1. Introduction

PRIVATE INTERNATIONAL LAW AND ITS HARMONISATION

The area of law known as private international law, or the conflict of laws, addresses three kinds of problem which arise, in connection with legal relationships governed by private law, where a factual situation is connected with more than one country. Rules of private international law may conveniently be referred to as ‘conflict rules’.

Such a situation may arise from the connections of persons, of acts or events, or of property involved. Thus relevant connections may include an individual’s domicile, residence or nationality; the place of incorporation, or the location of the headquarters, or of a branch, of a company; the place of conclusion or performance of a contract; the place where an accident giving rise to a tort claim occurred; or the location of property.

Three kinds of problem are dealt with by conflict rules. They relate to direct jurisdiction; to choice of law; and to foreign judgments. Rules on direct jurisdiction define the circumstances in which the courts of one country are competent, and should be willing, to entertain proceedings in respect of disputes which have some connection with another country. Such rules are applicable by a court for the purpose of determining its own jurisdiction to entertain proceedings instituted before it. Rules on choice of law select from the connected countries the one whose law is to supply the substantive rules to be applied in determining the merits of the dispute. Rules on foreign judgments define the circumstances in which a judgment given by a court of one country is to be recognised or enforced in another country.

In the modern world, every country having a developed legal system has its own set of conflict rules, which form part of its private law. Such rules differ from one country to another, and these differences tend to undermine the purposes of the rules. For such purposes include the achievement of legal security (by way of certainty, predictability and uniformity of results, regardless of which country’s courts are involved) for the persons involved. Like any other rules of a country’s private law, its conflict rules may be harmonised with those of other countries by means of international treaties, and in this respect much has been achieved by the conventions negotiated at the Hague Conference on Private International Law.1 Especially in recent decades, further harmonisation has been achieved at European level by measures adopted within the framework of the European Community or Union, and it is on such harmonisation that the present work is focused.

HARMONISATION AT EUROPEAN UNION LEVEL

Since the entry into force of the Treaty of Lisbon on 1st December 2009, the adoption at European level of measures for the harmonisation of conflict rules is now governed by Title V (Articles 67–89) of Part III of the Treaty on the Functioning of the European Union, which may conveniently be referred to as the Treaty on Functioning. These provisions have replaced Title IV (Articles 61–69) of the EC Treaty, under which many important measures had been adopted in the sphere of private international law, mainly in the form of EC regulations adopted either by the Council alone, or jointly by the Council and the Parliament. By the Treaty of Lisbon, the European Union has replaced and succeeded to the European Community.

Article 67(1) of the Treaty on Functioning declares that the Union constitutes an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Article 67(4) adds that the Union is to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Within Title V of the Treaty on Functioning, Chapter 3 (Article 81) is entitled Judicial Co-operation in Civil Matters. Article 81(1) requires the Union to develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases; and specifies that such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Then Article 81(2) authorises the adoption of measures for these purposes, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the following results:

a. the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
b. the cross-border service of judicial and extrajudicial documents;
c. the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
d. co-operation in the taking of evidence;
e. effective access to justice;
f. the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
g. the development of alternative methods of dispute settlement; and
h. support for the training of the judiciary and judicial staff.

Thus it seems clear that all aspects of private international law may be subjected to harmonisation by measures adopted under Title V.

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2 Article 81 replaces Articles 65 and 67 of the EC Treaty.
3 The insertion of ‘particularly’ in Article 81(2) seems designed to weaken the requirement of connection with the internal market, as compared with Article 65 of the EC Treaty.
Article 81(2) also specifies that measures under Article 81 are to be adopted by the Parliament and the Council, acting in accordance with the ordinary legislative procedure. But an exception is made by Article 81(3) in respect of measures concerning family law with cross-border implications. Measures on family law are to be established by the Council, acting in accordance with a special legislative procedure, under which the Council will act unanimously after consulting the Parliament.

The power of the European Court to give preliminary rulings on the validity or interpretation of acts of the European institutions at the request of national courts, conferred by Article 267 of the Treaty on Functioning, has full application to measures adopted under Article 81 of that Treaty or under its predecessor, Articles 61(c) and 65 of the EC Treaty. Thus a reference for the interpretation of a provision of, for example, the Brussels I Regulation may now be made by any court of a Member State, whether the referring court is a court of first instance, a court of intermediate appeal or a court of final appeal.

By Protocol 21 to the Treaty on European Union and the Treaty on Functioning, as amended by the Treaty of Lisbon, measures adopted under Title V of Part III of the Treaty on Functioning apply to the United Kingdom or Ireland only if they elect to participate in the adoption of, or after its adoption to accept, the measure in question. By Protocol 22, as so amended, such measures do not apply to Denmark, unless and until it elects wholly or partly to abandon this opt-out. These provisions conferring options on the relevant Member States resemble those formerly made by Article 69 of the EC Treaty, along with associated Protocols, in relation to measures adopted under Title IV of that Treaty. But Protocol 22 now enables Denmark to substitute a regime giving it an option in relation to each individual measure, similar to that enjoyed by the United Kingdom and Ireland.

So far Ireland has chosen, with one exception, to participate in the adoption of all of the measures which have been adopted under Article 81 of the Treaty on Functioning or Title IV of the EC Treaty in the sphere of private international law, and with two exceptions the United Kingdom has chosen either to participate in the adoption of, or after adoption to accept, all of these measures. Accordingly almost all of the existing measures in this sphere are applicable to the United Kingdom and to Ireland. But these measures have not become applicable to Denmark except where a special agreement on their extension to Denmark has been concluded between the European Union and Denmark.

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4 This corresponds to the co-decision procedure under the EC Treaty.
5 Cf. the former restriction under Article 68 of the EC Treaty of the power to make references to national courts of last resort.
6 In principle a national court of last resort has an obligation to refer relevant questions, but this is subject to the limited exception relating to clear and obvious points admitted by the European Court in Case 283/81: CILFIT v Ministry of Health [1982] ECR 3415. For a sound application of the acte clair principle in the sphere of private international law, see T v L [2008] IESC 48 (Irish Supreme Court).
7 The exception is the Succession Regulation.
Before 1999 measures designed to secure the harmonisation of conflict rules at European level had taken the form of conventions, signed and ratified by the Member States. Conventions in this sphere could be concluded on the basis of Article 220 of the EEC Treaty, or its successor, Article 293 of the EC Treaty, which required the Member States, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals (inter alia) the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. Conventions could also be based on a voluntary choice by the Member States to go beyond the requirements of that provision. After the entry into force of the Treaty of Maastricht on European Union, such conventions could also be drawn up by the Council, and recommended to the Member States for adoption in accordance with their respective constitutional requirements, on the basis of Title VI (Article K) of that Treaty, which dealt with co-operation in the fields of justice and home affairs, including judicial co-operation in civil matters. After the entry into force of the Treaty of Amsterdam, Title VI of the Treaty of Maastricht ceased to be available; and after the entry into force of the Treaty of Lisbon, Article 293 of the EC Treaty has also ceased to be available. Thus future measures at European level within the sphere of private international law must now be based on Article 81 of the Treaty on Functioning.

The measures of European harmonisation of conflict rules, currently adopted or proposed, may be classified under five headings: civil jurisdiction and judgments; the law applicable to civil obligations; family matters; insolvency; and procedural co-operation. In addition, in the sphere of company law (in a narrow sense) the European Court has utilised the Treaty provisions on freedom of establishment to insist, in the context of the internal market, on respect for the law of the country of incorporation and on non-discrimination against companies incorporated in other Member States.

CIVIL JURISDICTION AND JUDGMENTS

The Brussels I Regulation

The most important European Union instrument in the sphere of private international law is the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The original version of the Brussels I Regulation was adopted by the EC Council as Regulation 44/2001 on 22nd December 2000. It entered into force on 1st March 2002 for the 14 then existing Member States other than Denmark; on 1st May 2004 for the ten then acceding Member States; on

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9 The Brussels I Regulation is examined in Chapters 2–11 of the present work.
10 For its text, see [2001] OJ L12/1.
11 See the Athens Act of Accession 2003, Article 2. For minor adjustments, see its Annex II, Part 18(A)(3).
1st January 2007 for Bulgaria and Romania;\textsuperscript{12} on 1st July 2007 for Denmark;\textsuperscript{13} and on 1st July 2013 for Croatia.\textsuperscript{14} It replaced the Brussels Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is commonly referred to as the Brussels Convention.\textsuperscript{15}

A revised version of the Brussels I Regulation was adopted by the EU Parliament and Council as Regulation 1215/2012 on 12th December 2012.\textsuperscript{16} This will replace the original version when it becomes applicable on 10th January 2015.\textsuperscript{17} The revised version will apply in all the Member States other than Denmark, and is expected to be extended to Denmark by means of a notification by Denmark under Article 3 of the Agreement of 19th October 2005 between the European Community and Denmark.\textsuperscript{18}

The Regulation (in both versions) lays down rules on direct jurisdiction, applicable by the court seised of the original action in determining its own jurisdiction, as well as rules on the recognition and enforcement of judgments given in other Member States. It applies to most types of civil matter. But certain matters (such as family matters and insolvency proceedings) are excluded from its scope. The most important changes made by the revised version relate to jurisdiction clauses, concurrent proceedings and the enforcement of judgments.

**The Lugano Conventions**

The Brussels I Regulation is supplemented by the Lugano Convention of 30th October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,\textsuperscript{19} which may conveniently be referred to as the Lugano Convention 2007. This agreement between the European Community, Denmark, Norway, Iceland and Switzerland in substance extends the Brussels I Regulation to Norway, Iceland and Switzerland. Its provisions closely resemble those of the original version of the Brussels I Regulation. It entered into force between the European Union, Denmark

\textsuperscript{14} See the Act of Croatian Accession, Article 2; [2012] OJ L112.
\textsuperscript{15} For the latest version of its text, see [1998] OJ C27/1. The Convention was based on Article 220 of the EEC Treaty.
\textsuperscript{17} See Articles 80 and 81.
\textsuperscript{18} See Recitals 40 and 41 to Regulation 1215/2012, and note 13 above. See also Council doc 16599/12 PRESSE 483 of 6th December 2012.
and Norway on 1st January 2010, for Switzerland on 1st January 2011, and for Iceland on 1st May 2011. It has replaced the Lugano Convention of 16th September 1988.20

The Hague Convention 2005

A Convention on Choice of Court Agreements was adopted at the Hague Conference on Private International Law on 30th June 2005. This Convention was signed by the European Community on 1st April 2009,21 and has also been signed by the United States of America and acceded to by Mexico; but it has not yet entered into force.

Uncontested Claims

As regards judgments, the Brussels I Regulation is now supplemented by EC Regulation 805/2004, creating a European Enforcement Order for Uncontested Claims.22 This Regulation became applicable on 21st October 2005 in the 24 then Member States other than Denmark; on 1st January 2007 in Bulgaria and Romania;23 and on 1st July 2013 in Croatia.24 It enables the court of origin to issue a European Enforcement Order in respect of a judgment on an uncontested claim, with the result that the judgment becomes enforceable in other Member States without the need to obtain an enforcement order there.

Further provision in relation to uncontested claims has been made by EC Regulation 1896/2006, creating a European Order for Payment Procedure.25 This Regulation became applicable on 12th December 2008 in the then Member States other than Denmark and on 1st July 2013 in Croatia.26 It creates a procedure which involves an ex parte application to a court of a Member State for a European payment order. When made by the court, the order is served on the defendant. If he lodges a statement of opposition, the case proceeds as an ordinary civil proceeding. If he fails to lodge a statement of opposition, the court declares the order for payment enforceable, and it then becomes enforceable throughout the Member States, without the need for a declaration of enforceability in the State of enforcement.

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20 For its text, see [1988] OJ L319/9. See also the Jenard and Möller Report, [1990] OJ C189/57. The Lugano Convention 1988 was designed in substance to extend the Brussels Convention to EFTA (European Free Trade Agreement) countries, and its substantive provisions closely resembled those of the 1989 version of the Brussels Convention. Until replaced by the Lugano Convention 2007, it was in force between the 15 pre-2004 EC Member States, Poland, Switzerland, Norway and Iceland.


22 This will be referred to as the Uncontested Claims Regulation. For its text, see [2004] OJ L143/15. For discussion, see Chapters 10 and 11 below.


24 See the Act of Croatian Accession, Article 2; [2012] OJ L112.

25 For its text, see [2006] OJ L399/1. For discussion, see Chapter 11 below.

26 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
Small Claims

EC Regulation 861/2007, establishing a European Small Claims Procedure,\(^{27}\) became applicable on 1st January 2009 in the then Member States other than Denmark and on 1st July 2013 in Croatia.\(^{28}\) It establishes a European procedure for small claims, intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The procedure is available to litigants as an alternative to the procedures existing under the laws of the Member States. The Regulation also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in a Member State under the European small claims procedure.

THE LAW APPLICABLE TO CIVIL OBLIGATIONS

The Rome I Regulation

In the sphere of choice of law, EC Regulation 593/2008 on the Law Applicable to Contractual Obligations, which is commonly referred to as the Rome I Regulation,\(^{29}\) lays down choice-of-law rules for most types of contract. The Regulation became applicable on 17th December 2009 in the then Member States other than Denmark in respect of contracts concluded after that date, and on 1st July 2013 in Croatia.\(^{30}\)

The Rome I Regulation has replaced the Rome Convention of 19th June 1980 on the Law Applicable to Contractual Obligations, which may conveniently be referred to as the Rome Convention 1980.\(^{31}\) The Convention had entered into force on 1st April 1991. Prior to the entry into operation of the Rome I Regulation, the Rome Convention 1980 had been in force in all 27 then Member States.\(^{32}\) It remains in force in Denmark, and also remains applicable elsewhere in relation to contracts concluded before 17th December 2009.

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\(^{27}\) For its text, see [2007] OJ L199/1. For discussion, see Chapter 11 below.

\(^{28}\) See the Act of Croatian Accession, Article 2; [2012] OJ L112.

\(^{29}\) For its text, see [2008] OJ L177/6. The Regulation is examined in Chapters 12–14 below.

\(^{30}\) See the Act of Croatian Accession, Article 2; [2012] OJ L112.

\(^{31}\) For its text, see [1998] OJ C27/34. The Convention was not based on any particular Treaty provision, but on the desire of the Member States ‘to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments’.

The Rome II Regulation

EC Regulation 864/2007, on the Law Applicable to Non-contractual Obligations, which is commonly known as the Rome II Regulation, lays down choice-of-law rules for torts and restitutionary obligations. It became applicable on 11th January 2009 in the then Member States other than Denmark in respect of events occurring after that date, and on 1st July 2013 in Croatia.

FAMILY MATTERS

The Brussels IIA Regulation

In the sphere of family law, jurisdiction and judgments in respect of matrimonial proceedings and of proceedings concerning parental responsibility for children are now governed by EC Regulation 2201/2003, concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, which may conveniently be referred to as the Brussels IIA Regulation. The Regulation became applicable on 1st March 2005 in the 24 then Member States other than Denmark; on 1st January 2007 in Bulgaria and Romania; and on 1st July 2013 in Croatia.

The Brussels IIA Regulation deals with jurisdiction and judgments (but not choice of law) in respect of matrimonial proceedings (divorce, separation and annulment of marriage), and also of proceedings concerning parental responsibility for children, regardless of whether a marriage or divorce is involved. It replaces EC Regulation 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, which is commonly referred to as the Brussels II Regulation. This in turn had replaced a Convention, commonly referred to as the Brussels II Convention, based on Article K.3(2)(c) of the Treaty on European Union, which had been adopted and signed on 28th May 1998, but had not entered into force.

As regards matrimonial proceedings, the Brussels IIA Regulation consolidates the provisions of the Brussels II Regulation without substantial alteration. As regards

33 For its text, see [2007] OJ L199/40. The Regulation is examined in Chapters 15 and 16 below.
34 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
35 For its text, see [2003] OJ L338/1. The Brussels IIA Regulation is examined in Chapters 17 and 18 below.
37 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
38 For its text, see [2000] OJ L160/19. The Brussels II Regulation had entered into force on 1st March 2001 for the 14 then Member States other than Denmark, and on 1st May 2004 for the ten Member States which joined the European Community on that date. See the Athens Act of Accession 2003, Article 2; and for minor adjustments, see its Annex II, Part 18(A)(2).
39 For its text, see [1998] OJ C221/1.
parental responsibility, the Brussels IIA Regulation is much wider than its predecessor, since it extends to all children, regardless of whether a marriage or divorce is involved.

The Hague Convention 1996

By its Decisions 2003/93 and 2008/431, the EC Council authorised the Member States, in the interest of the Community, to sign and to ratify or accede to the Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. The Member States were also authorised to make declarations that, as between Member States, recognition and enforcement of judgments relating to parental responsibility and child protection would be governed by European Union law. The intention is that the Hague Convention 1996 will govern the relations between the Member States and non-member countries in regard to proceedings and judgments concerning parental responsibility for children.

By May 2014 the Convention had entered into force for all of the EU Member States except Belgium and Italy. It had entered into force for the United Kingdom on 1st November 2012. It was also in force for Albania, Armenia, Australia, the Dominican Republic, Ecuador, Georgia, Lesotho, Montenegro, Monaco, Morocco, Russia, Switzerland, Ukraine and Uruguay. It had been signed, but not ratified, by the United States of America.

The Maintenance Regulation

On 18th December 2008 the EC Council adopted Regulation 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters relating to Maintenance Obligations, which may conveniently be referred to as the Maintenance Regulation. The Regulation became applicable on 18th June 2011 in the then Member States, and on 1st July 2013 in Croatia. As regards jurisdiction and judgments concerning familial maintenance, it has replaced the Brussels I Regulation.

As regards choice of law, the Maintenance Regulation is designed to operate in conjunction with the Hague Protocol of 23rd November 2007 on the Law Applicable to Maintenance Obligations, which may conveniently be referred to as the Hague Protocol 2007. Accordingly, on 30th November 2009 the EC Council adopted Decision 2009/941, approving the conclusion of the Protocol by the European Community and making the Protocol applicable within the European Union from 18th June 2011. But the Protocol is not applicable in Denmark or the United Kingdom.

41 This may conveniently be referred to as the Hague Convention 1996. For its text, see [2003] OJ L48/3. For discussion, see Chapter 18 below.
42 For its text, see [2009] OJ L7/1. The Maintenance Regulation is examined in Chapter 19 below.
43 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
44 For its text, see [2009] OJ L331/19. The Protocol is examined in Chapter 19 below.

Matrimonial Property and Succession

On 4th July 2012 the EU Parliament and Council adopted Regulation 650/2012 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, which may conveniently be referred to as the Succession Regulation.\textsuperscript{50} By Article 84, it will become applicable on 17th August 2015 in the Member States other than the United Kingdom, Ireland and Denmark.

On 16th March 2011 the EU Commission presented a Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes,\textsuperscript{51} and another Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions regarding the Property Consequences of Registered Partnerships.\textsuperscript{52} These measures will probably not apply to the United Kingdom, Ireland or Denmark.

Various Hague Conventions

After joining the Hague Conference on Private International Law, the European Community considered its stance in regard to existing Hague Conventions. In a letter of 14th October 2008 from the EC Commission to the Hague Conference, signed jointly by the EC Commission’s Director in the Directorate-General for Justice, Freedom and Security, and the Chairman of the EC Council’s Civil Law Committee,\textsuperscript{53} the Community indicated that there are several Conventions relating to family or similar matters whose adoption is for the time being to be left to the Member States individually, because they deal with matters which are of low priority for the Community. These are

\begin{itemize}
  \item \textsuperscript{46} For its text, see [2011] OJ L192/51.
  \item \textsuperscript{47} [2011] OJ L93/9.
  \item \textsuperscript{48} [2011] L192/39.
  \item \textsuperscript{49} Other parties to the Convention are Albania, Bosnia and Herzegovina, Norway and Ukraine. It had also been signed, but not ratified, by the United States of America.
  \item \textsuperscript{50} [2012] OJ L201/107. See Chapter 20 below.
  \item \textsuperscript{51} COM(2011) 126 final. See also the EU Commission’s Green Paper of 17th July 2006; COM(2006) 400 final.
  \item \textsuperscript{52} COM(2011) 127 final.
  \item \textsuperscript{53} See JUSTCIV 235, of 6th November 2008.
\end{itemize}

INSOLVENCY PROCEEDINGS

EC Regulation 1346/2000 on Insolvency Proceedings, which may conveniently be referred to as the Insolvency Regulation, entered into force on 31st May 2002 for the 14 then Member States other than Denmark; on 1st May 2004 for the ten States which joined the Community on that date; on 1st January 2007 for Bulgaria and Romania; and on 1st July 2013 in Croatia. It deals with jurisdiction, choice of law, and the recognition and enforcement of judgments, in relation to insolvency proceedings. The Insolvency Regulation replaced a Convention, based on Article 293 of the EC Treaty, which had been opened for signature on 23rd November 1995, but had not entered into force.

On 12th December 2012, the EU Commission presented a Proposal for a Regulation amending the Insolvency Regulation. This may conveniently be referred to as the Insolvency Amendment Proposal. The United Kingdom and Ireland have subsequently given notice of their intention to take part in the adoption and application of the amended Regulation, but it will not apply to Denmark.

PROCEDURAL CO-OPERATION

Service of Documents

In the sphere of procedural co-operation, the service in a Member State of documents originating in other Member States is now governed by EC Regulation 1393/2007, on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or

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54 For its text, see [2000] OJ L160/1. The Insolvency Regulation is examined in Chapter 21 below.
55 See the Athens Act of Accession 2003, Article 2. For minor adjustments, see its Annex II, Part 18(A)(1).
57 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
59 For the text of the Proposal, see COM(2012) 744 final or JUSTCIV 365/2012.
60 See JUSTCIV 79/2013 and JUSTCIV 81/2013.
61 See Recital 13 to the Proposal.
Commercial Matters. Regulation 1393/2007 is applicable in all the Member States (including Denmark). Regulation 1393/2007 replaced Regulation 1348/2000, which had entered into force on 31st May 2001, and had in turn replaced a Convention which had been signed on 26th May 1997, but had not entered into force.

Taking Evidence

Also in the sphere of procedural co-operation, EC Regulation 1206/2001, on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, provides for a procedure whereby a court of a Member State requests a court of another Member State to take evidence for use in judicial proceedings. It also provides for a procedure whereby a court of a Member State requests permission to take evidence directly in another Member State. The Regulation entered into force on 1st January 2004 for the 14 then Member States other than Denmark; on 1st May 2004 for the ten States which joined the Community on that date; on 1st January 2007 for Bulgaria and Romania; and on 1st July 2013 in Croatia.

COMPANY LAW

Under traditional English law, matters governed by company law (in a narrow sense) are subject to the law of the country in which the company in question is incorporated and has its registered office. On this approach no particular difficulty arises if a company’s central management and control is located in a country other than that of its incorporation and registered office. In contrast, the laws of many other EU Member States refer matters governed by company law to the law of the country in which the
company’s central administration is located, and may not regard a company as properly constituted if its central administration is located in a different country from that of its incorporation and registered office. If, for example, it moves its central administration to a country other than that of its incorporation and registered office, it will become subject to the law of the country to which its central administration has been transferred, and that law may not regard it as properly constituted until it has been reincorporated in accordance with the local law and provided with a local registered office.

In the absence of any specific legislation of the European Union addressing such problems, the European Court has utilised the Treaty provisions on freedom of establishment to insist, in the context of the internal market, on respect for the law of the country of incorporation and on non-discrimination against companies incorporated in other Member States. More specifically, although it has accepted that the Member State of incorporation is not bound to permit a company to move its registered office or its central administration to another Member State, except by way of winding-up in the Member State of incorporation and reincorporation elsewhere, it has insisted that, if the Member State of incorporation does permit such a transfer of the central administration, its freedom to impose a tax in connection with the transfer is restricted by the Treaty provisions. It has also insisted that, where a company is validly incorporated in one Member State and has its registered office there, another Member State must allow the company to move its central administration to its territory, and must recognise the continued existence and capacity of the company after the move of its central administration. Moreover, where a company is validly incorporated in a Member State whose law permits its merger with another company incorporated in the same State, the Member State must also permit a similar merger between the company and another company which is incorporated in another Member State. Similarly, where a Member State permits the conversion of a company incorporated therein into another type of company by way of reincorporation and succession, it must permit a similar conversion of a company incorporated in another Member State into a local company. Moreover, where the Member State of incorporation of a parent company permits the parent company to merge with a subsidiary which is incorporated in another Member State, its freedom to regulate the fiscal consequence of the merger is restricted by the Treaty provisions.

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75 See Case C-123/11: A Oy [2013] 2 CMLR 1118.
THE EUROPEAN UNION AND THE HAGUE CONFERENCE


Now that the European Union has become a member of the Hague Conference, it is able to participate in the negotiations within the Conference leading to the conclusion of new conventions, or the revision of existing conventions. It is also able, under certain conditions and by various procedures, to sign and ratify, and thereby become a party to, conventions adopted by the Conference.

The ability of the European Union to become a party to a Hague Convention depends primarily on its competence under EU law to legislate in relation to the subject-matter of the Convention. Since Article 81 of the Treaty on the Functioning of the European Union empowers the Union to legislate on all aspects of private international law, the Union now has at least non-exclusive competence to become party to any of the Hague Conventions. Where the European Union has already adopted internal legislation whose operation would be affected by the adoption of the relevant Hague Convention, the competence of the Union to become party to the Convention is exclusive of the competence of the Member States.

The manner in which the European Union may become a party to a Hague Convention depends on whether the relevant Hague Convention provides for its adoption by a Regional Economic Integration Organisation. Recent conventions often do so, and it is then possible for the Union to sign and ratify the convention, either on its own (where its competence under Union law is exclusive) or along with the Member States (where its competence is concurrent). Thus EC Council Decision 2009/397, on the Signing by the European Community of the Hague Convention of 30th June 2005 on Choice of Court Agreements, declares that the Community has exclusive competence in all matters governed by the Convention, and that the Member States will not sign, ratify, accept or approve the Convention, but will be bound by the Convention by virtue of its conclusion by the Community.

Earlier conventions often contain no provision for their adoption by a Regional Economic Integration Organisation. Thus, in the absence of renegotiations for the amendment of the convention by the addition of such a provision, it is not possible to utilise the straight-forward method of signature and ratification by the European Union itself. In such cases an alternative procedure may be used, whereby the EU Council adopts decisions authorising the Member States to sign and ratify the convention in the

77 See Opinion 1/03, [2006] ECR I-1145, on the revision of the Lugano Convention.
interest of the Union. This procedure has been used in respect of the Hague Convention of 19th October 1996 on Parental Responsibility and Child Protection.79

The stance of the European Union, after joining the Conference, as to its possible adoption of various existing Hague Conventions was clarified by a letter of 14th October 2008 from the EC Commission to the Hague Conference, signed jointly by the EC Commission’s Director in the Directorate-General for Justice, Freedom and Security, and the Chairman of the EC Council’s Civil Law Committee.80 This classified the existing Hague Conventions as follows:

i. *Conventions on which no action by the European Union was envisaged, because all the Member States were already party to them.* This applied to the 1961 Convention on Legalisation for Foreign Public Documents, and the 1980 Convention on Child Abduction.


iii. *Conventions on which further reflection was envisaged.* This applied to the 1965 Convention on Service Abroad of Documents; the 1970 Convention on the Taking of Evidence Abroad; the 1970 Convention on Divorces and Legal Separations; the 1980 Convention on Access to Justice; and the 2006 Convention on Securities held with an Intermediary.

iv. *Conventions which the European Union intended not to adopt, because existing European legislation was regarded as adequate.* This applied to the 1971 Convention on Traffic Accidents; the 1973 Convention on Products Liability; and the 1978 Convention on Agency.

v. *Conventions whose adoption was for the time being to be left to the Member States individually, because they dealt with matters which were of low priority for the Union.* This applied to the 1961 Convention on the Form of Testamentary Dispositions;81 the 1978 Convention on the Validity of Marriages; the 1978 Convention on Matrimonial Property;82 the 1985 Convention on Trusts; the 1989 Convention on Succession to the Estates of Deceased Persons; the 1993 Convention on Inter-country Adoption; and the 2000 Convention on the Protection of Adults.

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80 See JUSTCIV 235/2008.
81 However, the Succession Regulation has adopted rules on the formal validity of wills which are compatible with the Hague Convention 1961.
82 Since the only parties to the 1978 Convention are France, the Netherlands and Luxembourg, that Convention will be superseded by an EU regulation on matrimonial property, if the Commission proposal of 16th March 2011 is adopted.