law of legal persons has been so far determined through the incorporation doctrine. There is no reason to deviate from this in the future private international law act in the light of the development of EU law and the recent national private international law codifications.

Instead, the question is the selection of the subsidiary connecting factors. In most situations, the governing law may be determined based on the place of registration, irrespective of the location of the actual seat of the legal person. However, there may be instances where no registration took place or the legal person has not yet been registered ('pre-company'). Subsidiary connecting factors are necessary if the place of registration cannot be ascertained.

In determining the connecting factors, it is worth considering two solutions. The first is the determination of the applicable law through connecting factors which correspond to the concepts of Hungarian substantive law. The place of registration could be retained as the main connecting factor. The subsidiary connecting factors in force now could be rephrased to a certain extent in order to ensure consistency with the substantive provisions, in particular with the new Hungarian Civil Code and company registration rules. Thus, it could be considered to replace the seat indicated in the statute *('alapszabályban megjelölt székhely')* with the statutory seat *('létesítő okirat szerinti székhely').* The place of the central management *('központi ügyvezetés helye'),* which appears as a subsidiary connecting factor, seems to be terminologically inconsistent with the substantive provisions of the Hungarian Civil Code on legal persons and companies and the Company Registration Act, as they do not contain this notion. The place of central management could be replaced by the notion of the place of central administration ('*központi ügyintézés helye*'). It must be noted that the Civil Code refers to the place of central administration concerning companies (and not other legal persons) only, but it is questionable whether there is a more appropriate notion.

The second option is the application of more abstract connecting factors, following the Swiss Private International Law Act or the Proposal of the German Council for Private International Law. Pursuant to the Swiss Private International Law Act, companies are governed

[59] Szászy (n 8) 226-227; Mádl (n 15) 98; Világhy (n 13) 98.
[60] Szászy (n 11) 5, 7. §.
[61] Austrian Act on Private International Law art 10.

by the law of the state, in accordance with the rules under which they were organised if the disclosure and registration requirements of that state had been duly complied with or if they were organised according to the law of that state in the absence of such requirements.[62] If these prerequisites are not complied with by the company then the law of the state where the company is effectively managed is to be applied.[63] As we have seen, according to the Proposal of the German Council for Private International Law, the law of the place of registration governs the legal person. In the absence of registration, the law of that state, according to which the legal person has been organised, is to be applied. This law may be identified relatively easily and can be established in almost all cases. Hence, the application of the abovementioned more abstract connecting factors may facilitate legal practice.

3 Scope of the Applicable Law

The next issue is the determination of the scope of the applicable law. The scope of the law governing legal persons may be determined in various ways in private international law. There are private international laws which do not address this question at all and only limit themselves to determining the governing law.[64] Other private international laws give a longer or shorter list embedded in the text of the private international law act or in a separate list. A further difference between the lists is that some of them are exemplificative in nature and they refer to this, for example, by the words 'in particular'.[65]

The various lists contain, among others, the following issues:

– the legal nature of the legal person;[66]
– legal capacity;[67]
– the competence to perform juridical acts and to act in court;[68]
– the creation of the legal person;[69]

[62] Swiss Private International Law Act art 154 (1).
[63] Swiss Private International Law Act art 154 (2).
[64] Croatian Private International Law Act art 17.
[65] Estonian Private International Law Act art 15; Dutch Civil Code art 10:119; Polish Private International Law Act art 17 (3); Swiss Private International Law Act art 155; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1).
[66] Belgian Private International Law Act art 111 (1) 1); Bulgarian Private International Law Act art 58 1); Estonian Private International Law Act art 15 1); Polish Private International Law Act art 17 (3) 2); Swiss Private International Law Act art 155 a); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).
[67] Belgian Private International Law Act art 111 (1) 4); Dutch Civil Code art 10:119 a); Polish Private International Law Act art 17 (3) 4); Swiss Private International Law Act art 155 c); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).
[68] Dutch Civil Code art 10:119 a); Swiss Private International Law Act art 155 c); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).
[69] Belgian Private International Law Act art 111 (1)3); Bulgarian Private International Law Act art 58 1); Estonian Private International Law Act art 15 2); Polish Private International Law Act art 17 (3) 1); Swiss Private International Law Act art 155 b); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a. (1) 2); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2).

- the form of the legal person;[70]
- the name of the legal person;[71]
- the internal relations of the legal person;[72]
- the organisation and organs of the legal person;[73]
- provisions on the capital of the company;[74]
- the legal relations between the members and the legal person;[75]
- the acquisition and termination of membership and the rights and obligations related to them;[76]
- legal relations between the members of the legal person;[77]
- the representation of the legal person;[78]
- the rights and obligations linked to the shares held by the members;[79]
- the liability of the members for the obligations of the legal persons and of the persons entitled to act on behalf of the legal person;[80]
- the liability for the debts of the legal person;[81]
- liability of the directors, the members of the supervisory board and other officers towards the entity;[82]

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[70] Bulgarian Private International Law Act art 58 1).

[71] Belgian Private International Law Act art 111 (1) 2); Bulgarian Private International Law Act art 58 2); Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 4); Polish Private International Law Act art 17 (3) 3); Swiss Private International Law Act art 155 d); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 3); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 3).

[72] Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 6); Dutch Civil Code art 10:119 b); Swiss Private International Law Act art 155 f).

[73] Belgian Private International Law Act Belga art 111 (1) 5); Bulgarian Private International Law Act art 58 4); Estonian Private International Law Act art 15 5); Polish Private International Law Act art 17 (3) 5); Swiss Private International Law Act art 155 e); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 4); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 4).

[74] *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 4); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 4).

[75] Belgian Private International Law Act art 111 (1) 6); Czech Private International Law Act art 30 (1); Swiss Private International Law Act art 155 f).

[76] Belgian Private International Law Act art 111 (1) 7); Bulgarian Private International Law Act art 58 6); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 6); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 6).

[77] Belgian Private International Law Act art 111 (1) 6); Czech Private International Law Act art 30 (1).

[78] Bulgarian Private International Law Act art 58 5); Estonian Private International Law Act art 15 8); Polish Private International Law Act art 17 (3) 6); Swiss Private International Law Act art 155 i); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 5); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 5).

[79] Belgian Private International Law Act art 111 (1) 8).

[80] Bulgarian Private International Law Act art 58 7); Czech Private International Law Act art 30 (1); Polish Private International Law Act art 17 (3) 8); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 7); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 7).

[81] Belgian Private International Law Act art 111 (1) 10); Estonian Private International Law Act art 15 7); Swiss Private International Law Act art 155 h).

[82] Dutch Civil Code art 10:119 d).

– the question of who is liable on the basis of a certain capacity for acts binding the cooperation in addition to the cooperation;[83]
– the legal consequences of the violation of the laws and the statute;[84]
– the liability for the breach of obligations based on company law;[85]
– compliance with accounting duties, including the preparation and examination of annual reports, compliance with disclosure obligations, sanctions for any breach thereof and the related liability;[86]
– merger;[87]
– demerger;[88]
– transformation;[89] and
– termination.[90]

The present Hungarian regulation is tight-lipped as to the scope of the applicable law and refers only to the legal capacity, economic quality and personal rights of the legal person and the legal relations between the members thereof. In my view, it would be advisable to broaden the questions covered by the applicable law and make a list of them. This would facilitate, for practical purposes, distinguishing the questions falling under the scope of application of the personal law of legal persons from other areas of conflict of laws. It should also be indicated that the list is non-exhaustive, as issues may arise which are not contained in the list. In drawing up the list, the solutions existing in other private international law acts could be taken into consideration. In Hungarian court practice, several cases arose which concerned the representation of the legal person, hence legal and organisational representation could be mentioned in the list in order to delimit them from the rules on representation based on power of attorney.

83 Dutch Civil Code art 10:119 e).
84 Belgian Private International Law Act art 111 (1) 9); Bulgarian Private International Law Act art 58 8); Polish Private International Law Act art 17 (3) 9).
85 Swiss Private International Law Act art 155 g); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 8); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 8).
86 *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 9); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 9).
87 Polish Private International Law Act art 17 (3) 1).
88 Polish Private International Law Act art 17 (3) 1).
89 Bulgarian Private International Law Act art 58 9); Polish Private International Law Act art 17 (3) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 2).
90 Belgian Private International Law Act art 111 (1) 3); Bulgarian Private International Law Act art 58 9); Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 2); Dutch Civil Code art 10:119 f); Polish Private International Law Act art 17 (3) 1); Swiss Private International Law Act art 155 b); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 2).

4 Legal Persons Other than Companies

Legal persons other than companies, such as foundations or associations, are usually treated in the same way as companies. Most of the private international law codes contain rules for legal persons that do not distinguish between companies and other legal persons, while others refer to a specific and broad company (Swiss Private International Law Act)[91] or cooperation (Dutch Code Civil)[92] concept, including legal persons other than companies. In my view, there is no need for adopting special conflict of laws rules for legal persons other than companies. Nevertheless, in addition to the place of incorporation, more abstract connecting factors, such as the place of organisation (as applied in the Swiss Private International Law Act and in the Proposal of the *Deutscher Rat für Internationales Privatrecht*), seem to be more appropriate to adequately cover all kinds of legal persons.

5 Cross-Border Mobility of Legal Persons

From the jurisprudence of the CJEU (*Cartesio* and VALE[93] judgments), it follows that Member States are obliged to ensure the possibility of cross-border conversion for companies, within the meaning of EU law. Cross-border conversion implies that 'a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable' and '…the company is converted into a form of company which is governed by the law of the Member State to which it has moved.'[94] For the other cases of the transfer of seat, in the relation between a company and the host Member State, the CJEU held that if a company transfers its real seat to another Member State, the host Member State has to recognise the legal capacity and standing of the company in accordance with the law of the Member State of incorporation.[95] In the relationship between the home Member State and the company, from the *Cartesio* judgment, it follows that the transfer of seat may be impeded by the Member State of origin if the company wishes to retain the law of that state as its governing law.[96] As discussed above, the provisions of the TFEU and the related case law do not determine the applicable connecting factor. The application of one or the other connecting factor does not determine in itself the possibility of cross-border conversion or other forms of the transfer of seat. The international conversion and other forms of the transfer of seat depend upon the interplay of substantive and conflict of laws provisions.

Some private international law acts or civil codes containing conflict of laws rules, such as the Dutch, Czech, Belgian and Polish private international law provide for the international conversion or other forms of the transfer of seat. Sometimes, private international law acts only

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91 Swiss Private International Law Act art 150 (1).
92 Dutch Civil Code art 10:117 a).
93 Case C-378/10 *VALE Építési Kft.* (ECLI:EU:C:2012:440).
94 *Cartesio*, para 111.
95 *Überseering*, para 95; Consolidated version of the *Treaty establishing the European Community* [1992] OJ C 224/1.
96 *Cartesio*, para 110.

require compliance with the provisions of the Member States concerned.[97] More detailed provisions may be found in the Swiss Private International Law Act.[98] Certain private international law acts and the Proposal of the German Council for Private International Law also regulate cross-border mergers[99] and demergers.[100]

In my opinion, there are two ways in front of the Hungarian legislator regarding the international mobility of legal persons. First, the issue of the transfer of seat could be simply dropped from the new law, in the expectation of a future EU legislative act regulating cross-border conversion (transfer of seat). Provisions on cross-border conversion (transfer of seat) could be inserted in the Private International Law Act, later taking the rules of such a future EU legislative act into consideration. However, at the moment it is not visible that such an EU legislative act would be adopted in the near future in the form of the Fourteenth Company Law Directive or as a regulation. The other way is to create rules on cross-border conversion or the other examples of the transfer of seat in the new Hungarian private international law act without waiting for EU legislation. The necessity of this is supported by the cases referred from Hungary to the ECJ and the Hungarian judiciary practice on the transfer of seat.[101] The regulation should be in conformity with the freedom of establishment provisions and the related case law of the ECJ. National legislation has to comply with the provisions on the freedom of establishment and the related judgments of the CJEU.

Some remarks must be made in this respect. The possibility of international conversion and other forms of the transfer of seat does not depend exclusively on conflict of laws rules, but much more on substantive law norms. Consequently, the creation of substantive law rules, which are almost entirely absent at the moment, in Hungarian law would also be necessary.[102] In my view, the regulation of international conversion and the other forms of the transfer of seat primarily requires substantive law regulation. If the new Hungarian private international law act regulated cross-border conversion or any other form of the transfer of seat, the absence of substantive law provisions would lead to uncertainty for business actors.

The same holds for cross-border demergers. Regarding the eventual regulation of cross-border mergers, it must be noted that there is secondary legislation regulating this issue, namely Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, which was implemented in Hungary by Act CXL of 2007.[103]

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97 Czech Private International Law Act art 30 (3); Bulgarian Private International Law Act art 59.

98 Swiss Private International Law Act arts 161-163.

99 Swiss Private International Law Act arts 163a-163c; Belgian Private International Law Act art 113; Polish Private International Law Act art 19 (2). *Vorschlag für eine Regelung auf europäischer Ebene* art 5; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10b.

100 Swiss Private International Law Act arts 163a-163d; *Vorschlag für eine Regelung auf europäischer Ebene* art 6; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10c.

101 See the *Cartesio* and the VALE cases; from the Hungarian judiciary practice see ÍH 2011. 168 *Fővárosi Ítélőtábla* (Budapest-Capital Regional Court of Appeal) 10. Cgf. 44.879/2009/2.

102 Section 7/B of the Act on company registration procedure refers only to the transfer of the principal place of the activity of the firm.

103 *2007. évi CXL. törvény a tőkeegyesítő társaságok határokon átnyúló egyesüléséről* (Act CXL of 2007 on the cross-border merger of limited liability companies).

It is important in any case that the future Hungarian private international law act should contain conflict of laws rules, while substantive law provisions should be contained in the relevant pieces of substantive legislation. The separation of the conflict of laws and substantive law aspects of the regulation might be quite difficult at the level of codification.

6 Special Conflict of Laws Rules

The creation of special conflict of law rules for certain specific questions depends partly upon the scope of the applicable law. The broader the scope of the applicable law, the fewer special rules are necessary. Some private international law acts, such as the Swiss[104] and Belgian[105] acts, contain provisions on the insolvency of legal persons. The potential regulation of insolvency matters in a new Hungarian private international law code should cover issues not regulated by the EU Insolvency Regulation.

Special conflict of laws rules may be found in the Dutch Civil Code, for example, on the liability of directors and supervisory board directors of insolvent cooperations.[106] The Swiss Private International Law Act provides for several special connecting factors, among others, on claims related to the public issue of shares[107] or to the violation of the name of the company.[108]

Some private international law acts contain provisions on entities without legal personality. Either the rules applicable to legal persons govern them as well, such as in Polish[109] or Estonian[110] law, or special rules apply to entities without legal personality, such as in Bulgarian law.[111] Nevertheless, the application of any of these solutions usually leads to the same outcome: the law governing legal persons also applies to entities without legal personality.

IV Conclusions

The regulation of the law governing legal persons raises several questions, such as the applicable connecting factor, the scope of the applicable law, the cross-border mobility of legal persons and the necessity of special connecting factors. The Hungarian legislator also faces the same issues in the process of the recodification of Hungarian private international law. The Hungarian legislator also has to take the development of EU law and the recent private international law codifications into account.

104 Swiss Private International Law Act arts 166-171.
105 Belgian Private International Act art 119.
106 Dutch Civil Code art 10:121 (1).
107 Swiss Private International Law Act art 156.
108 Swiss Private International Law Act art 157.
109 Polish Private International Law Act art 21.
110 Estonian Private International Law Act art 17.
111 Bulgarian Private International Law Act art 57.

There is no reason to deviate from the incorporation doctrine enshrined in the Decree-Law on private international law in force at the moment. However, the subsidiary connecting factors should be rephrased in order to ensure greater consistency between conflict of laws norms and substantive law provisions. It seems also necessary to broaden the questions falling under the scope of the applicable law. I suggested enumerating those questions in a list. It should be indicated that the list is non-exhaustive, as there might arise problems in the legal practice which do not appear in the list, but they should still be covered by the law governing legal persons. In my view, at the moment it is not advisable to create rules for the cross-border mobility of legal persons in the new Hungarian private international law act. First, the cross-border mobility of legal persons depends on the interplay of the substantive and conflict of laws rules. As substantive law rules are now missing in Hungarian law on the cross-border conversion and the other forms of the transfer of seat, the creation of conflict of laws rules may cause legal uncertainty. Second, a private international law act should determine only the conflict of laws rules regarding cross-border mobility. However, concerning the cross-border mobility of legal persons, separating substantive and conflict of laws rules could be highly difficult. Instead of conflict of laws provisions, the creation of substantive law rules could be considered by the legislator on the cross-border conversion.

In summary, the rules on legal persons in Hungarian private international law do not require comprehensive redrafting; the present norms only require fine-tuning in order to ensure greater regulatory consistency and certainty for the practice.

Georgios Panopoulos*

Limitation of Proceedings under Article 12 Successions Regulation (2012)

An Impossible Codification of the Improbable

I Introduction

Private international law at the European level is designed to simplify cross-border transactions and procedures, both through unification of the national solutions and, at the same time, through codification of 'good practices' identified across Member States and beyond. Nevertheless, being young and ambitious, maybe both too much, the codification experiment in fields other than contracts and torts – where the drafters have had the advantage of the well-crafted and well tested Rome Convention and Brussels Convention –,[1] presents two interdependent flaws: hurrying to do all at once and granting to European law the largest scope possible; and ill-conceived palliatives when it appears that such attribution of competence to European law has not been well thought out.

The Successions Regulation (2012),[2] which applies to the succession of persons who die on or after 17 August 2015 (Article 83), offers a good example of such bad legislation in its Chapter II on Jurisdiction.

Articles 4 to 11 of the Regulation attribute to the courts of the Member States full (in principle) jurisdiction to rule on any kind of succession dispute having even a remote connection to them. In particular, pursuant to the general rule of Article 4, 'the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole'. If the deceased had his last habitual residence in a third State, Article 10 para 1 comes into play in order to attribute jurisdiction (always to rule on the succession as

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1 *Rome Convention of 19.6.1980 on the law applicable to contractual obligations; Brussels Convention of 17.9.1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.*

2 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L201/27.7.2012, p. 107.

a whole) to 'the courts of a Member State in which [any] assets of the estate are located', in so far as one of the following conditions is met: '(a) the deceased had the nationality of the Member State at the time of the death; or, failing that, (b) the deceased had his previous [penultimate] habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed'. Even if the above conditions are not met, the courts of the Member State of the location of the assets still have jurisdiction, but, pursuant to Article 10 para 2, not to rule on the succession as a whole, but to rule on these specific assets. Furthermore, irrespective of whether any Member State court has jurisdiction on the basis of Articles 4 and 10, it is always possible for the parties concerned under Article 5 to make a choice-of-court agreement, but only in favour of the courts of the Member State of which the deceased was a national and the law of which the deceased had chosen to govern their succession; and prorogation may also be tacit (Article 9). Finally, where, despite the extensive jurisdiction recognised with regard to the courts of the Members States, no such court is competent according to the above rules, a Member State court may, if seised, still have jurisdiction *qua forum necessitatis* in accordance with Article 11.

It is manifest that the delimitation of the jurisdiction of the courts of the Member States under the Regulation has something of jurisdictional vertigo. Article 12 para 1 introduces a correction, in the sense that it instructs the courts of the Member States not to issue any decision on assets located in a third State, when it is expected that such a decision will not be recognized or enforced:

Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.[3]

The wide jurisdiction of the courts of the Members States is thus accompanied by a limitation; but the limits, conditions (II) and consequences (III) of this limitation are themselves difficult to discern. It should be noted that the second paragraph of Article 12 is out of the scope of this article, because it concerns the right of the plaintiff to define through their request (and the right of the defendant through a possible counterclaim) the object of the dispute; this right is recognised by the national procedural systems[4] and could not be affected through a European regulation respectful of the procedural autonomy of the legal orders of the Member States.

[3] The second paragraph, which enshrines the principle that the parties have decisive power over the scope of the proceedings, and which will not form part of the present discussion, reads as follows: 'Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised'.

[4] See e.g. Article 106 of the Greek Code of Civil Procedure.

II Conditions

Three conditions can be read in Article 12: *(a)* localisation of assets of the estate in a third State; *(b)* probability that the decision to be issued will not be recognized in that third State; *(c)* request of one of the parties (2). Nevertheless, one should also examine a fourth factor, despite its prima facie self-evidence: jurisdiction of a court of a Member State (1).

1 Jurisdiction of a Court of a Member State

Article 12 is applied by the 'the court seised', and it seems that the specific basis, on which the court has founded its jurisdiction, does not play any role. This is however not the case in relation to prorogation of jurisdiction, jurisdiction based on assets of the estate in accordance with Article 10 para 2 and forum necessitatis.

Article 12 does not apply in two cases where it is logically impossible that the conditions for its application be met, precisely because of the jurisdictional basis on which the court is seised. The first such case is absolutely manifest: the court seised under Article 10 para 2 has jurisdiction to rule only on the assets located in its Member State; in consequence, there is no room for the application of Article 12, since this provision deals only with assets located in a third State.

Furthermore, when the parties to the dispute have concluded a choice-of-court agreement under Article 5 covering assets of the estate located in a third State, none of them would rightfully request that such assets be exempted from the jurisdiction of the chosen court. The parties had the opportunity to provide for such an exception upon conclusion of their procedural agreement, and their failure to do so must constitute a tacit waiver of their right to submit the request required for the application of Article 12. The same should apply mutatis mutandis with regard to tacit prorogation by virtue of Article 9.

Finally, Article 12 cannot limit the jurisdiction of the forum necessitatis of Article 11. The Article 11 court itself shapes the extent of its jurisdiction; thus it cannot recognise itself as competent to rule on an asset located in a third State, where it is expected that its decision will not be enforced, because in such event it could not be a forum in the first place. The purpose of the effectiveness of the decision to be issued should be taken into consideration within Article 11 and limit its application; this purpose should not come ex post through Article 12 as an extrinsic limitation of a jurisdiction already shaped.

It follows that the limitation of Article 12 applies only where the jurisdiction of a court of a Member State is based on Article 4 or on Article 10 para 1. A question then can be raised, namely why the European legislator opted for the introduction of a whole article of apparently general application instead of a reservation, following the example of the Swiss law on PIL,[5] within Articles 4 and 10 para 1. Such a reservation could have stated that the jurisdiction of the courts under these Articles does not extend to assets of the estate located in third States, if these States recognise their own courts as having exclusive jurisdiction on these assets. In order

[5] See articles 86 and 87.

to answer this question, one should look at the explicit conditions of Article 12, as well as at the legal consequences it foresees.

2 Explicit Conditions

a) – Localisation of assets of the estate in a third State – Article 12 applies only if the estate comprises assets of any kind situated in a third State. If certain assets are located in a Member State, as such determination is made in accordance with the principles applying in relation to Article 10,[6] the application of Article 12 is not possible with regard to these assets. According to one view, the question of whether an asset is situated in a third State should be answered in accordance with the law of that third State.[7] However, a juxtaposition of Article 12 to Article 10, both of which make use of the same wording ('assets located'), shows that the European legislator had in mind a unique localisation of each asset, so that whatever is located in a Member State cannot be located in a third State at the same time, and *vice versa*. In consequence, the localisation of assets cannot be left to the law of the third State, but must be made on the basis of the criteria of Article 10, so that there are no gaps or overlaps.

b) – Request of one of the parties – The court may not apply Article 12 on its own motion; application of Article 12 is triggered only at the request of one of the parties.[8] Given that, in order for Article 12 to apply, the suit must have the rights on assets of the estate located in a third State as its object, it can be assumed that the relevant request will come from the defendant in the form of a defence.[9] The request must make specific reference to the assets that the defendant wishes to have exempted from the court's decision, as well as to the specific grounds justifying such exception.[10] There is, however, the question of the time at which this defence must be raised in order to be admissible; this depends on the reasons – to be explained below – that can possibly bar the recognition of the decision in the third State.[11]

c) – Decision expected not to be recognised in the State where the assets are located – This condition incorporates the substance and the purpose of Article 12: the court may not issue a decision if it is expected that it will remain unenforced. The main reason for such a denial of recognition and enforcement in a third State is that the latter recognises its own courts as having exclusive jurisdiction to rule on any succession dispute relating to immovable property located

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[6] The localisation of assets in a Member State should become the object of an autonomous interpretation and not be left to the *lex fori* or to the *lex causae*. For this interpretation, recourse can be had to Article 2(g) of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which defines the term 'the Member State in which assets are situated'. See A. Bonomi, in A. Bonomi, P. Wautelet, *Le droit européen des successions* (Bruylant 2013) art. 10 n° 12.

[7] See A. Bonomi (n 6) art. 12 n°7.

[8] A condition that is disputable *de lege ferenda,* see below under *e).*

[9] Or from the plaintiff in case of a counterclaim, but this case need not be analysed separately.

[10] These requirements are usually imposed in relation to defenses and objections by procedural rules, in Greek by Article 262 of the Code of Civil Procedure.

[11] See below under *c).*

in its territory, and, hence, that third State considers the courts of all other States as lacking jurisdiction.[12] However, the wording of the provision seems to be too wide to be limited to this sole ground for non-recognition but suggests it covers other reasons, such as the outright refusal by this State to recognise any foreign judgment, the absence of reciprocity, the refusal by this State to admit the indirect jurisdiction of the courts seised by virtue of the Regulation, the conflict with a prior judgment or *lis pendens,* or even the contrariety of the judgment with the public order of the third State concerned.[13]

None of these reasons should be admitted to influence the application of Article 12.

The reason connected to the denial of the third State to admit the indirect jurisdiction of the court seised by virtue of the Regulation cannot be distinguished from the main ground of non-recognition already examined.[14] The denial of the third State to recognise any foreign judgment at all, as well as the equivalent reason of lack of reciprocity, are questions of a political nature that, in the absence of an explicit and clear legislative provision, should not be left to the discretion of the courts. For instance, the Greek legislator has made such an option in Articles 3 and 4 of the Code of Civil Procedure[15] in relation to sovereign immunity and to immovable property located abroad, wherefrom it follows *a contrario* the clear political choice that no person having recourse before the Greek courts be left without judicial protection in any other conceivable constellation of territorial competence of these courts.

Furthermore, the court seised should not examine the probability of non-recognition on the ground that there is already a decision of a court of a third State where the assets of the estate under question are located or on the ground of *lis pendens* by virtue of proceedings initiated in that State. This is because the authority of *res iudicata* of judicial decisions originating from third States and the *lis pendens* due to proceedings initiated in third States fall outside the scope of the Regulation. Article 17 of the Regulation regulates *lis pendens* only in relation to proceedings initiated before the courts of Member States, and recognition under Article 39 concerns only decisions given in a Member State. The questions of *res iudicata* and *lis pendens* that fall outside the scope of the Regulation are governed by the national procedural systems.[16] In consequence, no such reason may prevent, by virtue of Article 12, the court from ruling.

It follows that lack of reciprocity and indirect jurisdiction, on the one hand, and *lis pendens* and *res iudicata,* on the other, are not valid grounds for the invocation of Article 12.

Finally, the reason of contrariety of the decision to be issued with the public policy *(ordre public)* of the third State leads the reasoning to its outer limits and, hence, to the core of the provision, as it can be shown in the following example. Assume a national of a State following

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[12] See also art. 96 para 1(b) & 2 Swiss Law on PIL, only in relation to immovable property.

[13] A. Bonomi (n 6) art. 12 n° 4: *le refus pur et simple de cet État de reconnaître toute décision étrangère, l'absence de réciprocité, le refus de cet État d'admettre la compétence indirecte des juridictions saisies en vertu du Règlement, la contrariété avec une décision antérieure ou la litispendance, ou même la contrariété de la décision avec l'ordre public de l'État tiers concerné.*

[14] See above under *c).*

[15] Royal Decree No. 657/1971; the Code has been recently profoundly modified through Law No. 4335/2015, but Articles 3 and 4 have remained untouched.

[16] See for example Articles 222 and 323 of the Greek Code of Civil Procedure.

the *Sharia* in some archaic form,[17] who dies intestate in a Member State where he had his habitual residence, leaving as his legal heirs his son and daughter and an estate comprising two buildings of comparable value, one in the above Member State and the second in the State of his nationality. The Member State court of the deceased's last habitual residence has jurisdiction under Article 4, and, in accordance with Article 21, the succession as a whole is governed by the law of this Member State. The applicable law contains a provision under which 'the children shall inherit by equal portions',[18] a provision whose application is expected, however, to be contrary to the *ordre public* of the State of the deceased's nationality, which presumably follows a principle by virtue of which the female heir's portion is half the male's portion. The daughter seises the court of Article 4 requesting the distribution of the estate. If the court applies Article 12 by the book, then it could proceed to the distribution of the building situated in the Member State in equal portions and disregard the building located in the third State. This would be to the detriment of gender equality, since *ex hypothesi* the courts of the third State would adjudicate to the son at least two thirds of the building located there.[19] If the court of the Member State does not apply Article 12 and gives a ruling also covering the building located in the third State, the decision would probably not be recognised and the result would be the same. It must be noted that one faces the same impasse also in the event of the basic ground for application of Article 12, namely that no foreign decisions are recognised in the third State when such decisions concern immovable property located there. It thus seems that Article 12 offers no solution in the precise case where the problem is most acute. This is examined below (III), since it touches the powers of the court seised, i.e. the legal consequences of Article 12.

d) – Some conclusions – The only situation in which Article 12 serves its purpose is where the third State of the location of the assets does not recognise foreign courts' jurisdiction to hear disputes relating to such assets (practically always immovable property); and where, for this reason, it is expected that the decision of the court seised on the basis of Articles 4 or 10 para 1 will probably (if not certainly) not be recognised in that third State. Even in such a case, however, as well as in the event that the decision of the court of a Member State is liable to run counter to the public policy of the third State, the limitation of proceedings under Article 12 does not seem capable of contributing to the realisation of justice in the individual case, as perceived in the legal order of the Member State court seised.[20]

e) – (i) In relation to the party's request: de lege ferenda – Three further conclusions can be derived from the above interpretation, two of which *de lege ferenda.* First, if Article 12 applies as such only with regard to immovable property located in a third State, its application should not depend on the request of any of the parties. The character of the jurisdiction of the courts of a third State to hear disputes relating to immovable property located in its territory is not altered depending on whether it is invoked or not by a party to a dispute before a court of

[17] E.g. the one applied by Greek courts to Greek Muslims.
[18] See for example article 1813 para 3 of the Greek Civil Code.
[19] 'At least', because if the court of the third State took into consideration the distribution already effected in the Member State, it would adjudicate to the son $^{5}/_{6}$ of the building located there.
[20] See above under *c).*

a Member State. And the concern not to give judgments expected to remain unenforced is of public interest and should not be left to the initiative of private parties. Second, this should also be the case not only in relation to the defendant's right under Article 12, but also with regard to the procedural agreements of the parties under Articles 5, 7 and 9. In other words, whereas Article 12, as it stands, does not apply in the event of prorogation, due precisely to the requirement of a request by one of the parties,[21] the proper *de lege ferenda* solution should be that the limitation imposed by Article 12 applies even in the face of an (explicitly or tacitly) expressed contrary wish of all the parties.

(ii) In relation to the party's request: de lege lata – The second conclusion deriving from the fact that Article 12 applies as such only regarding immovable property located in a third State, is related to the time at which the defendant must raise the relevant defence: the law of the third State – as well as the localisation of the assets of the estate there – is *ex hypothesi* known or deemed to be known by the defendant already at the time of the initiation of the proceedings before the Member State court, thus the relevant defence must be raised upon appearance. Furthermore, given that the Article 12 defence is similar to the motion to dismiss due to lack of jurisdiction, its procedural treatment should be the same as that reserved to the challenge of Article 9 para 2:[22] the request under Article 12 must be raised prior to any defence as to the substance.[23]

III Legal Consequences

The adoption of the condition of the party's request seems to be due to the fact that the European legislator had in mind an application of Article 12 much wider than the one proposed in the present analysis. This seems to be also the reason justifying the shaping of the legal consequences of this provision. Article 12 provides that, if its conditions are met, the court seised may decide not to rule on the assets located in a third State. Consequently, first, as it derives also from the heading of the Article, the object of the limitation is not the jurisdiction of the court but the subject matter of the proceedings. The courts of the Member State remain competent to rule on the assets located in the third State, but they just elect not to do so. Second,

[21] See above under *b).*

[22] Article 9 establishes jurisdiction, based on appearance, of the courts of a Member State whose law had been chosen by the deceased – a national of this Member State – to govern their estate. This Article reads as follows:
1. Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.
2. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction. In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.

[23] This is because Article 9 Successions Regulation should be applied on the basis of the principles developed for Article 18 Brussels Convention and which are still good law for the application of the relevant provisions of Brussels I and Ibis Regulations. See ECJ 24.6.1981, *Elefanten Schuh,* 150/80, ECR 1671 also ECJ 24.10.1981, *Rohr,* 27/81, ECR 2431·31.3.1982, *G.H.W. v G.J.H.,* 25/81, ECR 1189 14.7.1983, *Gerling,* 201/82, ECR 2503.

the limitation is not mandatory for the court but discretionary. This is reasonable, if one bears in mind the reasons which, in the European legislator's view, could justify the limitation of the proceedings. However, if one admits that the only such reason is in reality the exclusive jurisdiction of the courts of the third State then it would be reasonable that the court be *obliged* not to rule: when the third State provides for the exclusive jurisdiction of its courts to hear disputes relating to rights on the object of the enforcement, the court of the Member State should be obliged, not just entitled, not to rule on such assets. An interpretative correction of the provision towards this sense would be *contra legem.* Nevertheless, it is probable that the courts will impose such an interpretation in practice, making without exception a systematic use of the power offered to them under such circumstances.

However, if it appears reasonable, in the event that the conditions of Article 12 are met, that the court seised is obliged not to rule on assets located in a third State, then there is an autonomous interest in making an effort to understand why the legislator chose instead to grant to the judge just an option. However simplistic it seems, it is not improbable that the introduction of Article 12 in the final draft of the Regulation without any particular preparation is simply due to the jurisdictional vertigo caused by the imperialism of the bases for jurisdiction; an imperialism that the purpose of Article 12 was to limit, admittedly cowardly and awkwardly. In front of the established will to extend the jurisdiction of the courts of the Member States up to its outer limits, it seemed that a general limitation be needed, a general clause, instead of a careful case-by-case delimitation of the ambit of each of the bases of jurisdiction provided in the Regulation. But then again, the generality and vagueness of the limitation imposed a softening: not an obligation but discretion; not a lack of jurisdiction but just 'non-ruling'.

All these conceptual nuances could be meaningful precisely in those specific cases which Article 12 cannot deal with: where the public policy of the court of the Member State is in conflict with the public policy of the third State. Taking the example of the conflict between gender equality and sons' precedence over daughters,[24] the only solution that could lead to a judicial decision fitting in the European concept of justice is the following: to adjudicate to the daughter the whole building lying in the Member State of the court seised and to the son the whole building located in the third State. Even if the enforcement of such a decision in the third State offends that State's public policy, its non-recognition in combination with its acknowledgment by the court of the third State can lead that court to give a second decision with the same result: to adjudicate the whole building lying in the third State to the son. It could be said that, taking the vagueness of the letter of Article 12 into account, there is enough interpretative room for the European judge to proceed to such weighing within a global vision of the estate as a whole, despite its split depending on the localisation of its assets, and in the light of the fate of the assets located in the third State in accordance with that third State's law.[25] Such a view is pragmatic and must be approved. But the question remains: if this, at the end of the day, is the purpose of Article 12 then why is it not said?

[24] See above under II 2 *c).*
[25] See also A. Bonomi (n 6) art. 12 n°14-15.

Articles

Ildikó Németh*

The Successions in Europe

A Contribution to the Classification and Unification of the Succession Systems in Europe

I Alea Iacta Est?

As it is evident, the expression *ius commune* refers to the Romanistic-Germanic legal family which was developed in the 12th and 13th century in Western Europe under the direct influence of Roman law, canon law and customary law. It is less-known that the English translation of this Latin term is 'common law' which, however, refers the Anglo-American law that is totally different from its continental homonym. What is more, today in Europe we are witnesses to the emergence of a new *ius commune* under the aegis of the European Union.

These different concepts of *ius commune* clearly show that, despite the basically different legal traditions in Europe, there is a recurring desire for some sort of unification in law. The experiment to unify material law directly failed, but managing conflicts between different legal traditions with the tools of private international law proved to be an acceptable solution.

Nowadays the most recent development in the field of private international law is the establishment of the 650/2012/EU Succession Regulation.[1] This is an outstanding work and an excellent example of bringing fundamentally different legal traditions together. On the occasion of its entry into force, in the present study we will compare the European legal solutions in the field of succession law as the incarnations of the cultural heritage of the legal traditions of European countries. We are aware of the difficulty of this task. Such authors as Pintens have already explained that 'the law of succession is, as it were, a part of a country's cultural goods – like its monuments and museums'[2]. This statement, according to Marius J. de Waal, has two

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1 European Parliament and Council Regulation 650/2012/EU on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107 (European Succession Regulation).

2 W. Pintens, 'Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts' 1 (2003) Zeitschrift für das gesamte Familienrecht 329-331, cited in Kenneth GC Reid, Marius J. de Waal and Reinhard Zimmerman, *Exploring the Law of Succession – Studies National, Historical and Comparative* (Edinburgh University Press 2007, Edinburgh) 3.

implications: a legal comparison cannot be successful because the law is too firmly embedded in local culture and customs, and therefore comparison can be carried out only at 'micro-level'. Besides, de Waal comes to the conclusion that harmonisation in the field of succession law is not desirable because that would end up in some loss of cultural goods.[3]

Alea iacta est? The European Succession Regulation took effect from the 17th of August 2015. We can no longer circumvent examining the core and substance of the different European succession regimes. By fulfilling this task, we will use the famous set of categories called 'stylistic elements' as described by Zweigert and Kötz.[4] Obviously, this is not the only set of categories and it is far from being the best, but this list of 'stylistic elements' is quite comprehensive and practical, which form sufficient virtues for our purposes. With their use, we seek to arrange the mass of different legal rules in an understandable order. What we want is to understand the differences in the legal traditions of the European countries in a special field of civil law, namely in succession law. We carry out our examination along the lines of the legal families established by Zweigert and Kötz, namely the common law countries, the Nordic countries, the Romanistic legal family, the Germanic and the (Post-) Socialist one. However, many years have elapsed since the creation of the legal families; we find their classes in essence still valid to reflect the existing differences of the legal systems in European countries adequately. (Certainly we cannot deny that these legal families are somewhat outdated and cannot be clearly delimited from each other.)

In Hungary, one of the most outstanding contemporary scholars, Professor Burián, claims that those national private international codes which have a long history, theoretical grounds and are verified by practice are being frittered away and are being replaced by uniform Union conflicts of laws that are influenced by – often opposing – political interests, the building blocks of which are only loosely fitted together by general principles determining the direction and method of legislations[5]. Paul Terner more specifically states that the harmonisation of the law of succession is not only directed towards finding the best legal solution, but also towards finding a politically feasible solution.[6] We would like to reflect on these opinions, since nobody doubts that politics play a primordial role in the EU. However, we would like to verify our supposition that cultural background, historical origins, religious practices, etc. are even more important factors than the current political state of affairs.

[3] Marius J de Waal, 'A Comparative Overview' in Reid, de Waal, Zimmerman, *Exploring the Law of Succession – Studies National, Historical and Comparative* 3.

[4] K Zweigert, H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998, Oxford) 71.

[5] Burián László, 'Európai kolliziós jog: Korszak- és paradigmaváltás a nemzetközi magánjogban?'(2012) 11 Magyar Jog 695-704.

[6] Paul Terner, 'Perspectives of a European Law of Succession' (2007) 14 Maastricht Journal of European & Comparative Law 147-178.

II Historical Development

1 The Difference in Legal Development

Zweigert and Kötz state that historical development is one of the main elements that determines the specificity of a legal system. In our view, it is not always like that – especially not in the field of succession law.

From the historical point of view, one may easily draw a line between the *common law countries* and the continental ones. The distinct historical development of their legal culture is obvious; the geographical boundaries make that more evident. English common law consists of case law, equity law and statute law, in which case law has the biggest quantity and statute law the most importance. In other European legal systems, case law exists somewhat while stress is on the written sources of law. In the field of succession law, the main characteristic of common law is the institution of the *trust,* used by the administration of the estate. That has medieval roots typical of the common law countries.

The *Nordic Countries,* namely Denmark, Finland, Iceland, Norway and Sweden, are undoubtedly bound together with their unique history, as a result of which it is obvious that they differ from other European countries with their social, cultural, political and commercial ties. In the second part of the 19th century, Denmark, Norway and Sweden even begun to cooperate on legislation – the two remaining countries could only join after the First World War for at the beginning Iceland was part of Denmark and Finland was a Grand Duchy of Russia. This cooperation between these countries ended up in nearly identical acts in such areas as maritime law, trademarks, commercial registers, cheques and bills of exchange.[7] In the field of succession law they remain separated; however, according to their legislation these countries can be divided into two groups: the Western Nordic countries (Norway, Denmark and Iceland) and the Eastern Nordic countries (Sweden and Finland). To reach common ground between themselves with the 1934 Nordic Convention[8] they worked out private international rules on succession matters.[9]

The *Romanistic legal family,* where it is easy to reveal the influence of the French Code Napoleon, needs no explanation, either. In the Netherlands, Belgium and Luxembourg this influence is without any doubt; some sort of reception can be identified in Italy, Spain and Portugal. The Code Napoleon was based on the concept of equality in the eyes of the law, in terms of private property, freedom of contract and the freedom to work in an occupation of one's choice; it strengthened the patriarchal family and refused to have any religious content. It was designed to be so clear as to be understood by the layman and aimed to be accessible to anybody. It was intended to be complete, logically arranged and based on experience.[10]

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[7] Severin Blomstrand, 'Nordic Co-operation on Legislation in the field of Private Law' (2000) 39 Scandinavian Studies in Law 59-77.

[8] *Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden as revised by the intergovernmental agreement between those States of 1 June 2012.*

[9] Torstein Frantzen, 'Reforming the Norwegian Inheritance Act' in Torstein Frantzen (ed) *Inheritance Law – Challenges and Reform, a Norwegian-German Research Seminar* (Berliner Wissenschafts-Verlag 2013, Berlin) 25-34.

[10] André Tunc, 'The Grand Outlines of the Code' in Bernard Schwartz (ed) *The Code Napoleon and the Common Law Word* (The Lawbook Exchange Ltd. 1998, New Jersey) 22-33.

The *Germanic family* is the one which shows the elements of the Pandectist influence with its clear-cut theoretical concepts. It mainly covers the German-speaking countries of Germany, Austria and Switzerland. The institution of *parentela* or succession order, which derives from Pandectist theory, appears in the succession regimes of these countries.

The question that remains refers to the classification of the *Post-Socialist Countries.* Regarding their historical aspects they seem to form a separate legal family but, from a holistic comparatist's point of view, after the disappearance of the Socialist legal family they instead lie in *'a state of flux'* because, having overcome the socialist era, they are all developing individually. That encourages us to conclude that common historical development is not always an unequivocal decisive element of distinction among legal families.

A good example for that is the historical development of the Hungarian legal system, which can be categorised into different legal families according to historical periods. Until the beginning of the 19th century it was a customary legal system, similar to common law, although it was influenced by the Pandectists as well. In the 20th century the socialist impact was very clear. By now it has become quite difficult to classify it under its historical features since it developed its own legal characteristics as well.

2 The Historical Development of the Hungarian Legal System

We could state that the Hungarian legal system is 'hybrid' hence 'not easy to put (it) in the right family' and '(it) is in the process of moving towards a particular legal family, (...) extremely doubtful at which point of time the change of family is complete, and may not be possible to fix upon an exact moment'.[11]

The basics of the present Hungarian succession law can be found in the written but never royally assented and promulgated code called the Tripartitum. It is a systematic compilation of the existing customary law from 1514. It successfully preserved and summarised the existing private law of the nobility but at the same time it caused the development of law to be frozen for centuries.[12]

The provisions were basically intact until the adoption of the revolutionary acts of April 1848. Those acts were created during the Hungarian war of independence against the Austrian Empire. They aimed at creating a democratic political system by establishing equality in the eyes of law. In succession law, *successio universalis* was introduced a principle which was taken from Roman law. In 1852 the provisions of testamentary succession were also established.

After the revolution was defeated by the Habsburgs with the aid of the troops of the Russian tsar in 1849, the Austrian Civil Code (ABGB, *Allgemeines Bürgerliches Gesetzbuch*) was introduced in the Hungarian territories. That brought the institution of the reserved portion into the Hungarian succession law.

[11] When we call it a 'hybrid system', we use the term of art of Zweigert, Kötz (n 4) 72-73.
[12] Petrik Béla, 'A Hármaskönyv 500 éve' (2014) 11 Magyar Jog 662-665.

By 1861 Hungary had gained some judicial autonomy from Austria and the Provisional Rules of Administration of Justice were worked out. These rules were approved by the parliament and Franz Josef also assented to them but neither the Parliament nor the monarch did so in accordance with the constitutional rules and so they had not become legal rules. They were applied as customary law until the Civil Code of 1959 entered into force.

The Provisional Rules party restored the previous, customary law-based Hungarian legislation without the outdated feudal rules and, with a partial reception, took over the modern rules of the Austrian civil code and the land registry provisions which suited the economic conditions of that time.[13]

In succession, through the Provisional Rules, a specific legal institution was introduced, namely the *succession according branches ('ági öröklés')* which had its roots in the feudal legal system. This still existing peculiarity of Hungarian law made a difference between estates that had been gained by the deceased through succession and those through other forms of acquisition. In the event of intestacy, where no descendants were extant, the surviving spouse could inherit that estate which had been gained by the deceased through other forms of acquisition. The estate received through succession must remain within the family of the deceased and therefore it reverts to the branch of the family from which it came.

Although the 19th century was the 'age of codification', in Hungary the attempts were unsuccessful in many fields. However, if Codes were created, in most cases they were drafted to a very high technical standard by one of the leading professors.[14] Zweigert and Kötz rightly pointed out that 'Several drafts for a Hungarian Civil Code were worked out based on German law, and although they never officially became law, the courts treated them as if they had.'[15]

It was in the mid-20th century when the socialist influence caused Hungary to have a written Constitution (1949) and Civil Code (1957) – these acts were the first general codifications in these fields of law. During that time private ownership was restricted, which resulted in the range of property subject to succession being narrowed. After the fall of the socialist regime these restrictions were demolished; private ownership was fully acknowledged and a growing demand appeared for a new Civil Code that reflects the actual social and economic situation in Hungary and its new basics. The new Civil Code was passed in 2013 and, during its creation, current judicial practice, as well as new modern European trends, was taken into account. That is true for all books of the Civil Code with regard to succession law.[16]

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[13] Attila Harmathy, 'On the Legal Culture of Hungary' Legal Culture and Legal Transplants, Electronic edition of the national reports presented to the XVIIIth International congress of Comparative Law (2011) Volume 1 – Special Issue 1, Article 13, 342-361; <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/19/82> accessed in 20 April 2015.

[14] Like the Hungarian *1875. évi XXXVII. törvénycikk, kereskedelmi törvény* (Act XXXVII of 1875 on Act of Commerce) – was still in force after 1990.

[15] See Zweigert, Kötz (n 4) 154.

[16] Vékás Lajos, *Öröklési jog* (Eötvös József Könyvkiadó 2008, Budapest) 11-12.

III Distinctive Mode of Legal Thinking

According to Zweigert and Kötz, the typical mode of legal thinking is also a strong distinguishing feature of a legal system. We think that, in the succession laws of the EU Member States, the best way to observe this attribute is to look behind their probate procedures. In our view, the type of the authority which proceeds in a succession matter is itself a very relevant characteristic element, one that can help us to grasp the differences between the legal families.

1 The Nordic Countries

Taking the Nordic Countries, we can see that in these countries probate is an out of court procedure in which it is up to the beneficiaries themselves to settle the succession. If they cannot do that, a special person, an administrator of the estate and/or an estate distributor can be appointed by the court to solve their case. In *Sweden*[17] and *Finland*[18] the system is the following:

The *administrator of the estate* is generally but not in every case a third party, who acts under the supervision of the court. When appointing this person, the court takes the relevant wishes of the beneficiaries into account. The administrator has the knowledge and understanding to fulfil their duties but are not necessarily a lawyer – however, in most cases they are legal professionals. The administrator has the responsibility of drawing up an inventory, representing the estate towards third parties, paying and recovering debts, making decisions on payments of debts, sharing out the estate and settling the succession. They report to the beneficiaries as soon as they have prepared the estate inventory or it is possible to distribute the estate.

The *estate distributor* is appointed at the request of the beneficiaries, but, when no distributor has been nominated at the wishes of the parties, it is not excluded that an executor of a will carries out the function of this estate distributor. They do not need to be a lawyer either, but they must have the knowledge necessary to proceed in the actual case. They have to solve the material legal questions of the succession and distribute the estate. They accomplish their duties by making a decision regarding the distribution of the deceased's assets. This decision is valid if no beneficiary contests it before the court.

2 The Latin Civil Notarial System

In Member States having the Latin civil notarial system, mainly in France, Belgium and Luxembourg, where the estate includes immovable property the contribution of a notary is obligatory for the probate (it is also recommended for movable property). The invocation of

[17] Ferid, Firsching, Dörner, Hausmann, *Internationales Erbrecht,* (Verlag C.H. Beck, München) Rnz. 52-61; Swedish *Ärvdabalk* – Inheritance Code (1958:637) Chapter 18-23.

[18] Ferid, Firsching, Dörner, Hausmann, *Finnland,* Rnz. 213-243; Finnish Code of Inheritance 40/1965, Chapter 18-21.

a notary takes place in uncontested cases; in an unsettled case the parties certainly may go to court.

In *France*[19] notaries are not bound by competency rules – beneficiaries turn to someone they trust, so they are a bit like a 'friend of the family'.

During probate, the notary draws up a list of the people entitled to an inheritance and their respective rights, as well as an estimated inventory of the deceased's estate including the assets of the deceased and their liabilities. They are the one who completes the mortgage and tax formalities in connection with the death.

They certify the inheritance rights of the heirs in a notarial deed called *acte de notoriété.* This deed is drawn up on the basis of official documents of the case (certificate of deaths, marriage certificate, will, agreement as to succession, matrimonial property agreement) and the statements of the heirs, who are allowed to prove their capacity by any means. This notarial deed is suitable for officially proving the rights of the heirs and legatees, e.g. for the purpose of registering rights in land registers, although the notary is not performing a judicial function and their deed does not have a *res judicata* effect.

The procedure of the probate is not regulated at all. For instance, the notary does not have to summon *ex officio* all the interested parties and it is, without any prior notice, up to the beneficiary to act and to bring an action before a court if he or she feels that their right was overlooked. This system therefore also wants to solve problems primarily out of court and relies on the autonomy of the persons.

3 The Post-Socialist Countries

A more regulated system is the one that we can find in some Post-Socialist countries such as *Hungary,*[20] *Czech Republic*[21] and *Slovakia*[22]. In these states the notaries are the ones who proceed in a probate but their functions are very similar to courts. They are bound by procedural and especially by competency rules; they are impartial, they summon the beneficiaries and they deliver a decision to close the procedure, which has similar effects to court decisions and which can be appealed before court.

However *Austria*[23] is a Germanic country we would tend to include with this type of notarial system which performs judicial functions. This is because in Austria, a court of first instance proceeds in the inheritance procedure and technically it is the one that closes the probate by a vesting order; however, in the course of its procedure, it appoints a notary as a judicial administrator who, in practice carries out the main procedural acts. The notary is the one who

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[19] Ferid, Firsching, Dörner, Hausmann, *Frankreich,* Rnz. 303–313; French 'old' Civil Procedure Act – *Code de procédure civile* Arts. 907-1002; French Civil Code Arts. 720-842.

[20] See Hungarian *2010. évi XXXVIII. törvény a hagyatéki eljárásról* (Act XXXVIII. of 2010 on probate).

[21] See Ferid, Firsching, Dörner, Hausmann, *Tschechische Republick,* Rnz. 118–135; Czech Civil Procedure Act No. 99/1963.

[22] See the following homepage: <http://www.successions-europe.eu/en/slovakia> accessed 20 April 2015.

[23] See Austrian law on judicial administrators, Bundesgesetz vom 11. November 1970 *über die Tätigkeit der Notare als Beauftragte des Gerichtes im Verfahren außer Streitsachen (Gerichtskommissärsgesetz – GKG).*

draws up an inventory of the estate. From the transmission of the estate till issuing a vesting order, the heritage is a *hereditas iacens* i.e. it is considered as lying in abeyance, which justifies the appointment of the notary as well.

4 The Germanic Countries

Finally we have to mention those Member States in which probate is performed by courts in a classic sense. That is typical in Germanic countries, such as Germany.

In *Germany*[24] special courts deal with succession matters; the inheritance procedure comes under the material jurisdiction of the probate court called *'Nachlassgericht.'* This court is bound by strict procedural rules. It protects the estate, decides who the heirs and legatees are and upon request it issues certificates of succession or similar certificates. When it is requested, the court divides the joint property of the heirs and shares them out the estate.

Estonia[25] could be classified as a Post-Socialist country; nevertheless, in its probate procedure, we can find a lot of similarities with Germany. In Estonia it is also the court that handles succession matters. The court is competent to deal with the estate of the deceased; it decides on requests relating to disputes, on sharing out the estate and on establishing the heirs, legatees and other beneficiaries under the general rules of civil procedure. Notaries can be involved in probate as well, but their functions are less decisive since they are only competent to certify the acceptance or renouncement of the succession, making the inventory and issuing the certificate of succession. This certificate is authentic, develops *bona fidei* acquisitions of rights and it is presumed to be valid as long as it is not contested before court successfully.

As we have seen, the traditional boundaries of legal families created by Zweigert and Kötz are blurred. The examination of probate procedures leads us to the observation that some countries need to be reclassified.

IV Unique Legal Institutions

Legal institutions, according to Zweigert and Kötz,[26] are so characteristic that they form the third stylistic element in our study. As examples of these institutions we take the institution of the reserved portion, the inheritance right of the surviving spouse and clawback. We investigate their nature, appearance in the national legal systems and try to reflect on them.

[24] See Ferid, Firsching, Dörner, Hausmann, *Deutschland,* Rnz. 2644–2681; German Law *'Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit'* from 17.12.2008.
[25] See Ferid, Firsching, Dörner, Hausmann, *Estland,* Rnz. 204–208.
[26] Zweigert, Kötz (n 4) 71.

1 Reserved Portion

The individualist anthropology of the Anglo-Saxon culture and the almost unlimited natural right of ownership is expressed by the succession law in the way in which, in *England, Wales and Northern Ireland,* the reserved share of it does not exist. That means that no-one, not even one of the deceased's next of kin, can automatically have a part of the estate. However, the case law makes it possible for the surviving spouse or the child of the deceased, or anyone else who immediately before the death of the deceased was being maintained by the deceased, either wholly or partly, to submit a request before court. This person can claim that the deceased did not properly take care of their maintenance and the court – having examined the reasons for the maintenance –may order for their benefit payment out of the net estate or transfer of property.[27]

In *Germany,* if descendants, the spouse or registered partner or the parents of the testator are excluded by the disposition of property upon death from the succession, they can demand a reserved share from the heirs. The extent of the reserved share is half of that portion which would be due in the event of intestate succession. (For parents and remoter descendants, it is necessary for their entitlement to the reserved share that there should be no closer relative who would exclude them in the event of intestate succession.)[28] They do not have to prove any financial dependence or expectation from the deceased person; it is possible for them to require this reserved share simply upon the existence of kinship with the deceased.

The regulations in *Hungary* are similar to the German ones. The descendants, surviving spouse or registered partner and parents of the deceased (if the deceased has not left any descendants) are entitled to a reserved share. It is one third of the hereditary portion under the statutory inheritance. The reserved portion is a debt claim for part of the financial value of the estate. If the surviving spouse or registered partner received by intestate succession a *usufruct* right, their reserved portion is the restricted *usufruct* right on their inheritance.[29] (Under the previous Civil Code of Hungary which was in force until 15 Mach 2014, the proportion of the reserved share was the half of the property.)[30]

Spain seems to be exceptional. There, succession is regulated by different sources of law, in the sense that, in addition to the civil code, the law of different autonomous communities exist, too. This is the reason that the institution of reserved share is determined in so many ways. Legal solutions are extremely diverse: in some autonomous communities the extent of the reserved share is significant, while in others it is almost nothing.[31]

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[27] Ferid, Firsching, Dörner, Hausmann, *Groß-Britannien,* Rnz. 229–232.

[28] German Civil Code, *Bürgerliches Gesetzbuch* 2303 §, 2309 §.

[29] Hungarian *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code), 7:75-82 §§.

[30] Previous Hungarian Civil Code, *1959. évi IV. törvény a Polgári Törvénykönyvről* (Act IV of 1959 on the Civil Code), 661-672. §§.

[31] The reserved portion in Spain is generally established by the Civil Code but in Aragon, the Balearic Islands, Catalonia, Navarre, Galicia and the Basque Country by the laws of the autonomous community in question determine different portions.

In *Finnish and Swedish* law the surviving spouse is not entitled to a reserved share, only the descendants can assert such a right. In both countries the descendants are treated as joint heirs and they receive the half of the statutory inheritance portion.[32]

2 Inheritance Right of the Surviving Spouse

Another significant and characteristic institution in intestate succession matters in Europe is the inheritance right of the surviving spouse. This right competes with the inheritance right of the relatives and it aims at securing the widow's position in society. To achieve this aim, different solutions are to found in the national legal systems.

a) Some legal systems stipulate that the surviving spouse should receive maintenance *(Unterhaltsprinzip).* It is the case in South Africa, for example.[33]

b) In other legal systems the surviving spouse obtains *usufruct,* namely the right to use the estates that comes into the legacy of the relatives of the deceased *(Nutzungsprinzip).* One can recognise the elements of this solution e.g. in France, the Netherlands and Hungary.

In *France* the surviving spouse previously received in most intestate succession cases a *usufruct* only on a given portion of the estate. That has historical reasons: when creating the French Civil Code local customary provisions were mostly taken from northern France, according to which the surviving spouse should be insured by matrimonial assets especially through their share from the common matrimonial property. Namely, in the event of one of the spouses' death, the matrimonial and succession matters had been divided. Having settled matrimonial matters, the questions of the succession could be solved. In practice that meant that – unless the division of matrimonial assets were regulated otherwise by the spouses – first the surviving spouse would get 50 % of the whole property as the distribution of matrimonial property and only the other 50 % would be the subject of the succession.[34] Today, in succession matters, when the spouses' common children or descendants are at hand, the surviving spouse has an option between the *usufruct* on the whole estate and the ownership of one quarter of it.[35] Where the surviving spouse inherits together with other relatives they cannot choose and would simply get ownership of a special part of the property depending on the quality of the other relatives.[36] However if later the spouse, the heirs or other interested parties change their mind, they have a possibility to request the conversion of the *usufruct* into a life annuity.[37]

In *the Netherlands,* the situation is quite unique. The surviving spouse inherits in first degree with the descendants of the deceased. However if both the widow(er) and children are statutory heirs, the widow(er) receives all the estates of the deceased, including its debts and

[32] Swedish *Ärvdabalk* – Inheritance Code (1958:637) Chapter 7 Section 1; Finnish Code of Inheritance 40/1965, Chapter 7 Section 1.
[33] See Maintenance of Surviving Spouses Act 27 of 1990 of South Africa.
[34] Ferid, Firsching, Dörner, Hausmann, *Frankreich,* Rnz. 76–83.
[35] French Civil Code Art 757.
[36] French Civil Code Art 757-1 – 758.
[37] French Civil Code Art 759–762.

obligations. The children only acquire a right for a money claim, which they can require upon the insolvency of the widow(er), by his or her death or at a different time determined in the will of the deceased. As long as the children cannot realise their money claim, the spouse has a special *usufruct* right. The Dutch law however gives the opportunity to the widow(er) to deviate from this provision by a notarial declaration in which they choose another way of intestate succession, namely inheriting in equal shares with the children.[38]

In *Hungary,* until March 2014 the *usufruct* right of the surviving spouse was clear.[39] They inherited the *usufruct* of all property not otherwise inherited by them. The *usufruct* existed as long as they did not remarry. Descendants, however, could request the limitation of spousal *usufruct* to the degree that the limited *usufruct* provided for the needs of the spouse, in consideration of the property he or she had inherited, his or her own property and the earnings from his or her labour. Besides this, either the spouse or the descendants had the right to request the redemption of the spouse's *usufruct*. In that case the widow(er) was entitled to a share of the redeemed property which was equal to a child's portion.

c) This latter solution of Hungarian law, namely that the surviving spouse receives by redemption a child's portion from the estate, leads us to the third above mentioned category, when the widow inherits a part of the estate *(Teilungsprinzip).*[40]

This type of regulation can be found in a clear manner in the *Czech* legislation, where the surviving spouse is a joint heir with the descendants of the deceased; his or her inheriting position is equal to that of the children of the deceased.[41] However, in the absence of descendants, he or she cannot be the sole heir; he or she then shares the estate with the second degree of successors (also with the parents of the deceased and other persons who were being maintained by the deceased one year before his death).[42] To supplement this allocation, the surviving spouse has a right to active wage claims and income claims.[43]

The current Hungarian Civil Code foresees a similar solution. It treats the surviving spouse as a child who inherits an equal share with the children – however, in addition to that, he or she receives a *usufruct* on the marital home and household, too. In the absence of descendants, he or she inherits together with the parents and gets half of the estate plus the marital home and household. She is the sole heir if there are neither descendants nor parents.[44]

In *Germany,* the regulations are somewhat complicated. Here the spouse's share from the estate depends on the degree of *parentela* or succession order with which the spouse inherits. If the heirs are descendants of the deceased (1st *parentela*), the widow(er) gets one quarter of the estate. This portion is half upon inheriting with parents and their descendants (2nd *parentela*)

[38] Dutch Civil Code Art. 7:13, 7:18.
[39] Previous Hungarian Civil Code 615-616. §§.
[40] Ferid, Firsching, Dörner, Hausmann, *Deutschland,* Rnz. 1546.
[41] Czech Civil Code Art. 473.
[42] Czech Civil Code Art. 474.
[43] Czech Labour Code Art. 260.
[44] Hungarian Civil Code, Art. 7:58-7:62.

or with grandparents together.[45] Next to this portion, the widow(er), when inheriting with the 2nd *parentela* or grandparents, gets the objects belonging to the marital household, as well, as a preferential benefit; if the widow is an heir with the 1st *parentela*, she has a right to these objects only to the extent that she needs them to maintain a reasonable household.[46] Moreover, the share of inheritance of the surviving spouse increases by an extra one quarter of the inheritance on the title of dividing the matrimonial property by reason of death of one of the spouses (unless the spouses had agreed to regulate their matrimonial property regime otherwise).[47]

d) We also have to mention the solutions of England and Wales because they do not fall under the above categorisation of *Unterhaltsprinzip, Nutzungsprinzip* and *Teilungsprinzip*. Their systems show a totally different legal institution for securing the situation of the surviving spouse. In the culture of *common law,* the estate normally is not transferred to the heirs but to a so-called 'personal representative' who is a trustee and their task is to administer the estate as a proprietor for the benefit of the heirs. This is a 'trust for sale', where the trustee (the personal representative) can sell, manage or distribute the estate. The trustee does not need to distribute the inheritance in cash; if there is an agreement between the beneficiaries then they can hand it over *in natura*.[48]

The relevant act foresees five groups of legal heirs: (1) the surviving spouse, (2) the descendants, (3) the parents, (4) the sisters or brothers of the whole blood and (5) distant relatives.[49] If there are neither descendants, nor parents, sisters, nor brothers of the whole blood, nor their descendants then the surviving spouse inherits the whole estate. It is a 'residuary estate', where the funeral and administration costs and inheritance tax have to be paid before the spouse gets the net estate.

Where the deceased has descendants besides the surviving spouse, the spouse inherits a fixed amount of 250 000 GBP,[50] personal chattels, and the residual estate is a trust administered by the personal representative and divided in two equal parts. One half is a statutory trust, where the beneficiaries are the descendants, and other one is a 'life interest' for the benefit of the surviving spouse.

Where the deceased has parents, sisters or brothers of the whole blood or their descendants besides the surviving spouse, the spouse inherits 450 000 GBP,[51] personal belongings, 'personal chattels,'[52] and the residual estate is divided in two halves. One of them belongs to the relatives and the other one to the spouse 'absolutely', so this time not as a 'life interest' trust but as a sheer right.

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45 German Civil Code Art. 1931.
46 German Civil Code Art. 1932.
47 German Civil Code Art. 1971.
48 Ferid, Firsching, Dörner, Hausmann, *Groß-Britannien,* Rnz. 135.
49 On the whole succession of the surviving spouse see: Administration of Estates Act 1925, Sec. 46.
50 Family Provision Act 1966, Sec. 1.; < http://www.successions-europe.eu/en/united-kingdom/topics/in-the-absence-of-a-will_who-inherits-and-how-much> accessed 20 April 2015.
51 Family Provision Act 1966, Sec. 1.; <http://www.successions-europe.eu/en/united-kingdom/topics/in-the-absence-of-a-will_who-inherits-and-how-much> accessed 20 April 2015.
52 Administration of Estates Act 1925, Sec. 55 (1) (x).

3 The Institution of Clawback

There is a very special legal institution which by its own nature provokes significant debates on the national law of the Member States. That is the so called 'clawback'. Its purpose is to protect the interests of beneficiaries who are entitled to a reserved share under the applicable succession law, *lex successionis.* Its conditions vary greatly depending on the material law of the Member State concerned. It enables the persons entitled to a reserved share *to claim the gifts made by the deceased during their lifetime* in order to ensure that the beneficiary receives his or her reserved share from the estate.[53]

In *Belgium* these rules, incorporated in the Civil Code (Art. 920-930), are quite general. The restoration of the gift can be claimed indeed thirty years after the death of the testator. The reserved portion is calculated on the basis of a fictive hereditary mass and includes not only the assets existing at the time of death but gifts given by the testator during his lifetime, too.[54] If the assets existing at the time of death are not sufficient to cover the reserved share, first the property included in testamentary dispositions has to be exhausted; only then it is possible to challenge the *inter vivos* gifts starting with the gift made most recently and following with the others increasingly longer ago.[55]

In *Germany* the clawback *(Pflichtteilsergänzungsanspruch bei Schenkungen)* is a right to a supplement from the *inter vivos* gifts made by the testator in the last *ten years* of his or her lifetime if the estate is insufficient to cover the claims for a reserved portion.[56] With spouses there is an exception – any gift which was made before the divorce is not to be taken into account. As time elapses the less of the value of the gift is to be taken into account. Namely, in the very first year the beneficiary is entitled to claim the whole amount of the gift; in the second year 10 % less; in the third 20% less and so on. There are various rules which have to be taken into account when determining the gifts which cannot fall under the clawback. For instance a gift given to discharge a moral debt is excluded from the clawback.[57]

The Civil Code of *Hungary* regulates the clawback under the provisions of the *'felelősség a kötelesrész kielégítéséért'*[58]. According to these rules, the dispensation or completion of reserved portions can be demanded first from the persons having a share of the estate. If the reserved portion cannot be satisfied from the estate, the recipients of gifts from a testator within *ten years* prior to his or her death are responsible for reserved portions, irrespective of the temporal order in which the donations were received. The share of responsibility of several persons is determined by the applicable value of their allocations. A person who lost an allocation without fault is not liable for a reserved portion. A recipient is responsible for

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[53] More on clawback see Annex 1 ('A Comparative Analysis of the Succession Laws of Member States of the European Union on the Issue of Clawback' by Professor R. Paisley) of the Consultation Paper CP41/09 of the Ministry of Justice of the United Kingdom published on 21 October 2009.

[54] Code Civil Belge Art. 922.

[55] Code Civil Belge Art. 923.

[56] German *Bürgerliches Gesetzbuch* Art. 2325.

[57] German *Bürgerliches Gesetzbuch* Art. 2329.

[58] Hungarian Civil Code 7:84. §, previous Hungarian Civil Code 669-670. §§.

satisfying the reserved portion up to the total value of their allocation. However, an heir entitled to a reserved share is responsible only up to the value of the allocation that exceeds their reserved share. (The Hungarian Civil Code is in force since mid-March 2014; it only changed the previous clawback rules in reducing the time limit from fifteen to ten years during which the reserved share can be required from a recipient.)

The *Spanish* Civil Code (Art. 636. to read with Arts. 806-822) creates a fictive hereditary mass which has to be taken as a basis for the reserved portions. It contains the estate of the deceased at the time of death and all the *inter vivos* gifts made by him or her. If a beneficiary does not receive their entire reserved portion, they may request its completion. The Spanish Civil Code does *not contain a special time limit* for raising such claims but the general provisions of negative prescription apply, which is 6 years for movables and 30 years for immovable.[59]

In the *United Kingdom,* the institution of clawback does not exist. As we read in the consultation paper[60] prepared on the opt-in to European Commission proposal on the European Succession Regulation, the UK was not very keen on this institution. Probably its suspicion and reluctance for this legal institution is why it finally opted out and did not participate in the European Succession Regulation, which was officially adopted in 2012. UK criticised clawback for making transactions insecure, for undermining the integrity of registers and the use of *inter vivos* trusts as a mechanism for estate planning and thus eventually causing legal uncertainty.

V EU Legislation & Private International Law: Beyond Statutes vs. Cases

With regard to the sources of law, Zweigert and Kötz made an elementary distinction between statutory and case law systems; however at the same time they admitted that this statute law/case law dichotomy was a bit exaggerated.[61]

This is justified by the fact that European succession regimes are essentially regulated by statutes. The clear domination of statutes and acts can be observed in each country. Even in England, next to case law we can find a lot of statutes, although they are not incorporated into one single act but create the corpus of the English succession law.[62] In other EU countries, the provisions of succession law are compiled in one Act; in the Roman, Germanic and Post-Socialist countries they are normally a separate part of the national Civil Code[63] while in the Nordic countries these matters are regulated in special acts.[64]

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59 Spanish Civil Code Arts. 1962-1963.

60 Consultation Paper CP41/09 of the Ministry of Justice of the United Kingdom published on 21 October 2009.

61 Zweigert, Kötz (n 4) 71.

62 The most important English acts in this field are the following: Wills Act 1837, Administration of Estates Act 1925, Intestate Estates Act 1952, Inheritance Act 1975, Wills Act 1963.

63 Examples for that are the French, Belgian, German, Austrian, Polish and Hungarian Civil Codes.

64 See the Swedish *Ärvdabalk* – Inheritance Code (1958:637); Finnish *Perintökaari* – Code of Inheritance 40/1965; Danish *Arvelov* – Succession Law No. 215 of 1963.

In this type of source of law, namely in the statutes, we can find a common basis for the European legal systems as regards succession matters. It is a very important conclusion because, with its assistance, the European countries could start to consider a uniform instrument that would meet the needs of European citizens moving in the continent from one country to another or even all around the world. However, we have to admit that at the moment it is impossible to create a single act which shapes the content of European succession law, because of the differences in legal instruments and the various traditions of the states. The best legislative solution for this situation is the use of the connecting factors of private international law. Private international law neither requires nor implies the unity of substantive or even procedural law between the countries but it satisfies the need to solve different cases using connecting factors or conflict of laws rules. For a legal practitioner these connecting factors give simple and plausible answer to the *questio iuris:* the practitioner is directed to the forum and to the substantive law which are the most appropriate to govern the specific case.

This private international law approach at the beginning resulted in memberships in bilateral and multilateral agreements On the one hand, it is worth first mentioning the 1961 Hague Convention on the form of testamentary dispositions.[65] It has been ratified by fourteen European countries. Five states acceded and five became members as legal successors of a former state. This Convention however was signed by only one European country.[66] On the other hand the Nordic Convention (that has already been referred to) as a multilateral agreement contains private international law provisions as well. These relate to succession matters, wills and estate administration in the context of Denmark, Finland, Iceland, Norway and Sweden.[67]

The latest solution is the already mentioned Union instrument, the 650/2012/EU Succession Regulation prepared to meet the needs of those citizens (and their heirs) who have estates in several countries. Unlike the international agreements in force, this Regulation touches not just some but almost all Member States[68] and additionally contains provisions regarding third states. We therefore find it quite appropriate to focus on it as a new international source of succession law, applied in full from 17 August 2015.

The 650/2012/EU Regulation determines in matters of succession the rules regarding jurisdiction, applicable law, recognition and enforcement of decisions, as well as the acceptance

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[65] *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.*

[66] It was ratified by Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, was acceded by Estonia, Ireland, Ukraine, Turkey, Moldova, became member it as legal successor of the former Yugoslavia: Bosnia & Herzegovina, Croatia, Montenegro, Serbia, Slovenia, was signed by Italy. (These data are available at the homepage of the Hague Conference on Private International law – <http://www.hcch.net>.)

[67] *Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden as revised by the intergovernmental agreement between those States of 1 June 2012.*

[68] Those Member States which are not bound by the European Succession Regulation are the following: United Kingdom, Ireland and Denmark by reason of the Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union as well as the Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, [2012] OJ C326/295, 299.

and enforcement of authentic instruments. What is more, it creates a European Certificate of Succession which will be a *sui generis* legal instrument for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. The Certificate will produce its effects directly in all Member States. It is presumed that it reflects accurately the elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate will be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate. The Certificate will form a valid document for the recording of succession property in the relevant register of a Member State.[69]

As we look at the history of the European Succession Regulation, we have to state that an unusually long time elapsed from its proposal made by the Commission in October 2009[70] until its acceptance by the European Parliament and the Council in July 2012. This reflects that the basic differences in the legal traditions in the matter of succession made it extremely difficult to finalise this instrument. It is not self-evident how to unify even the connecting factors of so many countries, either. Hard work needed to be done to find a solution that was acceptable to all Member States and all legal traditions. In that sense the European Succession Regulation could not be a full success, since the two Member States which have an opt-in possibility do not make use of it, as the United Kingdom and Ireland do not participate in the application of the Regulation.

VI Ideology

Ideology was that stylistic element under Zweigert–Kötz that served to separate the socialist countries from the others. Two decades after the collapse of the socialist era, this element no longer seems to be relevant. Nevertheless, in our opinion, we could regard this stylistic element as useful if we examined, under the notion of ideology, the anthropology of the legal systems, more specifically what is the relationship between the state and its citizen, how the state treats their people and what attitude do the citizens show. From this point of view one could distinguish three categories, the 'independent', the 'semi-independent' and the 'dependent' type of citizenship.

[69] See Chapter VI on the European Certificate of Succession of the European Succession Regulation.
[70] COM(2009)154 final, 2009/0157 (COD), Brussels, 14.10.2009.

1 Independent Citizen

The independent citizen covers that kind of individual whose financial decisions are not influenced by family relations. That would be typical in common law countries where, in the field of succession law, there is no reserved portion and matrimonial property regime does not exist; people are free to arrange their assets and they are not limited even by moral and legal expectations based on kinship.

2 Semi-independent Citizen

In some countries – mostly in the Romanist legal family and especially in France, Belgium and Luxembourg – people act in an active, autonomous way; we could say that they behave in an 'adult' manner when it comes to business and administrative matters. This type of semi-independent citizen stands up for their rights and acts if something is affecting them detrimentally. A typical example for that is the French probate, where the citizen monitors the arrangements of the notary and immediately starts a court procedure if they realise that a notarial deed was issued to his disadvantage. This type of self-determination leads the citizen to be aware of his legal options and obligations. In material succession law the assertive citizen's freedom to dispose of their succession is somewhat limited but at the same time their sovereignty is respected.

3 Dependent Citizen

The behaviour of the dependent citizen is totally different from the above ones. They rely on the assistance of a paternalist state, since the legislator supposes that they are unable to act on their own initiative. That would be typical in Hungary and Slovakia – probably because in those countries the people are used to the paternalistic interventions of the state, but we could perceive this phenomenon in Germany as well. Let us just take the probate again. In these countries, the court or the court-like authority acts *ex officio* and guarantees the protection of the interested parties by strict procedural rules, e.g. by the formal service of summons. Here the judicial system serves the citizens: it accomplishes the probate and informs them constantly on their rights and obligations. This type of citizen does not need to grow up, and act independently or autonomously because the state stands beside them, ready to intervene and assist when they might fall.

VII Concluding Remarks

From five aspects, we have seen the five stylistic elements whereby the legal traditions in succession law are quite different. Some similarities can be found and upon them some classification is possible but it always needs to be revised when we start to examine a stylistic element. For example, from a historical point of view, Estonia is a Post-Socialist country, but its

probate is nearly the same as the Germanistic solution. Since the Hungarian legal system during its historical development showed resemblance with common law countries, then it was under German influence and later belonged to the socialist countries, today it does not have such clear attributes that would let it be placed into one single legal family.

We have also seen how rich the European legal systems are when it comes to their succession regimes. Sometimes they have totally different solutions for the same problem, e.g.: how to hand over the estates of the deceased to the heirs and beneficiaries. This richness is a value which must be highly appreciated, since it forms part of the legal and 'cultural heritage' of Europe.

We therefore agree with de Waal's conclusion cited in the first part, in the sense that we also think that a harmonisation of succession law would end up with a loss of cultural heritage; nevertheless, we believe that in our modern mobile world in which people live in different counties and collect property in different states, the matter of international successions has to be solved in a satisfactory manner, which preferably can be foreseen by the testator themself. We consider that it is the task of the international private law to handle this complex issue.

Within the European Union, there have been attempts to unify the European succession regimes when experts had to face with this diversity of cultural richness; the stakeholders finally chose the instruments of private international law to achieve some unity in this field.[71] The politically feasible solution demanded by Terner in the first part has been achieved. The brand new 650/2012/EU Regulation is on the table. From the practice, soon we will see whether this Regulation can achieve unity in diversity or not.

However, we also have to consider Professor Burián's and Paul Terner's thoughts, namely that postmodern private international law is often influenced by different, sometimes even contradictory political interests, the elements of which are loosely fixed together by such general principles that could determine the path and method of legislation. We completely agree with this statement but we are more optimistic. We think that there exists a type of true and righteous politician who is not focussing on current affairs; but instead sticks to long-terms values and principles to organise public life. Acting in this manner, they have strong roots in the legal culture and in that way politics and legal culture are not separated from each other. Succession matters are part of the cultural heritage and as such they cannot be overlooked at the level of legislation and general politics.

[71] However we have to admit, that once it was succeeded in Europe to unify different succession regimes. Namely by creating Book Five (on the law of succession) of the German Civil Code the legislators had to harmonise the succession regimes in force in different parts of the German territories, such as the *ius commune,* Saxon Common Law, Prussian *Allgemeines Landrecht* and French law and more than 100 local regimes. See D. Leipold, 'Europa und das Erbrecht,' in *Europas universal rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends: Festschrift für Alfred Söllner* (2000) 647-649, cited in Reid, de Waal, Zimmerman (n 3) 5.

Henry Deeb Gabriel*

The UNIDROIT Principles of International Contracts as a Basis for Teaching Law Reform and Other Legal Skills in the Course on Transnational Law

I would first like to put this in context. Among the audience of teachers of transnational commercial law at a conference on the teaching of transnational commercial law, we do not usually question why we teach this subject. We assume its teaching is self-justifiable in contemporary legal education given the globalization of the economy, the law, and legal practice.

What I would like to suggest in this paper is that transnational commercial law is an essential aspect of a legal education although this may not be widely appreciated among all in the legal academy. This may be especially the case in the United States where recent moves toward less teaching of doctrine and more emphasis toward 'experiential learning' and preparation for the professional bar exams has created an environment that values the training in immediately useful skills for a domestic practice above the more long term focus on the education of professionals who can work in the global legal market.

Thus it may be incumbent upon those of us that teach transnational commercial law[1] to be able to justify its inclusion as an essential part of the curriculum. In this regard, I suggest that the teaching of the UNIDROIT Principles of International Commercial Contracts as part of the transnational commercial law course serves several purposes that justify it and the broader course as an essential part of the law school curriculum.

The UNIDROIT Principles not only are a basis for teaching the doctrinal elements of international commercial contracts, but they are also ideal for teaching the skills of legal harmonization, law reform, and the need for and how to make policy choices among competing possible rules. It is this whole set of skills that makes the Principles worth teaching as part of the curriculum.

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[1] What I say here should be equally relevant to this course's first cousins, comparative law and international commercial law.

When we envisage the content of a course on transnational law, we might start by noting that everyone seems to agree that we should cover the CISG.[2] This seems intuitive. It is widely adopted,[3] its usage in actual transactions has grown exponentially over the last 35 years, and it is pretty much transnational law personified.

I should also note that it is relatively easy to teach. It does not cover much. It does not deal with the more difficult and complex questions of finance and payment. It is written at such a level of generality that it is easy to cover the surface basics to at least give the students a general notion of scope and the problems for which they should be looking.

I suspect that the primary reason that we give for why we teach the CISG is that it is the law for a significant number of transactions and therefore the students need this knowledge to function as transactional lawyers in general.

At the same time, we all use the CISG as a study in comparative law.[4] It is a great tool for this, and the barriers of entry are low; all of our students will have knowledge of some relevant domestic law of contract and sale to use as comparison. For those that do not otherwise a comparative common law/civil law background, it is an excellent tool for introducing some basic comparisons between the traditions.[5]

But how good is the CISG as a tool for developing the skills for law reform and legal development? What I have found is that it is not very good for this. It is easy to use the CISG to show how compromises can be made and how generalities can cover a multitude of sins, but I am not sure it is a good tool to show what the law might aspire to be.

Let me suggest that the UNIDROIT Principles of International Commercial Contracts may be better suited as a model for the discussion of and preparing students for law reform. I am, of course, suggesting this within the context of a course on transnational commercial law. Certainly the Principles may be an important part of a comparative law program as well as an adjunct to the basic contract and commercial law courses.

Thus, although the Principles do not achieve the goal of introducing students to 'the law' in the same way that the CISG or the Cape Town Convention[6] would, as they are binding conventions and therefore positive law, the Principles may do a better job at introducing students to law development and reform outside the constraints of the compromises and political pressures that have directed many conventions and treaties.

In this respect, the Principles might be used both as an academic model on how one might make the policy choices in the creation of law, and also as an actual model for what those rules might look like if one were to draft a contract law regime. Thus, properly introduced and

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[2] United Nations Convention on Contacts for the International Sale of Goods, http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

[3] There are currently 83 parties to the CISG.

[4] If given time, and if we are ambitious, the CISG can also be used as a background text for statutory interpretation. We rarely have time in our courses to pursue this.

[5] Of course, the possibly more important comparative distinctions between Civil Law and Common Law property law rules are not covered.

[6] http://www.unidroit.org/instruments/security-interests/cape-town-convention.

discussed, the Principles may serve as model for the process of drafting laws as well as the substance of the drafted law.

As an example of this point, I have in mind the American Restatements of the Law, which have been produced on a variety of legal subjects by the American Law Institute since the 1920's. The Restatements have always been aspirational: they not only state what the law is at a particular time, but also have always provided aspirational rules that arise either because the existing rule was thought to be deficient or because there were conflicting rules[7] from which the better rule could be chosen.

Because the Restatements were and are drafted by the American Law Institute, a non-governmental organization that need not satisfy any political or industry pressures, they have generally been viewed as objectively neutral instruments that can be relied upon to set out the best rule based on the best policy. For this reason, they are often used by default by American courts.

Thus so with the UNIDROIT Principles. Of course, what I have said should apply to any soft law instruments that were created in the same disinterested and neutral way.[8]

This brings us to the point of discussing the Principles as a basis for teaching legal harmonization. The Principles are an excellent model for what they are being and likely to be used for in the future: regional harmonization. This occurs both directly[9] and indirectly through the influence of arbitration[10] in which their usage creates a slow accretion of acceptance among regional partners.

Are the Principles the best model for harmonization? It must be noted that the UNIDROIT Principles have had relatively little usage and impact since they were first promulgated in 1994. It might be argued that if the Principles were meeting an important need they would already be widely used. Since this is not the case, why should we consider it as a model for harmonization now?

Since this question has been posed by others, I think this question needs to be put in context. The reason for the small acceptance and usage of the Principles at this time seems to be based on two factors. First, they are not widely known by their potential users The second reason is that they are not real 'law' and therefore one might question why should they be used.[11]

To answer these concerns, I would posit that the real question is whether the Principles are an appropriate model for harmonization in and of themselves, based on the content of the Principles, and not their current usage. For if they become the new regional or international

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[7] The Restatements are grounded in American law, but with over 50 separate jurisdictions, there is plenty of latitude of divergence of rules.

[8] Conversely this would not apply to soft law instruments that are created by and for industry trade groups that favor the trade groups.

[9] The Organization for the Harmonization of African Business Law, a regional organization in West Africa, has embraced this model.

[10] This, of course, is the primary use of the Principles today.

[11] One must appreciate that the Principles can be used. Lawyers appreciate the difference between a choice of law provision and the incorporation of the Principles as terms to an agreement, and it is quite easy to choose the Principles as governing the contractual relationship if parties wish.

standards, either by custom and usage within commercial transactions or by direct adoption by a jurisdiction, both of these concerns disappears.

There are advantages that the UNIDROIT Principles have as a soft law instrument over a competing binding convention that make it in and of itself worth teaching and a model for regional harmonization.

It has been suggests that 'soft law' instruments, such as the UNIDROIT Principles of International Commercial Contracts, have been successful 'precisely because they are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on International Commercial Arbitration,[12] they are designed to be a unifying influence and a resource, but it is left to legislatures, courts and arbitral tribunals to decide to what extent they assist in the solution of problems.'[13]

This aspect of the principles is what can be classified as the procedural advantage. This includes both the working methods used by UNIDROIT to create the Principles and the structural advantages soft law has over binding conventions and treaties.

At the technical level, the working methods of UNIDROIT may be better suited for this type of project. The UNIDROIT Principles were drafted by a select group of contract specialists from around the world who knew their own law and were fluent in comparative law and therefore were able to balance competing legal traditions. The members of the UNIDROIT working group were not tasked with supporting and defending their respective domestic laws. This type of work is much harder to accomplish at an organization such as UNCITRAL.

This would appear to be an advantage over competing positive law. Because treaties and conventions must be fashioned in a way to encourage adoption by various states and to create a high comfort level with the appropriateness of the instrument, there is a strong tendency toward the creation of instruments that will reflect the legal traditions and existing rules of the potential adopting states. At best, what emerges is the rule of one or another existing jurisdiction in the competition without any serious attempt to distance the draft from the existing rules and try to craft a possible new one that better reflects such values as business reality and fairness.[14]

This political tension, to a large extent explains the fairly limited coverage of the CISG. Thus, for example questions of validity, title and property rights[15] are specifically excluded from the CISG as are consumer contracts[16] and product liability actions.[17]

Competing with the existing legal models is the strong influence of concerned industry observers. Of course the benefit and justification of having industry input in the drafting of a convention or other legislation is that it allows the commercial users to give input on actual business practices and the needs of the affected industry. But there is a downside to this that has

[12] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.
[13] R. Goode, 'Communication on European Contract Law' in S. Gopalan, 'New Trends in the Making of International Commercial Law' [2004] Journal of Law and Commerce 117-168.
[14] This need was a large part of the reason why the United Nations' Convention on Contracts for the Sale of Goods took years to prepare even though it began with the template of The Hague Sales Convention.
[15] CISG art. 4(a).
[16] Id. art. 2(a).
[17] Id. art. 5.

long been documented,[18] and that is the 'capture' of the drafting committee and the legislature by the more powerful elements of the industry to drive their preferred rules or block the enactment later.

Non-binding general principles such as the UNIDROIT Principles of International Commercial Contracts can achieve the goal of balance and fairness because there is less necessity to accommodate the various legal traditions or domestic laws much less accommodate powerful lobbying interests. This is, I suggest, is reflected in the final product.

Of course the Principles, or some version of them, could be adopted as a package. However, we are just as likely to find the Principles used in individual transactions either in conjunction with arbitration or as incorporated terms in an agreement where the dispute might end up in court. In this latter case, the Principles have a flexibility that does not exist in positive law because the parties (or arbitrators) can cherry pick the rules to suit the individual case. [19]

In this circumstance the adoption of the Principles as a regional or universal standard would be a slow but definite accretion over time.[20] Since these principles are not binding, their likely effect is more to set norms instead of hard and fast rules, but this still achieves the goal of creating broad international standards.[21] In fact, in many areas, well known soft law instruments have become the international standards, and there has never been any suggestion that theses

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[18] R. Scott, 'Is Article 2 the Best We Can Do?' (2001) 52 Hastings Law Review 677.

[19] Soft law is often as a basis for gap fillers when the otherwise applicable international or domestic law does not address the specific question. For example, because the UNIDROIT Principles of International Commercial Law have a broader scope than the United Nations Convention on Contracts for the International Sale of Goods, the Principles have been used to resolve questions not address by the CISG. See e.g., *Hideo Yoshimoto v Canterbury Golf International Limited,* Court of Appeal of New Zealand, (2000) NZCA 350; *SCEA GAEC Des Beauches Bernard Bruno v Société Teso Ten Elsen GmbH & COKG,* Cour d'appel de Grenoble (1996).
Whether this guidance is always be useful may be questioned because, with the convenience of having existing rules in place, there is some reported tendency of tribunals to follow soft law principles blindly without any analysis of why the rules are appropriate or whether the rules are better suited for the issue than competing rules. See e. g, G. Maggs, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law', [1998] George Washington L. Rev. 508-555; S. Symeonides, 'The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing' [1997] Maryland L. Rev. 1248-1283.
There is the question of whether the instrument is intended to reflect current commercial practice or whether the instrument is intended to reflect the aspirations of the drafters as to what the law should be. Sometimes an instrument can be both. This is certainly the case with the American Restatements of the Law, which are drafted by the American Law Institute. See e.g., E. A. Farnsworth, 'Ingredients in the Redaction of the Restatement (Second) of Contracts' [1981] Columbia L. Rev. 1-12. However, to the extent that the principles were drafted carefully and thoughtfully, this concern should be minimal. The courts, in effect, are likely to stumble upon the best rule.

[20] This has been the case with some other soft law instruments. In addition to the UNIDROIT Principles on International Contracts, some of the other more successful soft law instruments are the UNCITRAL Arbitration Rules and the more recent UNIDROIT Principles and Rules of Transnational Civil Procedure and the UNCITRAL legislative guide to secured transactions, all of which have and are providing international standards, and thereby deserve treatment in our classes.

[21] Because of these broad advantages for soft law instruments, of the three major international governmental organizations that are delegated the task to produce international commercial law instruments, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Hague Conference on Private International Law, two of the organizations, UNIDROIT, UNCITRAL, have been quite active in producing soft law instruments.

instruments suffer any usage or recognition disabilities. Thus, for example, the UCP 600[22] and the INCOTERMS,[23] are so commonly used and accepted today that they often govern by default absent a contrary party agreement.

In a sense, the Principles were drafted in a vacuum. This is not to say that the drafters did not bring to the process their own perspectives and knowledge of and bias toward their own respective background and legal systems. But the drafters did not have the political pressures that forced compromises which moved the focus away from what should be the best rule.

In the case of a new treaty or convention, there is the strong desire by the negotiating jurisdictions to have the treaty or convention consistent with the domestic law of the jurisdiction.[24] Yet, the ability to harmonize a new treaty or convention with existing domestic or international law is subject to a variety of difficulties.[25]

With the revision of an existing convention or treaty, the focus tends to be inward-looking and focussed on the existing convention or treaty itself. In addition, the revisers of an existing

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UNCITRAL is a subsidiary body of the General Assembly of the United Nations. UNCITRAL was established in 1966. The Commission has a general mandate to harmonize and unify the law of international trade. Since its founding, UNCITRAL has prepared a wide range of conventions, model laws and other instruments that deal with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL is made up of sixty member states from five regional groups. Members of the Commission are elected for terms of six years. The terms of half the members expire every three years. Membership will increase to sixty member states over the next few years to provide greater representation.
UNIDROIT is an Independent intergovernmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was reestablished in 1940 on the basis of a multilateral agreement. This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to States that have acceded to the statute. There are presently sixty-three member states.
The Hague Conference on Private International Law consists of sixty-four member states. The First Session of the Hague Conference on Private International Law was convened in 1893 by the Netherlands Government on the initiative of T.M.C. Asser, who won the Nobel Peace Prize in 1911. Subsequent sessions were held in 1894, 1900, 1904, 1925, and 1928. The Seventh Session was held in 1951, and this session culminated with the preparation of a Statute which made the Conference a permanent intergovernmental organization. The Statute entered into force on 15 July 1955. Since 1956, regular Plenary Sessions have been held every four years. Under the Statute, the operation of the Conference is ensured by the Netherlands Standing Government Committee on Private International Law.

22 Uniform Customs and Practice for Documentary Credits 600, ICC Publication no. 645.

23 International Chamber of Commerce, INCOTERMS 2000, ICC Publication no. 560.

24 This, of course, may include international laws that are part of the domestic law of a given jurisdiction.

25 Thus, for example after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the United Nations Convention for the international Sale of Goods were reduced to the following prefatory comment:

> When the parties enter into an agreement for the international sale of goods, because the United States is a party to the Convention, the applicable law may be the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since many of the provisions of the CISG appear quite similar to provisions in Article 2, early in the process of drafting the amendments the drafting committee considered making references in the Official Comments to similar provisions in the CISG. However, upon reflection, the drafting committee concluded that these references should not be included because their inclusion might suggest a greater similarity between the Article 2 and the CISG than in fact exists.

convention or treaty will bring to the process their familiarity with the existing convention or treaty, and likely they are less familiarity with other laws that might be appropriate to consider for purposes of drafting the ideal instrument that is most compatible with modern business practices. Moreover, to the extent that there is a push to harmonize across the different legal traditions of the various states involved in the drafting of the convention or treaty, compromises, both in the language as well as the legal concepts, may have to be made which do not necessarily reflect the best view but simply a view that all parties can agree upon as not inconsistent with their internal law.[26]

This is not the case with the UNIDROIT Principles. With the Principles, it was not necessary to attempt to harmonize the Principles with the law of any specific jurisdiction or any international convention. Instead, without the eternal pressure to conform to a specific law, the drafters were able to pick provisions selectively among many sources to meet a specific need. This process of picking and choosing provided for systematic reflection on what should be the best result, and not simply a possible result.

This point was made by the late Professor Allan Farnsworth in describing what distinguished the work leading to the CISG, for which he was an American delegate and, which brought about the UNIDROIT Principles of International Commercial Contracts, for which he was a member of the working group:

> While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity).[27]

For this reason, the UNIDROIT Principles can be viewed as 'neutral' contract law principles in that they do not reflect the specific interests of any group or government.

Soft law instruments such as the Principles generally fall into one of two categories; those that are intended as the basis for legislation, and those that are not. For those soft law instruments, such as model laws that are specifically intended to be the basis for adoption by individual jurisdictions, many[28] have been most successful in setting international and domestic standards for legislation.[29] However, those model laws that are intended to be adopted as drafted

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[26] Much of the success of the CISG, for example, is based on the fact that the CISG is not based on any particular set of underlying established domestic legal principles, and instead, was drafted to be independent of, rather than to work in conjunction with, any particular domestic law. To the extent that one can attach a specific legal tradition to the CISG, it is a blend of both the common law and civilian traditions.

[27] E. A. Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 Tulane Law Review 1985-1994, 1989.

[28] For example, Legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Canada, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, part of the United Kingdom, and the United States of America.

[29] Of course sometimes actual conventions can be useful for setting international commercial standards for further conventions. This was clearly the case with the UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (1964) which was the basis for UNCITRAL'S Convention on the International Sale of Goods.

or with minor revisions, as with a treaty or convention, are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions or domestic laws because the drafters of the model law have the same concerns of ratification and coordination.[30]

Conversely, statements of principles such as the UNIDROIT Principles of International Commercial Contracts, the UNIDROIT/American Law Institute Principles of Transnational Civil Procedure, and the many American Law Institute Restatements of the Law have all been drafted without the express purpose of adoption, and therefore are not drafted with the external demands of harmonization limitations. Thus, they have often achieved a neutrality and balance that might not otherwise be possible.

This may suggest that the procedure for drafting the Principles may be better suited for creating a more balanced and neutral product, but the question still remains whether the Principles are substantively better than competing legal regimes that could be used to teach harmonisation and legal policy. In a sense, this is an unfair question as there is not any real competition in the broad global market.

As I have shown earlier, the CISG does what the CISG does, and it does it fairly well, but its scope is limited.[31] There have been various attempts to harmonize European contract and sales law, but to the extent that these are viable projects, they are very Eurocentric and therefore do not travel well. [32]

The Principles, on the other hand, have the advantage of being contemporary as well as having been drafted with a universal and not a regional perspective. This lack of a regional perspective is what has made the Principles actually attractive to attempts at regional harmonization, for it has become clear that even when creating regional rules, international commercial law is based on universal standards.

Thus, we see from the work of OHADA to create a regional contract law for West Africa that there was perception that the local law was a barrier and therefore they chose to use of the Principles as the basis for that regional law. In the current project on Asian Law Principles, they

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[30] Thus, many model laws, such as the Model Law on Electronic Commerce, have been used for domestic legislation because they were determined to be well drafted. Moreover, model laws can be used as a template for related legislation. Thus for example, the Model Law of Electronic Commerce was a source for the American Uniform Electronic Transactions Act, the Canadian Uniform Electronic Commerce Act, and the Australian Electronic Transactions Act.

[31] See e.g., H. Gabriel, 'The CISG: Raising the Fear of Nothing' (2005) 9 Vindabona Journal 219. This is the major justification for the recent proposal by the Swiss Government for a UNCITRAL project on global contract law. See UNCITRAL, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, at 4-5, U.N. Doc. A/CN.9/758 (May 8, 2012).

[32] I am mindful of broad generalizations such as this, and I appreciate some qualification may be in order. For example, the recent work on Principles of Asian Law has used the PECL as the model. Even in this project, though, the drafters have relied heavily on the Principles and the CISG as well as PECL, and the final product is likely to deviate from these instruments to the extent that the drafters can synthesize 'Asian Law'. See Shyiyuan Han, 'Principles of Asian Contract Law: En Endeavor of Regional Harmonization of Contract Law in East Asia' 58 (2013) Villanova Law Review 589.

have tried mightily to find 'Asian Law' but it seems to be just commercial law that is also based to a large extent on the Principles.

For the Principles themselves, the gestation period for the Principles expanded over thirty years. During that time, not only did the various working groups have the luxury of time and reflection, but there have been innumerable sources of scholarly and professional analysis of the Principles as well as a growing body of judicial opinions and arbitral awards that have analyzed the Principles.[33] The Principles have been road tested and have been shown as clear, balanced, and reflective of contemporary international business practices.

Which brings us back from where we started: the Principles as part of the law school curriculum. They have begun to be taught in law schools around the world. This has, at least in the United States however, been mostly an exercise in comparative law; an examination of how one might approach basic contract principles in a way different from the domestic law. This is a useful teaching device as it allows a close examination of the policy choices that underlie contractual relations.

The Principles are also taught in some law school courses as examples of what might be desirable rules.[34] In the course on transnational law, where harmonization of the law is a key component of the course, I suggest that the Principles may be one of the best examples we have to use as the basis for exposing students to legal harmonization.

Thus, to conclude, the UNIDROIT Principles not only are a basis for teaching the doctrinal elements of international commercial contracts, but they are also ideal for teaching the skills of legal harmonization, law reform and the need for and how to make policy choices among competing possible rules. It is this whole set of skills that makes the Principles worth teaching as part of the curriculum. In summation, it is this same set of skills that should be developed in a course on transnational law.

[33] These are collected on the UNILAW database maintained by UNIDROIT: http://www.unidroit.info/program.cfm?menu=subject&file=convention&lang=en.

[34] This, for example is the case in the Roy Good and Herbert Kronke's text *Transnational Commercial Law* (Oxford University Press 2007, Oxford).

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