1. Introduction

PRIVATE INTERNATIONAL LAW AND ITS HARMONIZATION

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 the court of one country is to be recognized 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 harmonized 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 years, further harmonization has been achieved at European level by measures adopted within the framework of the European Community, and it is on such harmonization that the present work is focussed.

HARMONIZATION AT EUROPEAN COMMUNITY LEVEL

Since the entry into force of the Treaty of Amsterdam on 1st May 1999, the harmonization of conflict rules at European level has been effected mainly by means of EC regulations adopted by the Council, or jointly by the Council and the Parliament, under Title IV (Articles 61–69) of the EC Treaty.¹

By Articles 61(c) and 65, in order to establish progressively an area of freedom, security and justice, measures may be adopted under Title IV in the field of judicial co-operation in civil matters having cross-border implications, insofar as necessary for the proper functioning of the internal market. By Article 65(a), such measures include measures improving and simplifying: (i) the system for cross-border service of judicial and extra-judicial documents; (ii) co-operation in the taking of evidence; and (iii) the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases. By Article 65(b), they also include measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction. By Article 65(c), they further include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Thus it seems clear that, subject to there being a sufficient connection with the functioning of the internal market, all aspects of private international law may be subjected to harmonization by measures adopted under Title IV.

All of the measures so far adopted under Title IV in the sphere of private international law have taken the form of regulations, though directives and decisions are in principle possible. The legislative procedure is governed by Article 67 of the EC Treaty. Under Article 67 in the version originally inserted by the Treaty of Amsterdam, the Council acted unanimously, on a proposal from the Commission or on the initiative of a Member State, and after consulting the

¹ On the priorities for action under Title IV in the sphere of private international law, see the programme of further measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the EC Council on Justice and Home Affairs on 30th November 2000; [2001] OJ C12/1. This programme envisaged in the first stage measures dealing with uncontested claims, small claims, and maintenance claims, as well as measures on access, on non-marital families, on subsequent orders modifying custody orders made in connection with matrimonial proceedings, on matrimonial and cohabitaitual property, and on wills and succession.
Parliament. This remains the case for measures relating to family law. But under Article 67 as amended by the Treaty of Nice, which entered into force on 1st February 2003, the Parliament and Council now act jointly in accordance with the co-decision procedure specified by Article 251, except in the case of measures relating to family law. By Article 68, preliminary rulings by the European Court on the interpretation of measures adopted under Title IV may be requested only by national courts of last resort.

By Article 69, along with associated Protocols, measures adopted under Title IV apply to the United Kingdom or Ireland only if they elect to participate in the adoption of or to accept the measure in question. But so far both the United Kingdom and Ireland have invariably opted into all measures under Title IV relating to private international law. Measures adopted under Title IV do not apply to Denmark, unless and until it elects wholly or partly to abandon this opt-out. All of the measures which have so far been adopted under Title IV in the field of private international law apply in and between all the Member States except Denmark.

Before 1999 measures designed to secure the harmonization of conflict rules at EC 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 what is now Article 293 of the EC Treaty (originally Article 220 of the EEC Treaty), which requires 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. Since the entry into force of the Treaty of Amsterdam, Title VI of the Treaty of Maastricht has ceased to be available. While in principle it might still be possible to conclude further conventions in the sphere of private international law under Article 293 of the EC Treaty, the practical advantages of proceeding under Title IV of the Treaty, not least in avoiding the need to wait for every Member State to effect a separate ratification, are so obviously overwhelming that further use of Article 293 is unlikely.

The measures of European harmonization 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.
CIVIL JURISDICTION AND JUDGMENTS

The most important Community instrument in the sphere of private international law is Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which is commonly referred to as ‘the Brussels I Regulation’. It is examined in Chapters 2–11 and 18 of the present work.

The Brussels I Regulation was adopted by the EC Council on 22nd December 2000. It entered into force for the fourteen pre-2004 Member States other than Denmark on 1st March 2002, and for the ten additional Member States on 1st May 2004. The Regulation 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 States to which the Regulation applies. It applies to most types of civil matter. But certain matters (such as most family matters; and insolvency proceedings) are excluded from its scope.

The Regulation replaces 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’. The Convention was based on Article 293 (ex Article 220) of the EC Treaty. For the time being the Brussels Convention remains in force between Denmark and the other fourteen pre-2004 Member States, but on 15th April 2005 the Commission presented proposals for Council decisions on the signature and conclusion of an Agreement between the European Community and Denmark extending to Denmark the provisions of the Brussels I Regulation and on 20th September 2005 the Council adopted Decision 2005/790 on the signing of the Agreement. In addition the Lugano Convention of 16th September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in substance extends the Brussels Convention to certain EFTA countries (Switzerland, Norway and Iceland).

As regards judgments, the Brussels I Regulation is now supplemented by EC Regulation 805/2004, creating a European Enforcement Order for Uncontested Claims. This Regulation was adopted by the Parliament and Council on 21st
April 2004, and it applies from 21st October 2005. 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 will become enforceable in other Member States without the need to obtain an enforcement order there. In addition, on 15th March 2005, the EC Commission presented a Proposal for a Regulation establishing a European Small Claims Procedure.9

THE LAW APPLICABLE TO CIVIL OBLIGATIONS

In the sphere of choice of law, the Rome Convention of 19th June 1980 on the Law Applicable to Contractual Obligations, which is commonly referred to as ‘the Rome Convention’,10 lays down choice of law rules for most types of contract. 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’. It entered into force on 1st April 1991, and is currently in force in the first fifteen Member States. A Convention on the Accession of the ten new Member States to the Rome Convention was signed at Luxembourg on 14th April 2005.11 The Rome Convention is examined in Chapters 12 and 13 of this work.

On 14th January 2003 the EC Commission issued a Green Paper on the conversion of the Rome Convention 1980 into a Community instrument and its modernization.12 On signing the Accession Convention on 14th April 2005, the Member States requested the Commission to submit, as soon as possible and at the latest by the end of 2005, a proposal for a Regulation on the law applicable to contractual obligations.13 Such a proposal was eventually presented by the Commission on 15th December 2005.14

On 22nd July 2003 the EC Commission presented a Proposal for a Regulation on the Law Applicable to Non-contractual Obligations.15 This is commonly referred to as ‘the Rome II Proposal’. It deals with choice of law in respect of torts and restitutionary obligations. On 6th July 2005 the European Parliament, by way of first reading, adopted a resolution amending the Rome II

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10 For its text, see [1998] OJ C27/34.
11 For its text, see [2005] OJ C169/1. By a joint declaration, the Member States have undertaken to take the necessary steps to ratify the Accession Convention within a reasonable time and, if possible, before December 2005; see [2005] OJ C169/9.
15 For its text, see COM(2003) 427 final.
Proposal and approving the Proposal as amended. On 21st February 2006 the Commission presented an amended version of the proposal. The Rome II Proposal is examined in Chapters 14 and 15 of this work.

FAMILY MATTERS

In the sphere of family law, jurisdiction and judgments in respect of important matters 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. This is commonly referred to as ‘the Brussels IIA Regulation’. It was adopted by the EC Council on 27th November 2003 and became applicable on 1st March 2005. The Brussels IIA Regulation is examined in Chapters 16 and 17 of this work.

The Brussels IIA Regulation deals with jurisdiction and judgments in respect of matrimonial proceedings (divorce, separation and annulment of marriage), and of 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.

18 For its text, see [2003] OJ L338/1.
19 See Article 72. For transitional provisions, see Article 64.
21 See [1998] OJ C221. As para. 6 of the Preamble to the Brussels II Regulation indicates, the content of that Regulation was substantially taken over from the Brussels II Convention, but the Regulation also contained a number of new provisions designed to secure consistency with the (then proposed) Brussels I Regulation on civil jurisdiction and judgments.
In addition, on 19th December 2002 the EC Council adopted Decision 2003/93, authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. When signing that Convention, the EC Member States had to make a declaration that, since the Convention allows Contracting Parties a degree of flexibility in order to apply a simple and rapid regime for the recognition and enforcement of judgments, and the Community rules provide for a system of recognition and enforcement which is at least as favourable as the rules laid down in the Convention, a judgment given in a court of an EU Member State, in respect of a matter relating to the Convention, will be recognized and enforced in the signing Member State by application of the relevant internal rules of Community law. On 17th June 2003 the EC Commission presented a proposal for a Council decision authorizing the Member States in the interest of the Community to ratify or accede to the Hague Convention 1996, but such a decision has yet to be adopted by the Council.


INSOLVENCY

EC Regulation 1346/2000 on Insolvency Proceedings was adopted by the Council on 29th May 2000. It entered into force for the fourteen pre-2004 Member States other than Denmark on 31st May 2002, and for the ten additional Member States on 1st May 2004. It replaced a Convention, based on Article

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22 See [2003] OJ L48/1. The decision is also binding on the ten States which joined the Community in 2004; see the Athens Act of Accession, Articles 53 and 54.
29 See the Athens Act of Accession, Article 2. For minor adjustments, see the Athens Act of Accession, Annex II, Part 18(A)(1).
293 (ex Article 220) of the EC Treaty, which had been opened for signature on 23rd November 1995, but had not entered into force. The Insolvency Regulation is examined in Chapter 19 of this work.

PROCEDURAL COOPERATION

In the sphere of procedural co-operation, EC Regulation 1348/2000 on the Service in the Member States of Judicial and Extra-judicial Documents in Civil or Commercial Matters was adopted by the Council on 29th May 2000. It entered into force for the fourteen pre-2004 Member States other than Denmark on 31st May 2001, and for the ten additional Member States on 1st May 2004. It replaced a Convention, based on Article K.3(2)(c) of the Treaty of Maastricht, which had been signed on 26th May 1997 but had not entered into force.

In addition EC Regulation 1206/2001 on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters was adopted by the Council on 28th May 2001. It entered into force for the fourteen pre-2004 Member States other than Denmark on 1st January 2004, and for the ten additional Member States on 1st May 2004. Also on 28th May 2001 the EC Council adopted Decision 2001/470, establishing a European judicial network in civil and commercial matters.

THE EUROPEAN COMMUNITY AND THE HAGUE CONFERENCE

On 9th December 2005 the EC Commission presented a Proposal for a Council Decision on the Accession of the European Community to the Hague Conference on Private International Law. This followed negotiations on the amendment of the Statute of the Hague Conference to enable the admission of Regional Economic Integration Organisations. It is envisaged that the amended Statute will enter into force, and the Community will become a member of the Conference, in July 2006.

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32 See the Athens Act of Accession, Article 2.
33 For its text, see [2001] OJ L174/1.
34 See the Athens Act of Accession, Article 2.