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INTRODUCTION

A. 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 major 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. Minor conflict rules deal with matters such as the service of documents across borders, the taking of evidence by a court of one country at the request of a court of another country, and the availability of special procedures (for example, as regards the obtaining of default judgments or of freezing orders) in cross-border cases.

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. 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 focussed.

B. 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

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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.

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

1.08 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.4 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.

1.09 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.5 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.6

1.10 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.

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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).
So far both the United Kingdom and Ireland have chosen either to participate in the adoption of, or after adoption to accept, most 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. Accordingly most of the existing measures in this sphere are applicable in and to the United Kingdom and 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.

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

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7 Neither the United Kingdom nor Ireland is party to the Rome III Regulation, the Matrimonial Property Regulation, the Partnership Property Regulation, or the Succession Regulation. The United Kingdom is also not party to EC Council Decision 2009/941 on the Hague Protocol 2007 on the Law Applicable to Maintenance Obligations.

8 Such special agreements have been concluded only in respect of the Brussels I Regulation and the Service Regulation.
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.

C. CIVIL JURISDICTION AND JUDGMENTS

1. The Brussels I Regulation

1.14 The most important European Union instrument currently in force in the sphere of private international law is the revised version of the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This was adopted by the EU Parliament and Council as Regulation 1215/2012 on 12th December 2012, and became applicable on 10th January 2015. It applies in all the Member States (including Denmark). It will be referred to in this work as the revised or new Brussels I Regulation.

1.15 The revised version has replaced the original version of the Brussels I Regulation, which had been adopted by the EC Council as Regulation 44/2001 on 22nd December 2000. It had 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 1st January 2007 for Bulgaria and Romania; on 1st July 2007 for Denmark; and on 1st July 2013 for Croatia. It will be referred to in this work as the original or old Brussels I Regulation. It had 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.\(^\text{18}\)

The new Regulation applies only to legal proceedings instituted, to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, on or after 10th January 2015.\(^\text{19}\) The old Regulation continues to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, before 10th January 2015 which fall within its scope.\(^\text{20}\)

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 revised Brussels I Regulation has been amended by EU Regulation 542/2014,\(^\text{21}\) which may conveniently be referred to as the Common Courts Regulation, so as to make provision for certain courts common to several Member States: the Benelux Court of Justice, and the Unified Patent Court.\(^\text{22}\) This inserts Articles 71A–71D into the revised Brussels I Regulation, with effect from its entry into operation on 10th January 2015.

2. 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,\(^\text{23}\) which may conveniently be referred to as the Lugano Convention 2007. This agreement between the

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\(^{18}\) For the latest version of its text, see [1998] OJ C27/1. The Convention was based on Article 220 of the EEC Treaty.

\(^{19}\) See Article 66(1).

\(^{20}\) See Article 66(2) of the old Regulation.


\(^{22}\) The United Patent Court is to be created under an Agreement signed on 19 February 2013, but is not yet in operation. See Chapter 7 below.

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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 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 1988.24

3. The Hague Convention 2005

1.20 By virtue of its signature and approval in pursuance of Council Decisions 2009/397 and 2014/887,25 the European Union (on behalf of its Member States other than Denmark) is a party to the Hague Convention of 30th June 2005 on Choice of Court Agreements.26 The Convention entered into force between the Union, the 27 Member States, and Mexico on 1st October 2015, and for Singapore on 1st October 2016. It has also been signed, but not yet ratified, by the United States and by Ukraine.

4. Uncontested claims

1.21 As regards judgments, the Brussels I Regulation is now supplemented by EC Regulation 805/2004, creating a European Enforcement Order for Uncontested Claims.27 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;28 and on 1st July 2013 in Croatia.29 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.

24 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 Association) 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.


26 For its text, see [2009] OJ L133/3. See also at paras 8.49–8.72 and 11.86–11.97 below.

27 This will be referred to as the Uncontested Claims Regulation. For its text, see [2004] OJ L143/15. For discussion, see paras 11.24 and 13.01–13.25 below.


29 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
Further provision in relation to uncontested claims has been made by EC Regulation 1896/2006, creating a European Order for Payment Procedure.\textsuperscript{30} This Regulation became applicable on 12th December 2008 in the then Member States other than Denmark and on 1st July 2013 in Croatia.\textsuperscript{31} It creates a procedure, available in cross-border cases, 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.

5. Small claims

EC Regulation 861/2007, establishing a European Small Claims Procedure,\textsuperscript{32} became applicable on 1st January 2009 in the then Member States other than Denmark and on 1st July 2013 in Croatia.\textsuperscript{33} 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.

6. Freezing orders

Another measure designed to improve procedure in cross-border cases is EU Regulation 655/2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.\textsuperscript{34} This Regulation became applicable on 18th January 2017, but does not extend to the United Kingdom or Denmark.

\textsuperscript{30} For its text, see [2006] OJ L399/1. For discussion, see paras 13.26–13.45 below.
\textsuperscript{31} See the Act of Croatian Accession, Article 2; [2012] OJ L112.
\textsuperscript{32} For its text, see [2007] OJ L199/1. For discussion, see paras 13.46–13.65 below.
\textsuperscript{33} See the Act of Croatian Accession, Article 2; [2012] OJ L112.
\textsuperscript{34} [2014] OJ L189/59.
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D. THE LAW APPLICABLE TO CIVIL OBLIGATIONS

1. The Rome I Regulation

1.25 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, 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.

1.26 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. 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. It remains in force in Denmark, and also remains applicable elsewhere in relation to contracts concluded before 17th December 2009.

2. The Rome II Regulation

1.27 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.
E. FAMILY MATTERS

1. 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 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.

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41 For its text, see [2003] OJ L338/1. The Brussels IIA Regulation is examined in Chapters 20 and 21 below.
43 See the Act of Croatian Accession, Article 2; [2012] OJ L112.
44 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).
45 For its text, see [1998] OJ C221/1.
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2. The Rome III Regulation

1.31 Provision as to choice of law in proceedings for divorce or legal separation is made by the Rome III Regulation, but this is only applicable in 17 of the Member States (not including the United Kingdom).

3. The Hague Convention 1996

1.32 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.

1.33 The Convention has now entered into force for all of the EU Member States (including Denmark), and for 18 other countries. It entered into force for the United Kingdom on 1st November 2012.

4. The Maintenance Regulation

1.34 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.


5. Succession on death

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. By Article 84, it became applicable on 17th August 2015 in the Member States other than the United Kingdom, Ireland and Denmark.

6. Matrimonial property

On 9th June 2016 the EU Council adopted Decision 2016/954, authorising enhanced co-operation in the area of jurisdiction, applicable law and the

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53 For its text, see [2011] OJ L192/51.
56 Other parties to the Convention are Albania, Bosnia and Herzegovina, Montenegro, Norway, Turkey, Ukraine, and the United States.

1.39 Pursuant to this authorisation, the Council proceeded, on 24th June 2016, to adopt Regulation 2016/1103, implementing enhanced co-operation in the area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes,\footnote{[2016] OJ L183/1.} and Regulation 2016/1104, implementing enhanced co-operation in the area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of the Property Consequences of Registered Partnerships.\footnote{[2016] OJ L183/30.}

1.40 Regulations 2016/1103 and 2016/1104 will be referred to in this work respectively as the Matrimonial Property Regulation and the Partnership Property Regulation. They will enter into application on 29th January 2019.\footnote{See Article 70 of the Matrimonial Property Regulation, and Article 70 of the Partnership Property Regulation.} But they will only apply in the 18 participating Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden.\footnote{See Article 1 of Decision 2016/954; Recital 11 and Article 70 of the Matrimonial Property Regulation; and Recital 11 and Article 70 of the Partnership Property Regulation.}

7. Non-molestation orders

1.41 EU Regulation 606/2013, on mutual recognition of protection measures in civil matters,\footnote{[2013] OJ L181/4. For supplementary legislation in England and Northern Ireland, see the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014 (SI 2014/3298).} which may conveniently be referred to as the Protection Measures Regulation, provides for the recognition and enforcement in a Member State of ‘protection measures’ ordered in other Member States. It applies in and between all the Member States except Denmark. It entered into application on 11th January 2015, and applies to protection measures ordered on or after that date, irrespective of when the proceedings had been instituted.
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The Protection Measures Regulation is concerned with civil orders designed to protect an individual from unwanted and potentially dangerous contact with another individual. In traditional English terminology, they might be referred to as non-molestation orders. But this Regulation does not apply to orders which fall within the scope of the Brussels IIA Regulation. The Protection Measures Regulation is examined in Chapter 20 below.

F. INSOLVENCY PROCEEDINGS

A revised Regulation on Insolvency Proceedings was adopted by the EU Parliament and Council on 20th May 2015 in the form of EU Regulation 2015/848 on Insolvency Proceedings.64 The new Regulation entered into application on 26th June 2017.65 It applies in all of the Member States except Denmark.66 It will be referred to in this work as the revised or new Insolvency Regulation.

The revised Regulation has replaced the original version of the Regulation on Insolvency Proceedings.67 The original version, which took the form of EC Regulation 1346/2000,68 had 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;69 on 1st January 2007 for Bulgaria and Romania;70 and on 1st July 2013 in Croatia.71 It will be referred to in this work as the original or old Insolvency Regulation. It replaced a convention, based on Article 293 of the EC Treaty, which had been opened for signature on 23rd November 1995,72 but had not entered into force.

The new Regulation applies only to insolvency proceedings opened after its entry into application; and acts done by a debtor before then continue to be governed by the law which was applicable to them at the time when they were committed.73 The old Regulation continues to apply to insolvency proceedings.
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which fall within its scope and which have been opened before the entry into application of the new Regulation.74

1.46 Both versions of the Insolvency Regulation deal with jurisdiction, choice of law, and the recognition and enforcement of judgments, in relation to insolvency proceedings. The principal changes made by the new Regulation relate to the widening of the scope of the proceedings covered; the procedure for determining jurisdiction to open insolvency proceedings; co-ordination between main and secondary proceedings; the establishment of interconnected, publicly accessible, online registers of proceedings opened; the provision of standard forms for notifying creditors and for the lodging of claims; and the co-ordination of insolvency proceedings in respect of different members of the same corporate group.

1.47 Neither version of the Insolvency Regulation applies where the debtor is an insurance undertaking or a credit institution (such as a bank). But provision for insolvency proceedings in respect of such debtors is made by EC Directive 2001/17, on the reorganisation and winding-up of insurance undertakings,75 and by EC Directive 2001/24, on the reorganisation and winding-up of credit institutions.76

G. PROCEDURAL CO-OPERATION

1. Service of documents

1.48 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 Commercial Matters.77 Regulation 1393/2007 is applicable in all the Member States (including Denmark).78

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74 See Article 84(2).
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.

2. 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 10 States which joined the Community on that date; on 1st January 2007 for Bulgaria and Romania; and on 1st July 2013 in Croatia.

H. COMPANY LAW

The law which governs corporate matters (in a narrow sense) may conveniently be referred to as the lex societatis. Under traditional English law, the law of the country in which the company in question is incorporated serves as its lex societatis. 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. But reincorporation in a different country (so as to retain corporate identity but adopt a new lex societatis) is not possible if either of the countries involved is the United Kingdom.
1.52 In contrast, under the traditional laws of many other EU Member States, it is the law of the country in which the company’s central administration is located which serves as its lex societatis. On this approach a company may be regarded as not properly constituted if its central administration is located in a different country from that of its incorporation. If, for example, it moves its central administration to a country other that of its incorporation, 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.

1.53 In the absence of specific EU legislation addressing problems relating to the lex societatis, the European Court has, in a line of cases commencing in 1999, utilised the Treaty provisions on freedom of establishment86 to insist, in the context of the internal market, on respect for the law of the country of incorporation, on the avoidance of discrimination against companies incorporated in other Member States, and on the possibility of reincorporation (without winding-up) in one Member State of a company hitherto incorporated in another Member State. In addition, some problems relating to the lex societatis in the context of the internal market have been addressed by EC Directive 2005/56, on cross-border mergers of limited liability companies.87

1.54 Thus, as regards respect for the law of the place of incorporation, the European Court has 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.88

1.55 In consequence the German courts have modified their earlier approach, under which the law of the place of central administration served as the lex societatis. German private international law now distinguishes between companies incorporated in a European Economic Area (EEA) Member State, and companies incorporated outside the EEA. Under the current German conflict rules, in the case of a company incorporated within the EEA, the law of the country in which the registered office is located serves as the lex societatis; but

86 See now Articles 49 and 54 of the Treaty on the Functioning of the European Union.
88 See Case C-212/97: Centros [1999] ECR I-1459, and Case C-208/00: Übersee-ting [2002] ECR I-9919. See also Case C-167/01: Inspire Art [2003] ECR I-10155, holding that a Member State in which a company incorporated in another Member State has established a branch cannot impose its own requirements as to minimum capital on the company.
in the case of a company incorporated outside the EEA, the law of the place of central administration continues to apply.

Moreover, as regards discrimination, the European Court has insisted that 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.\footnote{See Case C-411/03: \textit{SEVIC Systems} [2005] ECR I-10805.} Further, 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.\footnote{See Case C-123/11: \textit{A Oy}, EU:C:2013:84.}

As regards reincorporation (without winding-up) between Member States, the European Court still accepts 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, while remaining subject to the original lex societatis,\footnote{See Case 81/87: \textit{Daily Mail and General Trust} [1988] ECR 5483, and Case C-210/06: \textit{Cartesio} [2008] ECR I-9641.} but it also insists 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.\footnote{See Case C-371/10: \textit{National Grid Indus} [2011] ECR I-12273.} More fundamentally, the rulings of the European Court in \textit{Cartesio}\footnote{Case C-210/06, [2008] ECR I-9641, especially at paras 111–13.} and \textit{VALE Építési}\footnote{Case C-378/10, EU:C:2012:440.} have established that the Treaty provisions on freedom of establishment impose obligations on the Member States to facilitate reincorporation in a Member State by a company incorporated in another Member State, so as to convert (without winding-up) into a company incorporated in and governed by the law of the receiving Member State.

In \textit{Cartesio} the European Court indicated that, where such a conversion is permitted by the law of the receiving Member State, the Treaty provisions on freedom of establishment preclude the Member State of origin from preventing the conversion, other than on grounds which serve overriding requirements in the public interest. In \textit{VALE Építési} the European Court ruled that where the receiving Member State permits a local company to convert into a different type of local company, the Treaty provisions preclude it from refusing, by way of a general rule, to enable a company incorporated in another
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Member State to carry out a similar reincorporation and conversion into a local company. In such a case the receiving Member State must adapt its rules on conversion, so as to facilitate such conversions, in accordance with the principles of equivalence and effectiveness. It is apparent that these rulings require the United Kingdom to amend Part 7 (ss 89–111) of the Companies Act 2006, which deals with re-registration as a means of altering a company’s status, so as to facilitate cross-border conversions as contemplated by the rulings.

1.59 In addition to the obligations imposed on Member States by the Treaty provisions on freedom of establishment, as interpreted by the European Court, EC Directive 2005/56 on cross-border mergers of limited liability companies has established a mechanism designed to facilitate mergers between companies from different EU Member States or other EEA countries. In view of the definition of a merger laid down by Article 2(2) of the Directive, the mechanism specified by the Directive can be used for a cross-border operation which in substance involves the transfer by a single company of its incorporation and lex societatis between two Member States. This was confirmed by the European Court in KA Finanz v Sparkassen Versicherung, where it also ruled that, under the Directive, the relevant provisions governing the protection of the creditors of the acquired company are those of the national law applicable to that company.

1.60 As regards the possible further harmonisation of choice of law rules in respect of corporate matters, a Study on the Law Applicable to Companies, commissioned by the EU Commission, was published on 4th April 2017.

I. THE EUROPEAN UNION AND THE HAGUE CONFERENCE

1.61 On 3rd April 2007 the European Community became a member of the Hague Conference on Private International Law by depositing its instrument of acceptance of the Statute of the Hague Conference. This followed the
amendment of the Statute of the Hague Conference to enable the admission
of Regional Economic Integration Organisations, and the adoption by the EC
Council of Decision 2006/719, on the Accession of the Community to the
Hague Conference on Private International Law. By the Treaty of Lisbon,
the European Union has now replaced and succeeded to the European
Community.

Now that the European Union has become a member of the Hague Confer-
ence, 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 con-
ventions 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 concur-
rent). 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.

100 See Opinion 1/03, [2006] ECR I-1145, on the revision of the Lugano Convention.
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1.65 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 straightforward 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 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.102

1.66 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.103 This classified the existing Hague Conventions into five categories as follows.

1.67 The first category comprised 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.

1.68 The second category comprised Conventions which the European Union intended to adopt. This applied to the 1996 Convention on Parental Responsibility and Child Protection; the 2005 Convention on Choice of Court Agreements; the 2007 Convention on Child Support and Other Maintenance; and the 2007 Protocol on the Law Applicable to Maintenance Obligations. The envisaged adoption has indeed by now occurred.

1.69 The third category comprised 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.

1.70 The fourth category comprised Conventions which the European Union intended not to adopt, because existing European legislation was regarded as

103 See JUSTCIV 235/2008.
adequate. This applied to the 1971 Convention on Traffic Accidents; the 1973 Convention on Products Liability; and the 1978 Convention on Agency.

The fifth category comprised 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, and appears to remain applicable, to the 1978 Convention on the Validity of Marriages; the 1985 Convention on Trusts; the 1993 Convention on Intercountry Adoption; and the 2000 Convention on the Protection of Adults. It initially applied also to the 1961 Convention on the Form of Testamentary Dispositions; the 1978 Convention on Matrimonial Property; and the 1989 Convention on Succession to the Estates of Deceased Persons. But the subsequent adoption by the European Union of the Succession Regulation and the Matrimonial Property Regulation appears to indicate that the Union has no desire to adopt the three last-mentioned Conventions, and to preclude the adoption of these Conventions by any additional Member States.

### J. REMAINING GAPS

The system of private international law which currently exists at European Union level is incomplete. Various gaps remain, and further measures designed to fill them may be expected to be adopted in the coming years.

In the civil and commercial sphere, there are at present no harmonised rules of EU law on the recognition and enforcement in the Member States of judgments given in non-member countries, nor on choice of law in respect of matters governed by company law (in a narrow sense) with regard to companies which are not connected with two or more Member States, but with a single Member State and an external country.

At present, EU legislation applies or will soon apply, at least in most of the Member States, to choice of law in respect of proprietary issues relating to insolvency, succession on death, matrimonial property, particular assignments of claims in respect of contractual obligations, and assignments of property on intermediate registers. But there is at present no EU legislation on choice of law in respect of particular transfers or assignments...

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104 See Chapter 24 below.
105 See Chapter 23 below.
106 See Chapter 22 below.
107 See Article 14 of the Rome I Regulation; considered at paras 15.40–15.54 below.
108 See paras 15.53–15.54 below.
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inter vivos of land, goods, negotiable instruments, intellectual property rights, non-contractual claims, corporate shares, or beneficial interests in a trust fund. Nor is any specific provision made for block assignments of numerous debts.

1.75 In the familial sphere, there are at present no harmonised rules of EU law on the law applicable to the validity of marriages and civil partnerships, nor on the adoption of children.

1.76 Gaps also exist in respect of the general problems of private international law. These relate to the characterisation of connecting factors and issues; to renvoi (reference back or on) as to the applicable law; to choice of law with regard to incidental questions; and to the establishment of the content of relevant foreign substantive rules.

K. WITHDRAWAL BY THE UNITED KINGDOM

1.77 In late March 2017 the United Kingdom notified the European Council of its intention to withdraw from the European Union in accordance with Article 50 of the Treaty on Functioning. Accordingly, at the time of writing (in November 2017) negotiations are in progress between the United Kingdom and the European Union with a view to the conclusion of an agreement on the arrangements for the United Kingdom’s withdrawal. The withdrawal will take effect on the entry into force of the withdrawal agreement; or, if earlier, two years after the notification of intention to withdraw. Extension of the period for negotiation of the withdrawal agreement, and consequent delay in the taking effect of the withdrawal, would need a unanimous decision by the European Council, as well as the agreement of the United Kingdom. Thus the withdrawal of the United Kingdom from membership of the European Union may take effect in March 2019.

1.78 Meanwhile a European Union (Withdrawal) Bill is under consideration by the UK Parliament. This, if enacted, would take effect on the date of withdrawal. The enactment would repeal the European Communities Act 1972, but would, so far as practicable, continue in force in the UK rules derived from EU law until they were repealed or amended by UK legislation. Such rules might be said to be detached and anglicised.

1.79 It is of course possible that the withdrawal agreement will provide for the continued operation of some or all of the EU legislation on private international law in, and in relation to, the United Kingdom as if it had remained a Member State, or will do so with some amendments to the legislation in this
context. But it is also possible that there will be no withdrawal agreement, or
one which is silent in respect of the EU legislation on private international law.
Thus it seems worthwhile to consider the effect in this respect of a withdrawal
by the United Kingdom from membership of the European Union without
any agreement relevant to the matter.

It seems to the present writer that in that scenario most of the relevant EU
legislation would cease to apply in or to the United Kingdom, and the nature
of such legislation would prevent its continuance within the United Kingdom
by means of a general ‘anglicisation’ provision enacted within the United
Kingdom. For the EU legislation on direct jurisdiction and on the recognition
and enforcement of judgments, as well as that on service, the taking of
evidence, and corporate matters, is based on the inclusion of the United
Kingdom within a reciprocal system of judicial co-operation, and withdrawal
from membership of the Union would destroy the underlying reciprocity.
Thus, in the absence of a new and specific enactment within the United
Kingdom, the relevant matters would become subject to the traditional UK
rules, including those derived from treaties concluded by the United Kingdom
outside the framework of the European Union. Such treaties include special-
ised conventions on particular matters (such as the Geneva Convention on
carriage of goods by road) and Hague Conventions on various aspects of
private international law. But it seems likely that the change of legal regime
would not affect jurisdiction over proceedings commenced in UK courts
before the date of withdrawal, nor the recognition and enforcement in the UK
of judgments given in the continuing EU Member States before the date of
withdrawal.

Thus, for example, the jurisdiction of the English courts to entertain an action
in contract or tort, commenced after the date of withdrawal, against a
defendant domiciled in France or Germany would become subject to the rules
applicable (before and after withdrawal) to a defendant domiciled in New York
or Singapore. Similarly the enforcement in England of a French or German
judgment, given after the date of withdrawal, awarding damages for breach of
contract, would become subject to the traditional rules of the English common
law, unless the matter fell within a specialised convention to which the United
Kingdom was a party, in which case the Foreign Judgments (Reciprocal
Enforcement) Act 1933 would apply. On the same approach, the recog-
nition in England of a Dutch or Italian divorce, granted after the date of
withdrawal, would become subject to the UK provisions derived from the

109 It is thought that bilateral conventions on reciprocal recognition and enforcement of judgments, which were
abrogated by EU legislation, will not automatically revive on withdrawal.
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Hague Convention 1970, which (before and after withdrawal) apply to a Swiss divorce. Again, the service of an English claim form in France, or of a French claim form in England, after the date of withdrawal, would become subject to the Hague Convention 1965.

1.82 On the other hand, it seems practicable for the United Kingdom to continue in operation, by means of a general anglicisation provision, the choice of law rules specified by the Rome I Regulation and the Rome II Regulation, since these rules operate independently of any reciprocity.