

# PERSPECTIVES OF UNIFICATION OF PRIVATE INTERNATIONAL LAW IN THE EUROPEAN UNION

Edited by  
MIKLÓS KIRÁLY and TAMÁS SZABADOS

# **Perspectives of Unification of Private International Law in the European Union**



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Edited by  
Miklós Király and Tamás Szabados

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# The Interface Between the Harmonisation of Contract Law and Private International Law

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## I. Overview

Over the past decades, new instruments, called Principles, were devised in order to support the approximation of contract laws on a global as well a regional scale. These optional soft laws were published either by international institutions or academic bodies, thereby creating non-national sources of contract law and also posing new challenges for private international law.

The UNIDROIT Principles of International Commercial Contracts (UPICC) were first published in 1994, followed by new or amended editions in 2004, 2010 and 2016.<sup>1</sup> In 2013, a separate document was passed by the Governing Council of UNIDROIT on the choice of UPICC (Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts).<sup>2</sup> The Lando Commission published the Principles of European Contract Law (PECL) in 2000 and 2003.<sup>3</sup> The European Commission supported the academic exercise on the harmonisation of private law, which led in 2009 to the publication of the Draft Common Frame of Reference (DCFR),<sup>4</sup> and then the European Commission promulgated a draft Regulation and, as its annex, the Common European Sales Law (CESL).<sup>5</sup>

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<sup>1</sup> UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2004 (UNIDROIT, Rome 2004); UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2010 (UNIDROIT 2010); UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2016 (UNIDROIT 2016).

<sup>2</sup> UNIDROIT, Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT 2013).

<sup>3</sup> Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, Parts I-II (Kluwer 1999); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law*, Part III (Kluwer 2003).

<sup>4</sup> Christian Von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Outline edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), (Sellier 2009).

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final. By now, it is very unlikely that the Proposal will be passed in its original form by the Council of Ministers and the European Parliament. 8 Model Clauses 3 and 4.

All the above-mentioned Principles contain clauses on their possible application. The Preamble of the latest edition of the UPICC refers to several functions of the UPICC:

They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.

Furthermore, the above-mentioned separate UNIDROIT document on model clauses contains a very elaborate system of different types of clauses. According to them, it is possible for the contracting parties to choose only the UPICC (*kollisionsrechtliche Verweisung*) as governing law or to choose the UPICC but supplemented by a particular domestic law or supplemented by generally accepted principles of international commercial law. A separate model clause is offered to incorporate the UNIDROIT principles as terms of the contract (*materiellrechtliche Verweisung*). Moreover, other model clauses also refer to the UPICC as a means of interpreting and supplementing the United Nations Convention on Contracts for the International Sale of Goods (CISG) when the latter is chosen by the parties or as means of interpreting and supplementing the applicable domestic law.<sup>8</sup>

The PECL and the other above-mentioned Principles have not been accompanied by such a sophisticated document of pre-formulated choice of law clauses; however, they envisage very similar functions for themselves in the EU.

According to the PECL, 'These Principles are intended to be applied as general rules of contract law in the European Union'. The PECL will be applied 'when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them'.<sup>6</sup>

The DCFR is less explicit regarding its applicability. According to its Article I-I:101, 'These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters'. This low-key approach can be explained by the circumstance that

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<sup>6</sup> PECL, art 1:101. Furthermore, according to this provision, the PECL may be applied when the parties have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like; or have not chosen any system or rules of law to govern their contract. The PECL may provide a solution to the issue raised where the system or rules of law applicable do not do so.

the main purpose of the DCFR was thought by its editors to be a possible model for a ‘political Common Frame of Reference (CFR)’, an academic inspiration for a future EU contract law to be passed not by legal scholars but the institutions of the EU.<sup>7</sup>

Finally, the idea of the ‘political’ CFR was born under the name of the CESL. The CESL was originally modelled as a 28<sup>th</sup> legal regime of the EU, a *sui generis* set of European rules for contracts. In such a setting, the choice of CESL would have inevitably been of a private international law nature, touching upon the interesting but sensitive relationship between the harmonisation of substantive law (contract law) and the Rome Regulations, which are the results of the unification of private international law within the EU.<sup>8</sup> However, later the character of the CESL was changed, or at least a new robe was given to it. According to the published version of the proposal,

This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules.<sup>12</sup>

This statement has represented a significant policy shift on the side of the European Commission; the CESL has been kept outside the reach of the general system of European private international law norms.

Generally, the provisions on the scope and application of soft law instruments represent only one side of the coin. The actual application of the Principles is heavily dependent upon the private international law provisions of the *forum*,<sup>9</sup> unless their choice and application is guaranteed by another obligatory instrument, such as the draft CESL Regulation. For a long period of time, the private international law rules on contracts were firmly anchored in domestic law, despite the growing number of conventions prepared by the Hague Conference. However, with the rise of the law-making activity of the EU, this situation has changed radically, at least in Europe. The Rome Convention on the Law Applicable to Contractual Relationships was passed in 1980, while its successor, the Rome I Regulation, was promulgated in 2008. The Rome I Regulation—diverging from its original concept—shows a suspicious attitude towards non-national soft law instruments, such as the different Principles. According to its Article 3 on freedom of choice, a ‘contract shall be

<sup>7</sup> DCFR, Outline edition, 37.

<sup>8</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6; Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. CESL, art 6.

<sup>9</sup> Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Martinus Nijhoff 2010) 174–177.

governed by the law chosen by the parties'. In this context, the term 'law' clearly refers to domestic laws, promulgated by the states.<sup>10</sup> This strict approach is slightly cushioned by the Preamble of the Rome I Regulation, which includes a substantive law designation confirming that it 'does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention'.<sup>11</sup> However, this is not a major achievement; in fact, it comes directly from the contractual freedom of the parties. More forward-looking is paragraph (14) of the Preamble of the Rome I Regulation, according to which 'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules'. So, theoretically it accepts the applicability of an EU contract law—such as the CESL in its original draft form.

The Inter-American Convention on the Law Applicable to International Contracts, drawn up at the Inter-American Specialized Conference on Private International Law (CIDIP) in 1994, seems to be much more generous, declaring in its Article 10 that 'In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case'. This Article refers to the freedom of courts to apply the principles of international contract law; however, this freedom should be logically guaranteed for the contracting parties too, although Article 7 of the Convention is not very straightforward in this respect.<sup>12</sup> Unlike the Rome I Regulation, which has replaced the private international law rules related to contracts in EU Member States,<sup>13</sup> the geographical impact of the Inter-American Convention is much more limited, since up until now only Mexico and Venezuela have ratified it<sup>14</sup> and it is applicable only in the relationship between these two countries. There are no concrete plans for any rapid accession of the United States (US) to this convention, which could give a major impetus to its application. It means that the practice of US Courts will be influenced by the Restatement (Second) on Conflict of Laws, especially by its §§ 186-188, which refer to the 'law of the state chosen by parties,' or to the 'local law of the state,' not to mention non-state sources of contract law. Hence, similarly to the Rome I Regulation, only the 'incorporation by reference' of non-state laws (*materielle Verweisung*) seems to be accepted by the Restatement.<sup>15</sup>

<sup>10</sup> This is clearly supported by Article 4 of the Rome I Regulation, which provides rules on applicable law in the absence of choice and consequently refers to the 'law of the country'.

<sup>11</sup> Rome I Regulation, Preamble (13).

<sup>12</sup> 'The contract shall be governed by the law chosen by the parties'.

<sup>13</sup> In Denmark, the Rome Convention has remained the applicable EU instrument.

<sup>14</sup> Boele-Woelki (n 9) 186.

<sup>15</sup> Comment of § 187, Symeon C. Symeonides, 'Contracts subject to non-state norms' (2006) 54 AJIL 209, 216.

Finally, we have to mention the development of a unique instrument under the aegis of the Hague Conference. This instrument is the Principles on Choice of Law in International Commercial Contracts (Hague Principles), passed in 2015. According to its Article 3 on ‘rules of law’, ‘The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as neutral and balanced set of rules, unless the law of the *forum* provides otherwise’. The Hague Principles make the most decisive intellectual step towards broadening the scope of party autonomy. According to their provisions, choice may be to designate not only State law but also ‘rules of law’. The commentary of the Hague Principles expressly refers in this context to the UPICC and PECL as examples and elaborates the meaning of such qualifying key terms as ‘set of rules’, ‘neutrality’ and ‘balanced’. Nevertheless, we have to keep in mind that this is a pioneering effort, regarding the form of the instrument as well, since it will remain ‘Principles’, a soft law instrument itself, instead of a convention, so it will not be ratified in different countries and will not function as hard law. Despite this, we should not underestimate its persuasive authority, its contribution to the international discourse and its impact on the future development of private international law.

On balance, we have to admit a kind of discrepancy between the ambitions of the above introduced Principles of contract law and the prevailing approach of private international law: The Principles are much more ambitious than the present European private international law norms on contracts, although the application of the Principles is generally dependent upon the ‘goodwill’ of regional and domestic conflict of laws rules. We may recall again the fairly restrictive approach of Rome I Regulation. The Inter-American Convention is more generous but it has only a limited geographical application and the Hague Principles, which accept the choice of non-state laws, is a soft law instrument itself. However, it may be a forerunner of a new generation of private international law norms, supporting the application of non-state norms.

Of course, when evaluating the importance and application of the Principles in the field of substantive contract law, we should clearly differentiate between arbitration and litigation. Parties in arbitral procedures and arbitrators themselves enjoy a much greater freedom in deciding on the application of rules of law, including Principles,<sup>16</sup> than parties involved in litigation or judges of ordinary courts.

The Principles and private international law rules, the soft and the hard laws, will presumably live together in a nuanced relationship. This coexistence would work even more smoothly if private international law codes became more benevolent towards the application of high quality and neutral soft law instruments, enhancing in this way party autonomy and the effective application of the various Principles on contract law.

<sup>16</sup> For example, according to Article 21 of the 2012 ICC Arbitration Rules: ‘The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute’.

## II. The impact of the UNIDROIT Principles of Commercial Contracts on the Hungarian Civil Code

Non-state laws may serve as model-laws for national legislators and may influence the jurisprudence of national courts as well. The following part of this paper gives some examples of the impact of UPICC on the new Hungarian Civil Code<sup>17</sup> (hereafter HCC or Code) which was enacted in 2013. Its Book Six is devoted to the Law of Obligations, including several titles covering contracts. However, the analysis time-time has to go beyond the parts on contracts and refers to the introductory provisions of the HCC or to certain rules on non-contractual liability following the internal context and cross-references of the Code. The jurisprudence of the Hungarian courts is mainly related to the former Hungarian Civil Code; however, since there are many identical or at least similar provisions in the old and the new Codes, the earlier judgments of the courts remained as point of reference for the analysis. Moreover, in many instances, the jurisprudence of the courts was crystallised in the black letter rules of the new HCC as well.

Section 6:63 HCC introduces a new provision on usages, obviously inspired by Article 9 CISG and Article 1.9 UPICC. This Section is devoted to the conclusion and contents of contracts, while its subsection (5) specifically deals with usages and practices:

Under the contract the parties shall be bound by any usage which they have agreed on in prior business dealings and by any practice they have established between themselves. Furthermore, the parties shall be bound by a usage which would be considered generally applicable and widely known in the given business sector by parties to similar contracts, unless such usages and practices are likely to conflict with contract terms which have been previously negotiated between the parties.

This provision reflects to an embryonic Hungarian case law as well, which started to accept that usages may become part of a contract without an express reference. Since UPICC or several provisions of it can be considered as a codification of usages and *lex mercatoria*, according to an optimistic scenario Section 6:63 HCC may become a gateway towards the inclusion of the Principles into contracts having an international dimension or can serve as an interpretative background. However, the possible restrictive interpretation of the term ‘given business sector’ in the above quoted subsection of the HCC may pose obstacles against this line of development.

<sup>17</sup> Act V of 2013 on the Civil Code. In English: *Polgári Törvénykönyv – Civil Code* (Wolters Kluwer 2013).

The UPICC was translated into Hungarian; first the complete edition of UPICC 1994<sup>18</sup>, and then later only the black-letter rules of UPICC 2010.<sup>19</sup> As a result of these efforts, the Principles became well known to the Hungarian academic community. During the preparation of the HCC, several instruments of the unification of contract law were taken into account as a source of inspiration, especially the CISG, the UPICC and the PECL. This influence and inspiration was expressly admitted by the editorial committee preparing the original draft of the HCC.<sup>20</sup> As such, it is not surprising that the sections on contracts of the HCC fairly often contain similar or compatible norms to those of the UPICC.

Despite of the above-described influence of the UPICC on law-making, we do not find express references to UPICC—as applicable rules of law or interpretative tool—in Hungarian jurisprudence. The reasons are probably manifold: During the so-called ‘socialist’ era of law (1949–1990) the attitude was rather hostile towards usages; they were considered as sources of uncertainty and inherently dangerous to the protection of weaker parties. This approach has been perpetuated even to the provisions of the Act LXXI of 1994 on Arbitration (Act on Arbitration), although it was passed after the change of the social and legal system and followed the patterns of the UNCITRAL Model Law. However—unlike the UNCITRAL or ICC rules—it did not allow the choice of non-state laws, or at least it was rather ambiguous in this respect. On the one hand, according to Article 28 of the UNCITRAL Model Law ‘The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’, while Section 49 (1) of the Act on Arbitration—due to a false translation or intentionally—facilitated only the choice of state law or legal system of a state.<sup>21</sup> Curiously enough, this provision was imported into the new Hungarian law on arbitration, passed in 2017.<sup>22</sup>

<sup>18</sup> József Gehér, László Réczai and Péter Katona (trs), *Nemzetközi Kereskedelmi Szerződések Alapelvei* (Közgazdasági és Jogi Könyvkiadó 1996).

<sup>19</sup> Miklós Király (ed), *UNIDROIT, Nemzetközi Kereskedelmi Szerződések Alapelvei 2010* (ELTE Eötvös Kiadó 2014).

<sup>20</sup> Lajos Vékás (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* (Complex 2008) (Expert Proposal, 2008).

<sup>21</sup> Act LXXI of 1994 on Arbitration, s 49 (1):

The arbitration tribunal shall decide the dispute in accordance with the provisions of the governing law selected by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a particular State shall be construed—unless the parties have agreed otherwise—as one referring to the law of the State in question, having a direct bearing on the points in issue.

<sup>22</sup> Act LX of 2017, s 41 on the applicable law.

Negotiations in bad faith – Article 2.1.15 UPICC.<sup>23</sup> The HCC does not expressly use the term ‘negotiations in bad faith’, but it covers the situation described in UPICC Article 2.1.15. First of all, the HCC contains a general duty of good faith amongst its introductory provisions. According to its Section 1:3,

- (1) In exercising rights and in fulfilling obligations the requirements of good faith and fair dealing shall be observed.
- (2) The requirements of good faith and fair dealing shall be considered breached where a party’s exercise of rights is contradictory to his previous actions which the other party had reason to rely on.

Besides this general principle, the HCC reinforces the obligation to cooperate as a fundamental principle of contracts as well in its Section 6:62. According to its subsection (1), ‘the parties shall be required to cooperate during pre-contractual negotiations, at the time of the conclusion and termination, and during the life of the contract, and shall be duty-bound to communicate information to each other on circumstances relevant to the contract’. On one hand, the parties are free to negotiate and the following subsection (4) expressly declares that ‘If conclusion of the contract fails, the parties shall not be obliged to pay compensation’. On the other hand, subsection (5) makes clear that ‘If the contract is not concluded, the party who breaches the obligation referred to in subsection (1) during pre-contractual negotiations shall be subject to liability for damages in accordance with the general provisions of non-contractual liability’. Unlike in UPICC, there is no express reference on the consequences of entering into or continuing negotiations without the intention to reach an agreement with the other party; however, the general duty of good faith and the requirement of the duty to cooperate are applicable to this situation. It is obvious from the jurisprudence of the Hungarian courts that the duty to cooperate covers the period of negotiations before the conclusion of the contract.<sup>24</sup> The HCC does not enlist the different elements of cooperation between the parties; it mentions only the requirement to give information relevant to the contract. In case EBD 2013. P.12, a Hungarian court expressed that a party who enters into negotiations or breaks them contrary to principle of good faith and fair dealing will be liable to pay partial or full

<sup>23</sup> Art 2.1.15 (Negotiations in bad faith)

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

<sup>24</sup> Lajos Vékás, *Szerződési jog, Általános rész* (ELTE Eötvös Kiadó 2016) 86 referring to court cases BH 2007. 48; BH 1997. 48.

compensation.<sup>25</sup> At this point, Article 2.1.15 (3) UPICC could be used as an inspiring source of interpretation, supporting the argument that negotiations in bad faith are against the duty to cooperate and against the general principle of good faith and fair dealing and lead to liability for damages. Finally, it is worthwhile mentioning that, in the reasoning of an arbitral award delivered in case VB/04093, in 2005, a Tribunal of the Arbitral Court of the Hungarian Chamber of Commerce and Industry expressly referred to a similar provision included in Article 2:301 of the PECL, according to which a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.

Surprising terms – Article 2.1.20 UPICC.<sup>26</sup> There is a strong conceptual resemblance between UPICC and Section 6:78 HCC on standard contract terms becoming part of the contract. According to its subsection (1) ‘Contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for consideration before the conclusion of the contract, and if the other party has accepted those terms’. Subsection (2) then contains provisions on ‘surprising terms’, requiring that

The other party shall be explicitly informed of any standard contract terms that differ substantially from the relevant legislation and from usual contractual practice, except if they are in line with any practice the parties have established between themselves. The other party shall be explicitly informed of any standard contract terms that differ substantially from any stipulations previously applied by the same parties.

This provision is strictly in line with the decisions of the Hungarian Supreme Court (BH2013. 128) and of other high courts (BDT2013. 2875). Finally, subsection (3) of Section 6:78 HCC makes the application of these terms expressly conditional upon the acceptance of the other party: ‘The terms defined in subsection (2) shall form part of the contract only if the other party has expressly accepted them after being informed about them’. This provision is echoed by the jurisprudence of Hungarian courts. It has gained special importance in relation to the so-called foreign exchange credit contracts, when the position of consumers was especially volatile, due to the fluctuations of exchange rates and the specific technical terms included in the

<sup>25</sup> Lajos Vékás and Péter Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz* Vol. 1–2 (Wolters Kluwer 2014) 1392.

<sup>26</sup> Art 2.1.20 (Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character, regard shall be given to its content, language and presentation.

contracts but not understandable by average consumers. The judgments of the Hungarian courts underlined that, without providing explicit information to the consumers and their acceptance of them, these terms did not become part of their contract (BH2012. 265; BDT2011. 2407).<sup>27</sup>

The UPICC contains a separate, comprehensive chapter on interpretation. The HCC is less detailed; we have to analyse basically two sections, Section 6:8 on the Interpretation of legal statements and Section 6:86 on interpretation of contracts. Both Sections are relevant, and it is necessary to cite them repeatedly, although they offer, even when taken together, a less sophisticated answer to the problems of interpretation than Chapter 4 of the UPICC.

Intention of the parties – Article 4.1 UPICC.<sup>28</sup> Somewhat surprisingly, one cannot find in the HCC a provision similar to that of Article 4.1 UPICC—referring to the common intention of the parties or to the understanding of a reasonable person. Section 6:86 HCC simply states in its subsection (1) that ‘Contract terms and statements are to be interpreted in accordance with the contract as a whole’, while subsection (2) introduces the *in dubio contra proferentem* rule:

If the meaning of a standard contract term or the contents of the contract term which has not been individually negotiated cannot be clearly established by the application of the provisions set out in subsection (1) for the interpretation of the legal statement, the interpretation that is more favourable to the party entering into a contract with the person imposing such contract term shall prevail. In connection with a contract that involves a consumer and a business party, this provision shall also apply to the interpretation of any contract term.

In addition, it is necessary to recall Section 6:8 HCC on the interpretation of legal statements, which is applicable with regard to contractual statements as well, especially its subsection (1), according to which ‘In the event of a dispute, the statements shall be construed as the addressee had to interpret them in the light of the presumed intent of the person issuing the legal statement and the circumstances of the case, in accordance with the generally accepted meaning of the words’. This rule contains a reference to the will of the party, counterbalanced by a strong emphasis on the circumstances of the case and the generally accepted meaning of the words. It means that a certain equilibrium has been created between the subjective and objective interpretation of the statements, although commentaries tend to favour the literal meaning of

<sup>27</sup> Vékás and Gárdos (n 25) 1416–1417.

<sup>28</sup> Art 4.1 (*Intention of the parties*)

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

the declarations referring to the interest of legal certainty of transactions.<sup>29</sup> Although there is no separate provision prescribing the quest for the common intention of the parties, this is logically unavoidable since, according to the definition of Section 6:58 HCC ‘A contract is concluded upon the mutual and congruent expression of the parties’ agreement intended to give rise to obligations to perform services and to entitlements to demand services’. This concept presupposes the common intention of the parties is sought, at least when the courts have to decide on the existence of the contract.

Interpretation of statements and other conduct – Article 4.2 UPICC.<sup>30</sup> As is obvious from the previous part, Article 4.2 UPICC has its counterpart—although not a literally identical one—in the above quoted Section 6:8 HCC. This Section contains a reference to the intention of the parties and, besides this subjective element, more objective factors should be taken into account, such as the ‘circumstances of the case’ and the ‘generally accepted meaning of the words’. But—unlike in the UPICC—the ‘reasonable person’ test is not mentioned

Relevant circumstances – Article 4.3 UPICC.<sup>31</sup> There is no direct provision in the HCC containing a similar list to Article 4.3 UPICC. However, the above quoted Section 6:8 HCC on the interpretation of legal statements contains a general reference to the circumstances of the case. Moreover, the careful consideration of the factors enumerated by the UPICC is a standard practice in the jurisprudence of Hungarian courts. The commentaries on Section 6:87 HCC on merger clauses may serve as indirect evidence. On one hand, according to its subsection (1) ‘Where a contract in writing includes a term stating that the document contains all contract terms agreed upon by the parties, any prior agreements which are not contained in the document do not form part of the contract’. On the other hand subsection (2) refers to interpretation, confirming that, despite the merger clause, ‘Prior statements of the parties may be used for the interpretation of the contract’. This possibility was emphasised by the Expert Proposal of the HCC with an express reference to

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<sup>29</sup> Vékás (n 24) 103.

<sup>30</sup> Art 4.2 (Interpretation of statements and other conduct)

(1) The statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

<sup>31</sup> Art 4.3 (Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

(a) preliminary negotiations between the parties;  
(b) practices which the parties have established between themselves;  
(c) the conduct of the parties subsequent to the conclusion of the contract;  
(d) the nature and purpose of the contract;  
(e) the meaning commonly given to terms and expressions in the trade concerned;  
(f) usages.

PECL and UPICC.<sup>32</sup> The jurisprudence seems to be even closer to the UPICC since, in a decision (BH2004. 150) of the Supreme Court, it is clearly stated that, besides the statements of the parties, it is necessary to take into account ‘the processes leading to the conclusion of the contract and the subsequent conduct of the parties’.<sup>33</sup>

Moreover, usages unavoidably emerge during the process of interpretation since, according to the already cited Section 6:63 HCC, subsection (5),

Under the contract, the parties shall be bound by any usage which they have agreed on in prior business dealings and by any practice they have established between themselves. Furthermore, the parties shall be bound by a usage which would be considered generally applicable and widely known in the given sector by parties to similar contracts, unless such usages and practices are likely to conflict with contract terms which have been previously negotiated between the parties.

Logically, usages are relevant not only from the viewpoint of the formation and content of the contract but should also be considered as one of the relevant circumstances for consideration. The provisions of the UPICC on relevant circumstances may put the above-cited scattered provisions of the HCC into the proper context.

Reference to the contract or statement as a whole – Article 4.4 UPICC.<sup>34</sup> According to Section 6:86 HCC, subsection (1) ‘Contract terms and statements are to be interpreted in accordance with the contract as a whole’. This new rule of the HCC is identical to Article 4.4 UPICC, so the case law and commentaries related to this section of the UPICC may provide a further inspiration for Hungarian courts.

All terms to be given effect – Article 4.5 UPICC<sup>35</sup> and linguistic discrepancies – Article 4.7 UPICC.<sup>36</sup> The UPICC provisions on all terms to be given effect and linguistic discrepancies are obviously missing from the HCC. The UPICC could be a source of information and inspiration for Hungarian courts confronting situations leading to these legal problems.

<sup>32</sup> Expert Proposal, 2008 774. Similarly, Vékás and Gárdos (n 25) 1424.

<sup>33</sup> Vékás and Gárdos (n 25) 1422–1423.

<sup>34</sup> Art 4.4 (Reference to contract or statement as a whole)

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

<sup>35</sup> Art 4.5 (All terms to be given effect)

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

<sup>36</sup> Art 4.7 (Linguistic discrepancies)

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

Currency of payment – Article 6.1.9 UPICC.<sup>37</sup> Regarding the terms of payment of monetary debts, the approach of the HCC is close to that of Article 6.1.9 UPICC, focusing on the currency of the place for payment, although the Hungarian rules are less detailed. Section 6:45 HCC, subsection (1) prescribes that ‘A monetary debt shall be settled in the currency at the place and time of the settlement’. The parties are naturally free to agree otherwise; subsection (2) provides rules for this situation:

If the monetary debt is recorded in another currency, it shall be converted at the exchange rate specified by the central bank of the place of settlement in effect at the time of settlement, or failing this, based on the money market rate. If a monetary debt is to be repaid in a foreign currency, and at the time of settlement the debt cannot be repaid in that foreign currency, the monetary debt shall be settled as under subsection (1).

This solution does not tackle the problem of convertibility and does not offer the choice for the obligee to require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

Right to terminate the contract – Article 7.3.1 UPICC.<sup>38</sup> The HCC does not use the concept of fundamental non-performance as included in Article 7.3.1 UPICC.

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<sup>37</sup> Art 6.1.9 (Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

<sup>38</sup> Art 7.3.1 (Right to terminate the contract)

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

According to Article 6:137 HCC, ‘Non-performance of an obligation is any failure to perform that obligation’. This is essentially identical to Article 7.1.1 UPICC. In order to get a comprehensive picture on the right to terminate a contract it is necessary to recall the general provisions of the HCC on termination of a contract by mutual consent or unilaterally, due to the cross-references included in the relevant Sections. According to Section 6:212 HCC,

- (1) The parties may terminate a contract by mutual consent for the future, or may dissolve the contract with retroactive effect to the date when it was concluded.
- (2) In the case of termination of a contract, the parties shall not owe further services and they shall settle accounts with respect to services performed before the time of termination.
- (3) In the event of the dissolution of a contract, the services already performed shall be returned. If no restitution in kind is possible, dissolution of the contract is not allowed.

The rules on unilateral termination and the applied legal terminology are related to the above cited provisions, since Section 6:213 HCC, subsection (1) reads as follows:

Any person who has the right of cancellation or withdrawal according to law or on the basis of a contract may terminate the contract by making a statement to the other party. If the contract is cancelled, the provisions relating to termination, whereas in the event of withdrawal the provisions relating to dissolution shall apply, under the condition that the party may withdraw the contract if he offers to return the services received.

In sum, a party may cancel a contract for the future or withdraw a contract with retroactive effect if this right is provided by the contract or by law. The HCC offers different grounds for such a unilateral act—breach of contract is one of them.

It is necessary to recall the general provisions of the HCC relating to non-performance as well as the specific provisions on delay and lack of conformity. According to Section 6:140. HCC,

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- (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance;
  - (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.
  - (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

(1) If in consequence of non-performance the obligee's interest in contractual performance has ceased, he may withdraw the contract, or if restitution cannot be provided in kind, he may cancel the contract, unless this Act contains provisions to the contrary.

(2) The obligee's statement shall be considered valid if the reason for withdrawal or cancellation is properly indicated, if that right exists for a number of reasons. The obligee shall be entitled to switch from the reason indicated for withdrawal or cancellation to another.

The jurisprudence of Hungarian courts emphasises the importance of proportionality between the harm caused by non-performance and exercising the right of withdrawal or cancellation. A minor breach of contract—eg an insignificant delay in payment—does not justify withdrawal in the case of credit contracts, for example (BDT 2011. 2571). At this point the case law is getting relatively close to the idea of fundamental non-performance, although this concept is not expressly introduced in the HCC. However, the sophisticated rules of UPICC Article 7.3.1—like the analysis whether the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result—could enrich the arguments of Hungarian courts to strike the right balance.

Regarding the specific provisions allowing unilateral withdrawal or cancellation, several Sections of HCC are relevant, for example Section 6:154 on legal consequences of delay by the obligor:

(1) In the event of the obligor's delay, the obligee shall be entitled to require performance or, if performance no longer serves his interest, he shall be entitled to withdraw the contract.

(2) It shall not be necessary to prove the cessation of an interest in performance for the obligee's withdrawal if:

a) according to the agreement of the parties or due to the imminent purpose of the service, the contract had to be performed at a definite time and no other; or

b) the obligee has stipulated a reasonable deadline for subsequent performance and this period also elapsed without result.

(3) The obligor shall reimburse the obligee for damages caused by his delay, if it is in excess of the interest on late payment with regard to a monetary claim, unless the delay is excused.

The above-cited provision on stipulating a reasonable deadline has the same goal as UPICC Article 7.1.5 on additional period for performance but the latter is more

detailed. As such, certain rules of the UPICC may serve again as a source of inspiration, as with subsection (4), which covers the situation ‘where the obligation [that] has not been performed is only a minor part of the contractual obligation of the non-performing party’. This proportionality test is not expressly included into the corresponding Hungarian provision.

In the event of non-performance before the date of delivery—Section 6:151 HCC—the obligee is allowed to exercise his rights provided for delay, including withdrawal as well:

- (1) If it becomes obvious before the stipulated date of delivery that the obligor will not be able to effect performance as due, on account of which performance is no longer in the obligee’s interest, the obligee shall be entitled to enforce his rights stemming from delay.
- (2) If it becomes obvious before the stipulated date of delivery that performance cannot be effected as contracted, the obligee shall be entitled to enforce his rights stemming from lack of conformity following non-compliance with the deadline for repair or replacement.

Furthermore, the right to withdraw the contract is expressly provided in Section 6:159 HCC on warranty for lack of conformity:

- (1) On the basis of a contract in which the parties owe mutual services to one another, the obligor shall be liable to provide warranty for lack of conformity.
- (2) On the basis of warranty rights, the obligee shall have the option:
  - a) to choose either repair or replacement, unless compliance with the chosen warranty right is impossible or it results in disproportionate expenses on the part of the obligor as compared to the alternative remedy, taking into account the value the service would have had there been no lack of conformity, the significance of the non-performance, and the harm caused to the obligee upon compliance with the warranty right; or
  - b) to ask for a proportional reduction in the consideration, repair the defect himself or have it repaired at the obligor’s expense, or to withdraw the contract if the obligor refuses to provide repair or replacement or is unable to fulfill that obligation under the conditions described in subsection (4), or if repair or replacement no longer serves the obligee’s interest.
- (3) The obligee is not entitled to withdraw the contract if the lack of conformity is minor.
- (4) Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the obligee, taking account of the nature of the goods and the purpose for which the obligee required the thing.

Finally, Section 6:175 HCC on Warranty of title deals specifically with withdrawal in the following provisions:

- (1) In connection with an obligation for the transfer of ownership, a right or claim for consideration, if the acquisition of ownership, other right or claim is hindered by a right of a third party, the obligee shall request the obligor to eliminate such hindrance within the prescribed time limit, or to provide adequate guarantees. In the event of non-compliance within that time limit the obligee shall be entitled to withdraw the contract and to claim damages.
- (2) If the obligor has acted in good faith, he shall cover only the damages incurred by the conclusion of the contract.

Interest for failure to pay money – Article 7.4.9 UPICC.<sup>39</sup> According to Hungarian law, the debtor shall pay interest in the event of late payment. The rate of interest is attached to the base rate of the central bank issuing the foreign currency, unlike in the UPICC, where the short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment is relevant. The creditor cannot demand compound interest in respect of interest for failure to pay money; such a contractual clause is invalid according to the case law (BDT 2012. 2701). However, the creditor may demand compensation for damages not covered by the interest.<sup>40</sup> Section 6:48 HCC on interest on late payments provides the following rules

- (1) In respect of a monetary debt, the debtor shall pay interest on late payment from the time of default calculated by the central bank base rate in effect on the first day of the calendar half-year to which it pertains, or—if the monetary debt is to be satisfied in a foreign currency—by the base rate of the issuing central bank, or failing this, by the money market rate, even if the debt is otherwise free of interest.
- (2) If interest up to the date of default is due to the creditor, the debtor shall pay interest on late payment in addition to the interest due, as of the date of

<sup>39</sup> Art 7.4.9 (Interest for failure to pay money)

(1) If a party does not pay a sum of money when it falls due, the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment, whether or not the non-payment is excused.

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or, where no such rate exists at that place, the same rate as in the State of the currency of payment.

In the absence of such a rate at either place, the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it greater harm.

<sup>40</sup> Vékás (n 24) 217.

default at a rate of one-third of the central bank base rate in effect on the first day of the calendar half-year to which it pertains, or—if the monetary debt is to be satisfied in a foreign currency—by one-third of the base rate of the issuing central bank, or failing this, one-third of the money market rate, but not less than the default interest specified in subsection (1) as an aggregate.

(3) For the purposes of calculating the interest, the central bank base rate in effect on the first day of the calendar half-year affected shall apply to the entire period of the given calendar half-year.

(4) The obligation to pay interest shall apply, even if the obligor justifies his default.

Besides the general provisions on late payments introduced above, there are special, stricter rules applicable to undertakings. They implement Directive 2011/7/EU on late payments.<sup>41</sup> According to Article 2 (6) of the Directive, ‘statutory interest for late payment’ means ‘simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points’. This provision was implemented in Hungary too, by the fairly complex Section 6:155 HCC, subsection (1) on delay in payments in contracts between undertakings:

In connection with contracts between undertakings, interest on late payment shall be calculated as the sum of the central bank base rate in effect on the first day of the calendar half-year affected by the default—if the monetary claim is to be satisfied in a foreign currency, the base rate of the issuing central bank or, failing this, the money market rate—plus eight percentage points. For the purposes of calculating the interest, the central bank base rate in effect on the first day of the calendar half-year affected shall apply for the entire period of the given calendar half-year.

The directive was implemented in all Member States of the EU, so the regional harmonisation of laws prevails in this field.

Interest on damages – Article 7.4.10 UPICC.<sup>42</sup> Hungarian law follows the same approach and leads to the same result as Article 7.4.10 UPICC; however, it is necessary to take several provisions of the HCC into consideration in order to establish this conclusion. This is due to the fact that some rules on liability for damages are common in contractual and non-contractual (delictual) liability in the Code. The

<sup>41</sup> Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L 48/1.

<sup>42</sup> Art 7.4.10 (Interest on damages)

Unless otherwise agreed, interest on damages for non-performance of nonmonetary obligations accrues as from the time of non-performance.

two fields are interlocked by certain provisions of the HCC.<sup>43</sup> This relationship is expressly emphasised by Section 6:144 HCC on complementary application of the principle of non-contractual liability:

- (1) The aggrieved party's obligation relating to damage control and to the prevention and mitigation of damages, and the division of liability among parties bearing joint liability for damages shall be governed by the principle of non-contractual liability.
- (2) The provisions of non-contractual liability shall apply as regards the definition of damage and the mode of compensation in matters not regulated in this Chapter, with the exception that compensation may not be reduced on the grounds of equity.

This is supplemented by Section 6:146 HCC on liability for damages caused during performance, according to which 'The obligee may demand compensation for damages caused to his assets in the course of performance of the contract in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation'. The above-demonstrated interface between the contractual and non-contractual regulatory areas of the HCC establishes the reference to Section 6:532 HCC on the due date of compensation: 'Compensation shall be due immediately upon the occurrence of the damage'. At this point we have to recall briefly the already cited Section 6:48 HCC as well, which prescribes that 'the debtor shall pay interest on late payment from the time of default' and section 6:153 HCC on the obligor's delay, stating that 'An obligor shall be in delay if he does not perform his obligation when due'. The joint impact of all these provisions of the HCC is that the party liable for non-performance of the contract will be in delay as of the occurrence of a default event related to the breach of contract and has to pay interest. The date of submitting the claim for damages—if it is made within the prescription period—is not relevant in this respect, as has been confirmed by jurisprudence (BH2000. 153).<sup>44</sup>

In conclusion, the role and impact of UPICC as a model law and a tool for interpreting national laws should not be underestimated—even in those countries where the choice of soft law instruments is not a common practice.

<sup>43</sup> Vékás (n 24) 240.

<sup>44</sup> Vékás and Gárdos (n 25) 1416–1417.



*István Erdős*

# Illusion or Reality: The Interrelation of the Conflict of Laws Rules and the Practices of State Courts and Arbitral Tribunals

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## I. Introduction

International commercial disputes<sup>1</sup> involve foreign elements by their nature. The presence of a foreign element in a contractual or non-contractual relationship raises the issue of applicable law. The question of applicable law is or can be an issue even at the time of drafting a contract, however, it is definitely the case if a dispute arises and a third party has to decide the case. The most widely employed mechanisms to decide such disputes are litigation and arbitration. In both litigation and arbitration, the adjudicator, the court (judge) or the tribunal has a very important obligation in the course of the proceedings, to determine the laws or norms applicable to the substance of the dispute. This obligation of the respective adjudicator derives from the laws governing the particular proceedings: in litigation it is the *lex fori*, in arbitration it is the *lex arbitri*. These laws usually contain rules, namely conflict of laws rules, which provide for the assessment and methods by which the particular adjudicator has to determine the applicable law.

### 1. Litigation

In the course of litigation, the court, when it conducts the conflict of laws analyses, applies the conflict of laws rules that are in effect in the country where the court is located. This is usually referred to as the conflict of laws rules of the *lex*

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<sup>1</sup> For the purposes of the present introduction, the term commercial is suggested to be understood in line with the concept of commercial as envisaged in the UNCITRAL Model Law on International Commercial Arbitration (1985, 2006). The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

*fori*. In the course of this assessment, and in almost all the Member States of the European Union,<sup>2</sup> due to the private international law revolution which took place over the past seventeen years in the European Union, the courts apply the Rome I Regulation<sup>3</sup> or Rome II Regulation,<sup>4</sup> and where necessary, national private international laws<sup>5</sup> to commercial disputes. The regulations referred to provide for the conflict of laws rules with regard to contractual or non-contractual matters. Since the reason that these regulations were adopted was the need, created by the internal market, ‘to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought’,<sup>6</sup> the regulations do not grant the court discretionary power as to whether it wishes to apply these conflict of laws rules or not. Therefore, if the subject matter of the dispute is such that it falls under the scope of the respective regulation, the seised court in the Member State must apply the conflict of laws provisions of the respective regulation. The scope of the regulations extends to civil and commercial matters which involve some foreign element, and therefore the applicable law has to be determined, unless the matter in question falls under any of the excluded categories of obligations.<sup>7</sup> The regulations not only provide for the specific conflict of laws rules that are applicable in the particular matter, but also cover some of the issues from the general part of private international law, such as for example public policy, imperative rules or *renvoi*. However, other issues, for example the determination of the content of the foreign law, are not regulated, neither by these regulations nor through other instruments under European Union law, which means that based on the rules of the *lex fori* national law, the courts have to apply other sources of law. Concerning the examples of international cooperation in this field, the European Convention on Information on

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<sup>2</sup> It should be noted that Denmark does not participate in the adoption of measures to further the area of freedom, security and justice (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1, Protocol 22 (TEU and TFEU)) and that participation by Ireland and the United Kingdom is dependent on these Member States’ decision to opt in to such measures (TEU/TFEU Protocol 21). Denmark continues to apply the 1980 Rome Convention on the law applicable to contractual obligations. See Xandra Kramer, Michiel de Rooij, Vesna Lazic, Richard Blauwhoff and Lisette Frohn, A European Framework for private international law: current gaps and future perspectives, Study (European Union) 2012, 17 and 29.

<sup>3</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>4</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

<sup>5</sup> See: Symeon C. Symeonides, *Codifying Choice of Law Around the World* (OUP 2014).

<sup>6</sup> See eg Rome I Regulation, Preamble 6.

<sup>7</sup> See Rome I Regulation, art 1, Rome II Regulation, art 1.

Foreign Law<sup>8</sup> sets up a mechanism for how courts in the Member States can collect information on the content of law of another Member State.<sup>9</sup> However, due to many reasons and concerns,<sup>10</sup> the mechanism set up by the convention is not used very frequently in the EU Member States.<sup>11</sup> There were and are constant attempts within the European Union to create effective means in this regard for practitioners and judges as well.<sup>12</sup> Concerning any possible further action at the level of the European Union, the Madrid Principles adopted in 2010 might provide some guidance.<sup>13</sup> The goal of the drafters of the Madrid Principles was to highlight some basic principles of potential acceptance for all, or at least most, of the EU Member States regarding the ascertainment of the content of foreign law.<sup>14</sup>

Due to the patchwork nature of the body of private international law rules that are applicable in a given commercial matter, when national courts conduct the conflict of laws analysis and determine the applicable substantive law, they have to apply more than one source of law, and in fact, have to apply legal sources having different legal nature; some are pieces of European Union law while others are rules of national, domestic law. Since the source and nature of the applicable private international law sources are different, the application of such rules, and so the conflict of laws analysis, requires special attention and expertise from the national courts. This is a challenge that not all national courts can tackle in all situations. Several problems may arise in the course of this analysis. First, the seised court may not recognise that the matter involves conflict of laws situation(s) and, since the parties do not raise such a concern, the court will apply not only the *lex fori* procedural law, but also the substantive law of the country where the *forum* is located. Second, the seised court may recognise the conflict of laws problem but either does not or cannot apply the appropriate conflict of laws rules. Third, the court may not only recognise the conflict of laws problem, but may also be capable of identifying the applicable appropriate conflict of laws rules, however, cannot refrain from doing it in a proper manner. Fourth, the court may apply the appropriate conflict of laws

<sup>8</sup> European Convention on Information on Foreign Law, Council of Europe, ETS No.062, London, 07/06/1968.

<sup>9</sup> All EU Member States are signatories of the Convention except for the Czech Republic. See Chart of signatures and ratifications of Treaty 062, available at: <[https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062/signatures?p\\_auth=yHaqIBZ5](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062/signatures?p_auth=yHaqIBZ5)>.

<sup>10</sup> See The application of foreign law in civil matters in the EU Member States and its perspectives for the future, JLS/2009/JCIV/PR/0005/E4, Part II, Empirical Analysis, Swiss Institute of Comparative Law, Lausanne, 2011, 17.

<sup>11</sup> *ibid* 15.

<sup>12</sup> See the European Judicial Network in Civil Matters, the European Judicial Atlas in Civil Matters, European e-justice.

<sup>13</sup> See Carlos Esplugues, 'Harmonization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010' (2011) 13 Yearbook of Private International Law 273.

<sup>14</sup> *ibid* 293.

rules in a proper manner, however, cannot determine the content of the applicable foreign law. Fifth, although the court can even determine the content of the applicable foreign law, public policy concerns may emerge.

## 2. Arbitration

Compared to litigation, arbitration is different in many regards, and this distinctiveness has its implications in the context of the conflict of laws analysis as well.

Since arbitration is a private dispute resolution mechanism, the rules otherwise applicable in state court proceedings are not automatically applicable in arbitration. Arbitration proceedings are primarily governed by the national arbitration law of the seat of arbitration, that is, by the *lex arbitri*. Contrary to the concept of *lex fori* in state court proceedings, the seat of arbitration does not necessarily mean that the proceeding actually takes place in the particular country, in fact, the place of arbitration may often have no relationship with the parties or the dispute.<sup>15</sup> The *lex arbitri* is the consequence of a legal construct, the so-called legal domicile or juridical location of the arbitration. It is of crucial importance since, as it was mentioned earlier, it is the law applicable to arbitration. However, it is not the law applicable in arbitration. The law applicable in arbitration, that is what substantive laws or norms will be applied by the tribunal to decide the case, will be determined in the course of the conflict of laws analysis conducted by the arbitral tribunal under the *lex arbitri*. National arbitration laws and also the arbitral rules do contain provisions on the determination of law or other norms applicable to the substance of the dispute. For example, both the UNCITRAL Model Law on International Commercial Arbitration<sup>16</sup> and the UNCITRAL Arbitration Rules<sup>17</sup> regulate how arbitral tribunals are to determine the rules applicable to the substance of the dispute or, as the latter refers to it, the applicable law.<sup>18</sup> However, compared to the conflict of laws rules applicable in state court proceedings, the rules in the arbitration laws and in the arbitral rules dealing with the determination of the law or rules applicable to the substance of the dispute are not as comprehensive and detailed as the respective legal sources in state court proceedings. Usually, arbitration laws and arbitral rules accord wide discretionary power to the arbitral tribunal regarding the way the tribunal can determine the applicable rules or law. Furthermore, the private international law rules applicable in arbitration

<sup>15</sup> Thomas H. Webster and Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, Sweet & Maxwell 2014) 303.

<sup>16</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

<sup>17</sup> UNCITRAL Arbitration Rules, 1976, 2010, 2013.

<sup>18</sup> Art 35.

do not regulate the conflict of laws analysis in the way that national PIL sources or even the mentioned EU regulations do. They do not particularly deal with the issues that are usually covered by the general part of private international law, such as for example qualification, public policy or mandatory rules.<sup>19</sup> This is not the case regarding the issue of *renvoi*, because this question is often dealt with in the conflict of laws rules applicable in arbitration as well. However, these rules also do not usually deal with the ascertainment and application of the applicable law in international arbitration either.<sup>20</sup> The International Law Association in 2008 adopted a resolution regarding the ascertainment of the content of the applicable law in international arbitration. The resolution, which in many respects follows the common law approach, provides that, at any time in the proceedings, a question requiring the application of a rule of law (including questions of jurisdiction, procedure, merits or conflicts of laws) arises, arbitrators should identify the potentially applicable laws and rules and ascertain their contents insofar as it is necessary to do so to decide the dispute.<sup>21</sup> In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or the appearance of bias.<sup>22</sup> The Resolution emphasises that the arbitral tribunals attempting to ascertain the content of applicable law have to take into consideration that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration, given the fundamental differences between international arbitration and litigation before national courts.<sup>23</sup> Although the arbitrators are not confined to the parties' submissions about the contents of applicable law,<sup>24</sup> the arbitral tribunals should primarily receive information about the contents of the applicable law from the parties,<sup>25</sup> and when it appears to the arbitrators that the contents of applicable law might significantly affect the outcome of the case, the arbitrators should promptly raise that topic with the parties and establish appropriate procedures as to how the contents of the law will be ascertained, that is whether it should be provided

<sup>19</sup> Whereas these issues do come up in arbitration as well. See eg Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*. [1999] ECR I-3055; Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (eds), *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 195; Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 205.

<sup>20</sup> At the 73rd Conference of the International Law Association held in Rio de Janeiro, Brazil, 17–21 August 2008, ILA adopted Resolution No. 6/2008 concerning the ascertaining the contents of the applicable law in international arbitration.

<sup>21</sup> Recommendation No. 1.

<sup>22</sup> Recommendation No. 2.

<sup>23</sup> Recommendation No. 4.

<sup>24</sup> Recommendation No. 7.

<sup>25</sup> Recommendation No. 5.

by the parties in submissions with the materials attached, or should be established through experts, witnesses or otherwise.<sup>26</sup> In this context, the arbitral tribunals can consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties' representatives, opinions and cross-examination of experts, scholarly writings and the like.<sup>27</sup> When the arbitral tribunal relies on sources not invoked by the parties, the tribunal has to bring those sources to the attention of the parties and invite their comments, at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case. The arbitral tribunal may rely on such additional sources without further notice to the parties if those sources merely corroborate or reinforce other sources already addressed by the parties.<sup>28</sup> Finally, the Resolution provides for a solution where the content of the applicable law cannot be established:

[I]f after diligent effort consistent with these Recommendations the contents of the applicable law cannot be ascertained, arbitrators may apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard.<sup>29</sup>

## II. The determination of the applicable law in state court litigation

In the Member States of the European Union, state courts<sup>30</sup> are bound by many of the so-called private international law regulations. More particularly the ones that are relevant for our discussion are the Rome I Regulation concerning contracts, and Rome II Regulation concerning non-contractual obligations. Both regulations exclude certain relationships and matters from their scope,<sup>31</sup> and also deal with the relationship between the regulations and other provisions of EU law or international conventions,<sup>32</sup> which means that in those areas other sources of private international law will be applicable, and not the regulations.

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<sup>26</sup> Recommendation No. 3.

<sup>27</sup> Recommendation No. 9.

<sup>28</sup> Recommendation No. 10.

<sup>29</sup> Recommendation No. 15.

<sup>30</sup> See n 2.

<sup>31</sup> See Rome I Regulation, art 1 (2); Rome II Regulation, art 1 (2).

<sup>32</sup> See also Rome I Regulation, arts 23–25; Rome II Regulation, arts 27–28.

## 1. The Rome I Regulation

According to Rome I Regulation, the parties can choose the applicable law, and also, the Regulation contains conflict of laws provisions applicable in the absence of choice.

As a principle, the parties' freedom to choose the applicable law is one of the cornerstones of the system of conflict of law rules in matters of contractual obligations under the Regulation.<sup>33</sup> Therefore, as a default rule, a contract is governed by the law chosen by the parties.<sup>34</sup> The choice can be made expressly or must be clearly demonstrated by the terms of the contract or the circumstances of the case.<sup>35</sup> By their choice the parties can select the law applicable to the whole or to part only of the contract. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice of the parties or the application of the conflict of laws rules of the Regulation. Any change in the law to be applied that is made after the conclusion of the contract cannot prejudice its formal validity or adversely affect the rights of third parties.<sup>36</sup> The determination of the existence and validity of the consent of the parties as to the choice of the applicable law is also covered by the Regulation.<sup>37</sup> The Regulation refers to situations where the parties' choice is not a state law.<sup>38</sup> However, if the parties choose a non-state body of law as applicable law, such choice will not be considered as a choice of law. It is because, under the choice of law provisions of the Regulation, the parties can choose only state law. It means that only the choice of a national law can exclude the application of the provisions of the otherwise applicable national law. In the original proposal, the Commission intended to extend the scope of the choice of law provisions to the situations as well where the parties selected a non-state body of law as well. According to the draft text of Article 3 (2) of the Commission's proposal,

the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.<sup>39</sup>

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<sup>33</sup> Preamble 11.

<sup>34</sup> Art 3 (1).

<sup>35</sup> *ibid.*

<sup>36</sup> Art 3 (2).

<sup>37</sup> Art 3 (5).

<sup>38</sup> Preamble 13.

<sup>39</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final 14.

The reason for such a significant departure from the Rome Convention<sup>40</sup> was an attempt to further boost the application and impact of the principle of party autonomy in private international law. Should the particular proposal had been adopted, it would have authorized the parties to choose a non-state body of law as the applicable law. As the Commission explained

The form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community. Like Article 7(2) of the Vienna Convention on the international sale of goods, the text shows what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law.<sup>41</sup>

However, this approach was not supported by the other institutions in the legislative procedure<sup>42</sup> and the final text does not allow for such a choice. What the final text of the Regulation now provides for in this regard is two paragraphs in the preamble: the first deals with the choice of international treaties or unification instruments, such as eg the UPICC,<sup>43</sup> and the second relates to the choice of an appropriate EU instrument. Regarding the choice of international treaties or unification instruments, the Regulation provides that it does not preclude the parties from incorporating by reference into their contract a non-state body of law or an international convention.<sup>44</sup> Such an incorporation practically means that even if the parties opted for the application of a particular set of rules of law, certain provisions of the otherwise applicable national law will still be applicable. These provisions of the otherwise applicable national law are the ones from which the parties cannot derogate. Concerning the choice of an appropriate EU instrument, the Regulation provides that in case the European Union adopts, in an appropriate legal instrument,

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<sup>40</sup> 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] OJ L 266/1, Art 3 (1): A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

<sup>41</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final, 5.

<sup>42</sup> Debate in Council, Position of the European Parliament 29 adopted at first reading on 29 November 2007 with a view to the adoption of Regulation (EC) No .../2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) (EP-PE \_ TC1-COD (2005) 261).

<sup>43</sup> UNIDROIT Principles of International Commercial Contracts (1994, 2004, 2010, 2016).

<sup>44</sup> Rome I Regulation, Preamble 13.

rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.<sup>45</sup> Such choice concerning its effect would be a choice of law, of course, depending on the particular provisions of the would-be instrument. An attempt to adopt an instrument which would have been covered by this rule was the proposal concerning the adoption of a regulation on a Common European Sales Law (CESL),<sup>46</sup> which the Commission later withdrew.<sup>47</sup> Furthermore, even if the parties opt for the application of a particular state law in their choice of law agreement, in some cases it does not mean that by this choice they can fully exclude the application of provisions of other state laws. It can be the case in the following two scenarios. First, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen by the parties, the choice of the parties cannot prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.<sup>48</sup> Second, where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State cannot prejudice the application of provisions of European Union law, where appropriate as implemented in the Member State of the *forum*, which cannot be derogated from by agreement.<sup>49</sup>

Should the parties not choose the applicable law to their contract, or they choose certain rules of law but not a state law, the provisions of the Regulation dealing with the determination of the applicable law in the absence of parties' choice will be applicable. In this context, the Regulation contains a general rule and specific provisions for specific contracts. The specific rules cover contracts of carriage,<sup>50</sup> consumer contracts,<sup>51</sup> insurance contracts,<sup>52</sup> and individual employment contracts.<sup>53</sup> The general rules are applicable in case none of the specific provisions can be applied. As the general objective of the Regulation is to ensure legal certainty in the European Union

<sup>45</sup> Rome I Regulation, Preamble 14.

<sup>46</sup> Proposal for a Regulation of the European Parliament and of the on a Common European Sales Law COM (2011) 635 final, art 3: Optional nature of the Common European Sales Law: 'The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7'.

<sup>47</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 – A New Start COM (2014) 910 final, Annex II, 12 Item 60.

<sup>48</sup> Rome I Regulation, art 3 (3).

<sup>49</sup> Rome I Regulation, art 3 (4).

<sup>50</sup> Rome I Regulation, art 5.

<sup>51</sup> Rome I Regulation, art 6.

<sup>52</sup> Rome I Regulation, art 7.

<sup>53</sup> Rome I Regulation, art 8.

in this regard, the aim of the legislators was while creating conflict of laws rules that are highly foreseeable, that the courts could still retain a degree of discretion to determine the law that is most closely connected to the situation.<sup>54</sup> Therefore the relevant provision of the Regulation applies a mechanism where even if the objective conflict of laws rules lead to the application of a particular state law, by applying the so-called escape clause a more relevant, that is a more closely connected law can be applied.<sup>55</sup> This is because, according to the escape clause, where the contract is manifestly more closely connected with a country other than the one that can be determined by applying the general conflict of laws rules, the law of that other country is to apply. In order to determine that country, account is to be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.<sup>56</sup>

According to the general rule, in the absence of choice, the applicable law is to be determined on the basis of the fact that the contract can be categorised as one of the specified types of contracts enlisted in the Regulation, such as eg contract for the sale of goods, contract for the provision of services, contract relating to a right in rem in immovable property or to a tenancy of immovable property or franchise contract.<sup>57</sup> Where the contract cannot be qualified as one of the enlisted specified types, or the contract is a mixed contract, that is where the elements of the contract would be covered by more than one of the enlisted specified types, the contract will be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.<sup>58</sup> Where the applicable law cannot be determined on the basis of the respective list or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract will be governed by the law of the country with which it is most closely connected.<sup>59</sup> In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

Beside the conflict of laws rules, the Regulation contains further provisions which might affect the final set of laws and rules applicable; overriding mandatory provisions,<sup>60</sup> exclusion of *renvoi*,<sup>61</sup> and the public policy of the *forum*.<sup>62</sup>

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<sup>54</sup> Rome I Regulation, Preamble 16.

<sup>55</sup> Rome I Regulation, arts 4 (3), 5 (3), 8 (4).

<sup>56</sup> Rome I Regulation, Preamble 20.

<sup>57</sup> Rome I Regulation, art 4 (1).

<sup>58</sup> Rome I Regulation, art 4 (2).

<sup>59</sup> Rome I Regulation, art 4 (4).

<sup>60</sup> Rome I Regulation, art 9.

<sup>61</sup> Rome I Regulation, art 20.

<sup>62</sup> Rome I Regulation, art 21.

## 2. The Rome II Regulation

Rome II Regulation regulates the determination of the applicable law to non-contractual obligations covered by its scope. As the concept of a non-contractual obligation varies from one Member State to another, in the context of the Regulation, non-contractual obligation is an autonomous concept,<sup>63</sup> and covers torts and/or delicts,<sup>64</sup> unjust enrichment,<sup>65</sup> *negotiorum gestio*<sup>66</sup> and *culpa in contrahendo*.<sup>67</sup>

According to the Regulation, the parties may agree to submit non-contractual obligations to the law of their choice,<sup>68</sup> with some limitations.<sup>69</sup> Generally, this agreement should be entered into after the event giving rise to the damage occurred, or where all the parties are pursuing a commercial activity, they can agree on the applicable law even before the event giving rise to the damage occurred. The parties' choice has to be expressed or must be demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.<sup>70</sup> The parties can choose state law only. However, similarly to the previously discussed Rome I Regulation, in two specific situations the Regulation does not allow departures for the parties from the application of certain provisions of laws in effect in certain countries. First, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties cannot prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.<sup>71</sup> Second, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State cannot prejudice the application of provisions of EU law, where appropriate as implemented in the Member State of the *forum*, which cannot be derogated from by agreement.<sup>72</sup>

If the parties do not designate the applicable law, the objective conflict of laws rules have to be applied. The Regulation provides for conflict of laws rules for each of the four types of non-contractual obligations. The Regulation aims to reach an

<sup>63</sup> Rome II Regulation, Preamble 11.

<sup>64</sup> Rome II Regulation, arts 4–9.

<sup>65</sup> Rome II Regulation, art 10.

<sup>66</sup> Rome II Regulation, art 11.

<sup>67</sup> Rome II Regulation, art 12.

<sup>68</sup> Rome II Regulation, art 14.

<sup>69</sup> The law applicable may not be derogated from by an agreement in case of Article 6 (unfair competition and acts restricting free competition) and Article 8 (infringement of intellectual property rights).

<sup>70</sup> Rome II Regulation, art 14 (1).

<sup>71</sup> Rome II Regulation, art 14 (2).

<sup>72</sup> Rome II Regulation, art 14 (3).

appropriate balance between the requirements of legal certainty and the need to do justice in individual cases.<sup>73</sup> The first can be ensured through the connecting factors, whereas individualisation can be reached through a certain level of flexibility accorded under the applicable conflict of laws rules. Therefore, for example in the area of torts and delicts, the Regulation provides for a general rule<sup>74</sup> and where the general rule does not allow a reasonable balance to be struck between the interests at stake, specific rules,<sup>75</sup> and for an escape clause.<sup>76</sup> The general and the specific rules serve the interest of predictability and legal certainty, whereas the escape clause brings in the necessary level of flexibility in order to ensure fair and appropriate determination of the applicable law. Similarly to Rome I Regulation, Rome II Regulation also contains further provisions, which can affect the final set of applicable provisions of law: overriding mandatory provisions,<sup>77</sup> rules of safety and conduct,<sup>78</sup> exclusion of *renvoi*,<sup>79</sup> and public policy of the *forum*.<sup>80</sup>

### III. The determination of the applicable law in arbitration

In arbitration, the rules applicable to the substance of the dispute are to be determined based on the conflict of laws rules of the *lex arbitri*. If the *lex arbitri* contains such rules. These rules ensure the parties' freedom to determine the applicable rules or laws, as a particular reflection of the principle of party autonomy and, in case the parties do not designate the applicable law themselves, grant discretionary power for the arbitration tribunal to determine the particularly applied conflict of laws rules and the applicable law or rules of law or other norms as well.<sup>81</sup>

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<sup>73</sup> Rome II Regulation, Preamble 14.

<sup>74</sup> Rome II Regulation, art 4.

<sup>75</sup> Rome II Regulation, art 4 (2), arts 5–9.

<sup>76</sup> Rome II Regulation, art 4 (3): Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

<sup>77</sup> Rome II Regulation, art 16.

<sup>78</sup> Rome II Regulation, art 17.

<sup>79</sup> Rome II Regulation, art 24.

<sup>80</sup> Rome II Regulation, art 26.

<sup>81</sup> See eg Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14 *Journal of International Arbitration* 39.

The UNCITRAL Model Law on International Commercial Arbitration<sup>82</sup> in Article 28 contains provisions as to the determination of rules applicable to the substance of the dispute. At the time when the Model Law was negotiated, many national arbitration laws did not regulate how the law applicable to the substance of the dispute was to be determined in arbitration. The lack of such rules created difficulties in international disputes. The solutions what tribunals applied were diverse: it was either the law of the country of the place of arbitration or the law of the procedure selected by the parties, or it was left to the discretionary power of the arbitral tribunal to determine the rules private international law it considered appropriate to the case.<sup>83</sup> In the course of the negotiations leading to the adoption of the Model Law, the reception of the proposed text of the Model Law, to grant the parties the freedom to resort to rules of law as well by the observers and delegations was very diverse: some did not consider it as a relevant issue since ‘law’ and ‘rules of law’ do not differ much,<sup>84</sup> some supported it,<sup>85</sup> some even wanted to go further,<sup>86</sup> and some expressed their concerns.<sup>87</sup> One of the main supporters of the proposed ‘rules of law’ wording was the delegate of France, who emphasised that

[T]he important point was that the parties must have the right to choose for the settlement of their dispute a set of provisions which was not necessarily contained in an enacted law and would enable the arbitrators to decide the dispute as flexible as possible. Above all, parties wished to be certain that it would be settled on the basis of known considerations, which might be trade usage, the provisions of a convention which had not yet entered into force or the legislation of a third country.<sup>88</sup>

<sup>82</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. In the European Union a considerable number of Member States follow the Model Law: Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain, and Scotland (UK).

<sup>83</sup> See Summary Records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 326th meeting (1985) 16 Yearbook of the United Nations Commission on International Trade Law 482.

<sup>84</sup> Eg Singapore (the term ‘law’ and ‘rules of law’ convey the same meaning and any distinction between them was largely a question of semantics), Finland (there is not much difference in substance or in practice between the two terms).

<sup>85</sup> Eg United States of America, Germany and France.

<sup>86</sup> Republic of Korea (proposed that the title should be amended to read ‘Rules and principles applicable to substance of dispute’ and so the first sentence of the proposed article should be amended to read ‘the arbitral tribunal shall decide the dispute in accordance with such rules and principles of law as are designated by the parties’).

<sup>87</sup> Eg Hungary would have preferred a more traditional approach.

<sup>88</sup> See Summary Records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 326th meeting (1985) 16 Yearbook of the United Nations Commission on International Trade Law 484.

Concerning the issue of *dépeçage*, the representative of Switzerland even referred to the 1980 Rome Convention on the Law Applicable to Contractual Obligations as a point of reference.<sup>89</sup>

Although the debate in the Commission was very vivid,<sup>90</sup> the Model Law as it was adopted provides that the parties have the freedom to determine the rules applicable to the substance of the dispute. The choice of the word ‘rules’ is not by accident. It means that the parties can choose not only state law as applicable law, but also non-state bodies of law, that is rules of law, as applicable rules. For example in this regard the parties may designate eg the CISG<sup>91</sup> or the UPICC as the applicable substantive rules based on which the dispute has to be decided.<sup>92</sup> Such a choice is generally accepted by arbitral tribunals,<sup>93</sup> but of course national laws may introduce restrictions in this regard.<sup>94</sup> Unlike in state court proceedings, such choice can exclude the application of the national law, or the national law will be applied only subsidiary.<sup>95</sup> A failure of the arbitral tribunal to decide in accordance with the substantive law chosen by the parties may lead to the challenge of the award or application to set aside the award by an unsuccessful party.<sup>96</sup> If the parties designate the law or legal system of a given state, unless otherwise expressed, such choice must be interpreted as directly referring to the substantive law of that

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<sup>89</sup> *ibid* 483.

<sup>90</sup> At a certain point there was a considerable support within the Commission to replace the wording ‘rules of law’ to ‘law’, while according the term ‘law’ a broader sense the previously. See *ibid* 485.

<sup>91</sup> United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).

<sup>92</sup> UNCITRAL, UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, (UN 2012), 121.

<sup>93</sup> See eg Arbitral Award 166/2012 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 27.05.2013 <<http://www.unilex.info/case.cfm?id=1791>>, Arbitral Award Permanent Court of Arbitration 2009 <<http://www.unilex.info/case.cfm?id=1473>>, Arbitral Award Centro de Arbitraje de México (CAM) 30.11.2006 <<http://www.unilex.info/case.cfm?id=1149>>.

<sup>94</sup> See eg Arbitral Award International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry 22.12.2004 <<http://www.unilex.info/case.cfm?id=1099>>. The case concerned a sales contract between a foreign buyer and a Ukrainian seller where the parties agreed that the law applicable to their contract would be the U.N. Convention on Contracts for the International Sale of Goods (CISG), the *lex mercatoria* and the UNIDROIT Principles of International Commercial Contracts (1994 edition). However, since according to Article 6 of the Ukrainian Law on Foreign Economic Activity, where the national law of neither party to the contract has been chosen as the applicable law, the applicable law shall be the law of the country in which the seller is situated, the Arbitral Tribunal decided that in the case at hand also the law of Ukraine was applicable.

<sup>95</sup> See eg Arbitral Award 233/2012 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 03.10.2013 <<http://www.unilex.info/case.cfm?id=1793>>.

<sup>96</sup> German courts found that art 28 (1) permits a national court to consider if the award was based on the law chosen by the parties See: CLOUT case No. 375 [Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 23/99, 15 December 1999], CLOUT case No. 569 [Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001]. UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 92) 122.

State and not to its conflict of laws rules, which means that *renvoi* is excluded. Furthermore, the parties can choose not only the applicable law or rules of law, they can also authorise the arbitral tribunal to decide the case *ex aequo et bono* or as *amiable compositeur*.<sup>97</sup> This authorisation needs to be expressed<sup>98</sup> but, if the parties do so, the arbitral tribunal can decide the dispute without the application of the particular law or set of rules of law but based on principles the tribunal deems to be just.

In case the parties do not designate the applicable rules of law, the arbitral tribunal has the discretionary power to determine the applicable law. In this context, the arbitral tribunal can determine the conflict of laws rules that it considers appropriate, and can apply such conflict of laws rules.<sup>99</sup> However, it is important to note that, in this regard, the arbitral tribunal's discretionary power is not as broad as the parties' autonomy to designate the applicable rules of law, because the arbitral tribunal, when it applies the appropriate conflict of laws rule, can resort only to a national law.<sup>100</sup> The connecting principle that is usually applied in these situations is either the principle of the closest connection or the principle of characteristic performance. Finally, in all cases, the arbitral tribunal has to decide the case in accordance with the terms of the contract and has to take into account the usages of the trade applicable to the transaction.<sup>101</sup> The requirement concerning the application of trade usages can in some cases lead to the application of international or transnational trade law instruments, such as for example the CISG or the UPICC, even if the parties designated a particular national law as the applicable law.<sup>102</sup>

The Arbitration Act 1996 in England follows a slightly different approach. According to Article 46 of the Arbitration Act, the arbitral tribunal has to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. For this purpose, the choice of the laws of a country is to be understood to refer to the substantive laws of that country and not its conflict of laws rules. If or to the extent that there

<sup>97</sup> In this regard see Jana Herbočzková, 'Amiable Composition in the International Commercial Arbitration', Cofola 2008 <[https://www.law.muni.cz/sborniky/cofola2008/files/pdf/mps/herboczkova\\_jana.pdf](https://www.law.muni.cz/sborniky/cofola2008/files/pdf/mps/herboczkova_jana.pdf)> accessed 26 April 2018; Regis Bonnan, 'Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time' (2015) 6 Journal of International Dispute Settlement 522.

<sup>98</sup> On the interpretation of express authorisation see CLOUT case No. 507 [Liberty Reinsurance Canada v. QBE Insurance and Reinsurance (Europe) Ltd., Ontario Superior Court of Justice, Canada, 20 September 2002], [2002] CanLII 6636 (ON SC).

<sup>99</sup> UNCITRAL Model Law on International Commercial Arbitration art 28 (2).

<sup>100</sup> UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 92) 121.

<sup>101</sup> UNCITRAL Model Law on International Commercial Arbitration art 28 (4).

<sup>102</sup> Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A \_ 240/2009.

is no such choice or agreement, the tribunal has to apply the law determined by the conflict of laws rules which it considers applicable.<sup>103</sup>

Although in Italy the arbitration legislation is not based on the Model Law, many of the principles of the Model Law can be identified in the Italian law. In Italy, arbitration is regulated in the Italian Code of Civil Procedure, under Title VIII. The latest amendment of the respective rules took place in 2006. Before the modifications were enacted in 2006,<sup>104</sup> the law provided different rules for domestic and international arbitration. With regard to international arbitration, the law provided that the parties could agree among themselves upon the rules which the arbitrators had to apply to the merits of the dispute or could provide that the arbitrators could decide *ex aequo et bono*. If the parties were silent, the law with which the relationship has its closest connection was to be applied. In both cases, the arbitrators had to take into account the provisions of the contract and trade usages.<sup>105</sup> The arbitration reform enacted in 2006 eliminated the differences between international and domestic arbitration. According to the current rules, under the title rules for the deliberation, the arbitrators shall decide according to the rules of law, unless the parties have provided, by any expression, that the arbitrators shall render the award *ex aequo et bono*.<sup>106</sup> The consequence of this rule is that the tribunals having their seat in Italy might ‘follow different approaches, including probably most frequently, relying on the conflict rules of the forum’.<sup>107</sup> It means that if the parties do not agree otherwise, the application of Article 822 will result in the application of the Italian law, including the law on private international law,<sup>108</sup> which means the application of the rules of the Rome Convention,<sup>109</sup> and other sources of EU private international law as well.

France has a legislative framework that encourages and facilitates arbitration. The enactment of the respective national legislative framework preceded the adoption of the UNCITRAL Model Law, which may explain why France has not adopted

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<sup>103</sup> According to Article 22 (3) of the London Court of International Arbitration Rules (2014), the Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate. Article 22 (4) further provides that the Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from ‘*ex aequo et bono*’, ‘*amiable composition*’ or ‘*honourable engagement*’ where the parties have so agreed in writing.

<sup>104</sup> Legislative Decree of 2 February 2006, No. 40.

<sup>105</sup> Art 834.

<sup>106</sup> Art 822.

<sup>107</sup> Arbitration Guide, IBA Arbitration Committee, Italy, March 2012, 3.

<sup>108</sup> Law No. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law.

<sup>109</sup> Article 57 provides: Contractual obligations shall be governed in all cases by the Rome Convention of 19 June 1980, on the Law Applicable to Contractual Obligations, as enforced by Law No. 975 of 18 December 1984, without prejudice to any other international conventions, where applicable.

the Model Law.<sup>110</sup> In France, similarly to Italy, arbitration is regulated in the Code of Civil Procedure.<sup>111</sup> The French law provides for different rules in domestic and international arbitration.<sup>112</sup> Concerning international arbitration, the arbitral tribunal has to decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. However, it does not mean that the arbitrators would be required to apply the conflict of laws rules of a specific national legislation. As the law grants a wide discretionary power to the arbitrators as to the methods for the determination of the applicable law or rules of law, they are allowed to apply conflict of laws principles, use the *voie directe* or resort to *lex mercatoria* if they considered it appropriate. The limitation in this regard is that the arbitrators must give reasons for their decision and respect the mandatory rules that are applicable.<sup>113</sup> Furthermore, the arbitral tribunal shall take trade usages into account.<sup>114</sup> If the parties have empowered it to do so, the arbitral tribunal has to rule as *amiable compositeur*.<sup>115</sup>

The arbitration law in the Czech Republic<sup>116</sup> is not based on the Model Law either.<sup>117</sup> The act provides that if there is an international element in the case, the arbitrators should decide the case in accordance with the law, ie national law, chosen by the parties.<sup>118</sup> However, should the parties not designate the applicable law, the conflict of laws rules of the location of the *forum* will be applicable.<sup>119</sup> It means that the national act on private international law<sup>120</sup> has to be applied, which also provides for the application of international treaties which are binding on the Czech Republic and of any directly applicable provisions of European Union law,<sup>121</sup> eg Rome I or Rome II Regulations.

Arbitration rules also contain provisions as to the determination of the applicable substantive rules or rules of law. The current, 2010 text of the UNCITRAL Arbitration Rules<sup>122</sup> in Article 35 regulate the determination of law applicable to the

<sup>110</sup> Michael Ostrove, Claudia Salomon and Bette Shifman (eds), *Choice of Venue in International Arbitration* (OUP 2013) 323.

<sup>111</sup> Book IV, Domestic Arbitration: arts 1442 to 1503, International Arbitration: arts 1504–1527.

<sup>112</sup> Arbitration Guide, IBA Arbitration Committee, France, March 2012, 4.

<sup>113</sup> Thomas H. Webster and Dr Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, Sweet & Maxwell 2014) 299.

<sup>114</sup> Art 1511.

<sup>115</sup> Art 1512.

<sup>116</sup> On the Czech arbitration law and practice see Alexander J. Bělohávek, *Arbitration Law of Czech Republic: Practice and Procedure* (JurisNet 2013).

<sup>117</sup> Act of the Czech Republic No. 216/1994 Sb. on arbitration proceedings and on enforcement of arbitration awards.

<sup>118</sup> Art 37 (1).

<sup>119</sup> Art 37 (2).

<sup>120</sup> 91/2012 Coll.

<sup>121</sup> Art 2.

<sup>122</sup> The UNCITRAL Arbitration Rules were initially adopted in 1976.

substance of the dispute. A difference between the UNCITRAL Model Law and the Arbitration Rules in this regard is that the latter, already in the title of the particular provision, assumes a more limited approach than that followed in the Model Law. However, the text itself does not differ, in the sense of what can be chosen as applicable law or rules of law. According to the Arbitration Rules, similarly to the Model Law, the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute.<sup>123</sup> However, it was not always the case. The original text of the Arbitration Rules, as adopted in 1976, provided that the arbitral tribunal had to apply the law designated by the parties as applicable to the substance of the dispute. The result of the 2010 revision of the text is that now it allows the parties to choose not only law but also the rules of more than one legal system, including internationally elaborated rules. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.<sup>124</sup> The decision in the 2010 version to allow the parties the ability to choose ‘rules of law’ and limit the tribunal’s discretion to ‘law’ was intentional.<sup>125</sup> Similarly, it was intentional to alter the arbitrator’s discretionary power from the discretion to determine the applicable conflict of laws rules to the discretionary power to determine the applicable substantive law directly as well.<sup>126</sup>

The Model Law, the discussed national legal frameworks and arbitration rules show that arbitrators usually have a wider margin of discretionary power compared to state court judges when it comes to the question of choosing the applicable conflict of laws rules and the applicable law or legal system. In practice, however, the basic mechanism for the determination of governing law is not principally different.<sup>127</sup> Generally, in practice, arbitrators resort to one of the following methods when determining the applicable substantive rules: they apply either the standard private international law rules, or the so-called cumulative method or the general principles of conflict of laws rules.<sup>128</sup> The cumulative method means that the arbitrators apply all conflict of laws rules of the legal systems connected with the dispute.<sup>129</sup> When the arbitrators apply the connecting principles evolved in private international law, they usually focus on the identification of the centre of gravity of the facts of the case or the closest connection between the facts of the case and a particular legal system or rules of law. In this context, the connecting factors and principles that

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<sup>123</sup> Art 35 (1).

<sup>124</sup> Art 35 (1).

<sup>125</sup> Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (CUP 2013) 395.

<sup>126</sup> *ibid* 396.

<sup>127</sup> Bělohávek, (n 116) 1787.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid* 1788.

are usually applied in order to establish the closest connection are the habitual residence or place of business of the party that provides characteristic performance or the place of characteristic performance.<sup>130</sup>

#### IV. Interactions, impacts and possible future developments

Although arbitration is separate from state court proceedings and so the laws applicable to state court proceedings do not apply to arbitration, how the law applicable in arbitration is determined is influenced by the standard rules and principles of private international law sources applied by state courts, and the practice developed by such courts. Of course, this affect is substantiated in line with the arbitrator's wider power of discretion and the greater freedom accorded to the parties. In the following, two aspects of it will be discussed; first, the application and impact of state court, national and EU conflict of laws rules in arbitration, and second, the application of rules of law beside or instead of national law in state court proceedings.

##### 1. The applicable conflict of laws rules, connecting factors and connecting principles in arbitration

A comparison of the trends in arbitration and state court proceedings reveals that the impact of the connecting factors and connecting principles applied in the conflict of laws legislations is undisputable. It is because the rules dealing with the determination of the laws or rules of law applicable to the substance of the dispute can grant a wide discretionary power to the arbitral tribunal in choosing either the appropriate conflict of laws principles, or the applicable substantive rules, or both. Even if this discretionary power can be limited, eg by the obligation to apply certain mandatory rules,<sup>131</sup> at the level of designating the applicable conflict of laws rules it allows the arbitral tribunal more flexibility than the rules to be followed in state court proceedings. This higher level of flexibility is also present at the level of the application of the designated conflict of laws rules or principles, since arbitral tribunals can often freely determine how they apply the particular rules or principles, and these are usually quite flexible. In the absence of such provisions, or where the *lex arbitri* rules require so, the conflict of laws rules of the country where the arbitration takes place

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<sup>130</sup> *ibid* 1790.

<sup>131</sup> *Redfern and Hunter on International Arbitration* (n 19) 196.

can or must be applied. In this case, the arbitral tribunals will apply the same conflict of laws rules, eg national or where applicable EU conflict of laws rules,<sup>132</sup> which the state courts would apply if the case were to be decided in litigation.

However, difficulties may arise when the arbitral tribunals apply the respective EU regulations.<sup>133</sup> For example, if there is uncertainty as to the interpretation of the EU law, contrary to state courts, arbitral tribunals do not have the power to make preliminary reference to the Court of Justice of the European Union (CJEU), which can lead to inconsistencies in the application of EU law by arbitral tribunals. A conventional commercial arbitration tribunal, where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration, and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator, cannot make preliminary reference to the CJEU because it does not qualify a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU<sup>134</sup> The CJEU has accepted preliminary reference from arbitral tribunals where the participation in the arbitration proceedings was legally mandatory and neither the jurisdiction of the arbitral board did depend on the parties' agreement nor 'the composition of the arbitration board was within the parties' discretion',<sup>135</sup> or where the arbitral tribunal, even if it dissolved after making its decision, was established on a legislative basis, had permanent compulsory jurisdiction, and the national legislation defined and framed the applicable procedural rules.<sup>136</sup> However, the inability of conventional commercial arbitral tribunals to make preliminary reference is not a problem that could not be solved. A creative solution is applied in the 2005 Danish Arbitration Act.<sup>137</sup> According to the relevant provision, if the arbitral tribunal considers that a decision on a question of European Union law

<sup>132</sup> Davor Babić, 'Rome I Regulation: binding authority for arbitral tribunals in the European Union?' (2017) 11 *Journal of Private International Law* 71; Burcu Yüksel, 'The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union' (2011) 7 *Journal of Private International Law* 149.

<sup>133</sup> See in this regard eg Alexander J Belohlavek, 'Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration' in Alexander Belohlavek and Nadezda Rozehnalova (eds), *Czech Yearbook of International Law*, vol 1 (JurisPublishing 2010) 25, <<https://ssrn.com/abstract=1723715>> accessed 26 April 2018.

<sup>134</sup> Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*. [1982] ECR 1095 paras 10–12; *Eco Swiss*, para 34; Case C-125/04 *Guy Denuit and Betty Cordenier v Transorient – Mosaïque Voyages et Culture SA*. [2005] ECR I-923, para 13.

<sup>135</sup> Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paras 7–9.

<sup>136</sup> C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd and Others* ECLI:EU:C:2014:92, paras 22–25.

<sup>137</sup> Act no. 553 of 24 June 2005 on Arbitration. The Arbitration Act was drafted in accordance with the 1985 UNCITRAL Model Law on International Commercial Arbitration.

is necessary to enable it to make an award, the arbitral tribunal may request the courts to request the CJEU to give a ruling thereon.<sup>138</sup> Application of similar solutions in other Member States might help to solve the problem that might arise from the inconsistent application of the EU law, however, the length of the preliminary ruling proceedings might create additional problems. According to the data available regarding the 2016 statistics, in the case of references for a preliminary ruling the average duration of proceedings was 15 months, which actually constituted the shortest duration recorded for more than 30 years.<sup>139</sup>

## 2. The application of rules of law beside or instead of national law in state court proceedings

The conflict of laws rules applied in state court proceedings are quite reluctant to honour the parties' choice of a non-state body of law or rules of law as having the same effect as the choice of national law would have. This is because, under these rules, the parties' freedom to designate the applicable substantive rules extend only to the choice of state law, because should the parties choose a non-state body of law, that clause in the contract would eg under the respective rules of Rome I Regulation be considered only as an incorporation of the particular source into their contract. Therefore, the parties cannot choose eg the UPICC or the PECL as governing substantive law. This is however not the case in arbitration. The wider freedom to determine the applicable substantive laws or rules granted to the parties in arbitration has already tried to find its way to sneak into the conflict of laws legislation applicable in state court proceedings as well. An excellent example of this attempt was the discussed Article 3(2) of the first version of the Commission proposal concerning Rome I Regulation. The Commission proposal in fact applied a very similar approach and wording,<sup>140</sup> what was proposed by a delegate at the UNCITRAL regarding a possible, broad wording of Article 28 (2) of the Model Law on International Commercial Arbitration.<sup>141</sup> However, the final version of the adopted regulation does not provide for such a wide freedom

<sup>138</sup> Art 27 (2).

<sup>139</sup> Court of Justice of the European Union, Annual Report, Judicial activity, 2016 (European Union 2017) 82.

<sup>140</sup> '[T]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community'. Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final, 14.

<sup>141</sup> See the wording suggested by the delegate of the Republic of Korea: 'The arbitral tribunal shall decide the dispute in accordance with such rules and principles of law as are designated by the parties' Summary Records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 326th meeting (1985) 16 Yearbook of the United Nations Commission on International Trade Law 483.

for the parties, and such an extension of the principle of party autonomy got taken off the table, at least for the time being.

Regarding the extension of choice of law rules to the choice of non-state laws or norms in state court proceedings an important step further was the adoption of the Hague Principles on Choice of Law in International Commercial Contracts in 2015.<sup>142</sup> Article 3 of the Principles provide that the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the *forum* provides otherwise.<sup>143</sup>

One of the most recent codifications of private international law in the EU Member States is the new Hungarian Private International Law Act which was adopted on 4 April 2017 by the Hungarian National Assembly.<sup>144</sup> The new act will replace the current legislation, which was adopted in 1979, as of 1 January 2018.<sup>145</sup> The new act is the result of an almost two years long codification process and brings about several modifications, innovations and developments as to the former regime. Of the several new elements and innovations to be introduced by the new act, one concerns party autonomy. The new act extends the possibility accorded to the parties to choose the applicable law, and the principle of party autonomy will be applied in a broader and more extensive manner than it was in under the previous law. However, it does not do so regarding the question that what can be chosen by the parties as substantive law. Concerning contracts,<sup>146</sup> the new act provides that a contract shall be governed by the law chosen by the parties.<sup>147</sup> If the parties want to have the otherwise applicable national law be excluded due to their choice, they must choose a national law.<sup>148</sup> Otherwise, if they choose non-state bodies of law, their choice will count as ‘only’ choice of rules of law and not choice of law. Modelled after the respective provisions of Rome I Regulation,<sup>149</sup> the act allows choice of law where the contract is connected with only one country. In this case the choice of the parties cannot prejudice the application of provisions of the law of this one country which cannot be derogated from by agreement.<sup>150</sup> Title 28 of the

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<sup>142</sup> The Hague Principles on Choice of Law in International Commercial Contracts is available at <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>>.

<sup>143</sup> So far Paraguay, in the Law 5393 of 2015 regarding the applicable law to international contracts, has implemented the Principles. Article 5 of the Paraguayan Law reads that in the context of the law, a reference to law includes rules of law that are generally accepted on a non-state origin, as a neutral and balanced set of rules.

<sup>144</sup> Act XXVIII of 2017 on Private International Law. The act was published in the official gazette on 11 April 2017.

<sup>145</sup> Art 125.

<sup>146</sup> Title 26.

<sup>147</sup> Art 50 (1).

<sup>148</sup> Art 1.a.

<sup>149</sup> Rome I Regulation, art 3 (3).

<sup>150</sup> Art 50 (4).

act covers non-contractual obligations not governed by the Rome II Regulation. According to the new act, the parties can choose the applicable law to non-contractual obligations as well.<sup>151</sup> The choice can be made after a non-contractual relationship emerged, and can be either expressed or tacit. Like regarding contracts, where the non-contractual legal relationship is connected with one country only, the choice of law made by the parties cannot prejudice the application of provisions of the law of this country which cannot be derogated from by agreement.

## V. Closing remarks

As arbitration is excluded from the scope of the current EU instruments, thoughts emerged that ‘in order to enhance the attractiveness of arbitration within the EU, a more comprehensive legal regulation of arbitration may be considered’.<sup>152</sup> Furthermore, the JURI Committee commissioned a study in 2015 in order to investigate the law and practice of arbitration across the European Union and Switzerland.<sup>153</sup> The study found that international commercial arbitration and EU law can interact with each other in a number of ways, and this can lead to potential inconsistencies. Therefore, the question of the proper relationship between EU law and commercial arbitration is vital. On the one hand, too much influence of EU law over commercial arbitration can undermine the effectiveness and attractiveness of arbitration but, on the other hand, too little can risk allowing arbitration, in some situations, to be used as a means of avoiding otherwise applicable restrictions that are seen as important to the proper functioning of the European Union.<sup>154</sup> The study recommends some changes and adjustments, among others<sup>155</sup> concerning the authority of arbitral tribunals to make references for preliminary rulings,<sup>156</sup> jurisdictional rules,<sup>157</sup> or public policy.<sup>158</sup> Further actions would be required concerning the role and application of mandatory provisions in international commercial arbitration as well.

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<sup>151</sup> Art 63.

<sup>152</sup> Xandra Kramer, *Current gaps and future perspectives in European private international law: towards a code on private international law?* (European Union 2012) 12.

<sup>153</sup> Tony Cole, Ilias Bantekas, Federico Ferretti, Christine Riefa, Barbara Warwas and Pietro Ortolani, *Legal instruments and practice of arbitration in the EU* (European Union 2014).

<sup>154</sup> *ibid* 186.

<sup>155</sup> The study discusses in great details the issue of consumer and online arbitration as well. See *ibid* 204–221.

<sup>156</sup> *ibid* 186–188.

<sup>157</sup> *ibid* 189–199.

<sup>158</sup> *ibid* 199–200.

Concerning the choice of non-state law in state court proceedings, the future might not treasure too much of a surprise: at present, no choice-of-law codification in Europe expressly allows the choice of non-state norms.<sup>159</sup> At the level of European Union law, no significant changes affecting the freedom of the parties to choose even a non-state body of law can be envisaged either. At least in the short or medium run. Looking more into the future, some convergence between the approach followed in the Rome I Regulation and Rome II Regulation and in arbitration might take place. This convergence might be reflected in the determination of the pool of substantive laws, rules of law, rules and principles from which the parties can choose the one or ones they wish to be applied in their dispute. Since the regulations only provide for the choice of state law as a possible choice of law, the departure might be into the direction of broadening the parties' freedom.<sup>160</sup> However, considering the latest developments that took place in the area of EU private international law lawmaking, and the fact that the parties who usually would opt for the application of non-state bodies of law in their dispute are typically sophisticated commercial parties and they would anyway go to arbitration, such reform is not yet on the horizon. Also, considering the teaching of the saga of the rise and fall of the CESL, rapid and significant development in that area, where the situation pictured in Preamble 14 of the Rome I Regulation could really happen, cannot be anticipated either.<sup>161</sup>

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<sup>159</sup> Symeon C. Symeonides (n 5) 142.

<sup>160</sup> For example, modelled after Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts (2015).

<sup>161</sup> Regarding possible future developments in EU private international law see eg Xandra Kramer, Michiel de Rooij, Vesna Lazic, Richard Blauwhoff and Lisette Frohn (n 2); Kramer (n 152).

## **Uniform or Diverging Application of EU Instruments in the Field of Private International Law by National Jurisdictions – Preliminary References in the Area of Judicial Cooperation in Civil Matters**

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The statistics in the annual reports of the Court of Justice of the European Union clearly demonstrate that in recent years the area of freedom, security and justice has definitely been one of the subject-matters in which a considerable number of preliminary references was sent to the Court of Justice (hereinafter Court) by national courts. In fact, in 2016 the number of references in this field reached the highest number ever, with 76 referrals representing a sixth of all references.<sup>1</sup> The growing need for interpretation is of course partly due to the sudden proliferation of legal instruments witnessed during the last decade in the area of freedom, security and justice, but it might have other reasons as well, such as the waiving of the Treaty-based restrictions concerning the courts entitled to initiate preliminary references in this area or the need to seek definite answers to unsettled questions stemming partly from ambiguities found in the relevant instruments and partly from newly emerging challenges linked to the use of information technologies in cross-border relations or to novel forms of international mobility or transactions.

This paper will make an attempt to give an overview on the nature, relevance and frequency of preliminary references concerning the core instruments of European private international law (PIL), being a constitutive element of the area of freedom, security and justice under judicial cooperation in civil matters. It will analyse the activity of the different national courts in referring questions to the Court and their openness or reticence to refer when applying and interpreting European PIL Regulations and the motivations of national governments in participating with written observations in preliminary ruling procedures. At the same time, the study aims

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<sup>1</sup> In 2016, the number of preliminary references in the field of freedom, security and justice was 76 followed by taxation 68, which is traditionally a subject-matter where the number of references is very high. In 2015, this number was 50 for the area of freedom, security and justice and 43 for taxation, while in 2014 the latter was in the lead with 54 references followed by the former with 49 referrals, source: <[https://curia.europa.eu/jcms/jcms/Jo2\\_7000/en/](https://curia.europa.eu/jcms/jcms/Jo2_7000/en/)>.

to identify typical or standard questions necessitating a binding interpretation at European level. In order to limit the scope of the study, only preliminary references concerning the Brussels I Regulation<sup>2</sup> (and its heir, the Brussels I bis Regulation<sup>3</sup>), the Brussels II bis Regulation,<sup>4</sup> the Rome I Regulation,<sup>5</sup> the Rome II Regulation<sup>6</sup> and the Rome III Regulation<sup>7</sup> will be analysed with special regard of course to their earlier instrumental forms, and, where applicable, the Brussels Convention of 1968 and the Rome Convention of 1980. The quite recent Succession Regulation<sup>8</sup> will not be covered by the study, given that its application at national level is just starting to raise questions to be solved.<sup>9</sup> The case-law under scrutiny embraces cases decided or pending as of 15 October 2017.

## I. The preliminary ruling procedure in the field of private international law

The preliminary ruling procedure as foreseen by the current Article 267 of the Treaty on the Functioning of the European Union<sup>10</sup> (TFEU) aims above all to ensure that EU law is interpreted and applied in a uniform way throughout the Union. Although with regard to secondary law instruments even their validity can be raised under a preliminary ruling procedure, the procedure is predominantly

<sup>2</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

<sup>3</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

<sup>4</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1.

<sup>5</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/6.

<sup>6</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199/40.

<sup>7</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/1010.

<sup>8</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

<sup>9</sup> There is one judgment and two pending references at the Court concerning the interpretation of this Regulation.

<sup>10</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

used by national courts for seeking interpretation. The interpretation of EU legislation is of course not an exclusive privilege of the Court; national courts are within the European judicial system and are also full-fledged interpreters of EU law, but the Court is however the only institution which provides interpretation of binding force.<sup>11</sup> As such, it is commonplace that the very essence of the preliminary ruling procedure is to prevent or put an end to diverging understanding and perception of EU legislation. Under the classical approach, the procedure is seen as a cooperation between national courts confronted with a problem of interpretation and the Court assisting them by providing useful answers to their questions.

Under Article 267 TFEU, any national court is entitled to seek a preliminary ruling procedure while those courts or tribunals against whose decisions no remedy is available under national law are obliged to refer their questions of interpretation to the Court unless the famous CILFIT criteria laid down by the Court are satisfied.

However, Article 267 TFEU (or its precursors)—although being the general rule—has not always been an exclusive basis for preliminary ruling procedures and this non-exclusivity concerns above all the area of freedom, security and justice under which private international law is regulated at European level. It is important to note that the most relevant PIL Regulations have their normative roots in traditional international conventions adopted by the Member States, long before the concept of the area of freedom, security and justice was created by the Treaty of Amsterdam. The Brussels Convention<sup>12</sup> was concluded very early in 1968 while the Rome Convention<sup>13</sup> came into being in 1980. As they were both adopted outside the scope of Community law, the preliminary ruling procedure could not be applied by virtue of the EEC Treaty at that time. However, it was evident that, in order to ensure the uniform application of the Conventions, the involvement of a Court with authoritative interpretative functions would be inevitable. Therefore, in the case of both Conventions, special protocols were adopted foreseeing the possibility for the national courts of the contracting parties to seek preliminary rulings from the Court. As far as the Brussels Convention is concerned, a Protocol was signed in 1971 by the contracting parties (involving all Member States at that time) on the interpretation by the Court of Justice of the Convention.<sup>14</sup> Article 2 of the Protocol identifies three categories of courts entitled to initiate a preliminary ruling procedure. Paragraph 1 lists the supreme courts of the contracting parties by name while

<sup>11</sup> Jacques Pertek, *Coopération entre juges nationaux et Cour de Justice de l'UE – Le renvoi préjudiciel* (Bruylant Bruxelles) 126.

<sup>12</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32.

<sup>13</sup> Convention on the law applicable to contractual obligations [1980] OJ L 266/1.

<sup>14</sup> Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1975] OJ L 204/28.

paragraph 2 provides that the courts of the contracting states when sitting in an appellate capacity are also entitled to refer questions to the Court. Finally, paragraph 3 contains a special provision concerning cases under Article 37 of the Convention and allows courts identified in that Article to consult the Court. Article 3 of the Protocol reflects the philosophy of the Treaty when imposing an obligation upon the supreme courts listed in Paragraph 1 of Article 2 to launch the procedure if a question of interpretation arises before them. It is quite clear that the scope of Articles 2 and 3 read together is narrower than the general rules of the Treaty on preliminary reference, as courts acting at first instance were completely excluded from the possibility of launching the procedure, this right being reserved for higher courts only. The mechanism reflects a cautious attitude of the Member States in trying to save the Court from an extremely high number of incoming cases and in preserving most probably the somewhat ‘outsider’ nature of the Convention. At the same time however, the Protocol contains in its Article 4 a somewhat peculiar rule, opening an additional way for the designated competent authorities of the contracting states to ask for a preliminary ruling. It provides that they may refer questions to the Court if judgments of *res judicata* force given by courts of their state conflict with the interpretation given either by the Court of Justice or with a judgment of one of the courts of another contracting state. This provision goes clearly beyond the Treaty Article on preliminary ruling procedure by allowing to ask for guidance from the Court, even if no genuine legal dispute is at stake before a national court. Indeed, even if never used in practice during the lifetime of the Convention, the provision has been referred to by many as an eventual model for reforming the current preliminary ruling procedure in order to make possible interpretation in cases where, for settlement or for other reasons, the termination of the legal dispute at national level results in the compulsory withdrawal or rejection of the preliminary question due to the absence of a genuine legal dispute, although a binding interpretation would definitely be necessary for the uniform application of EU law.<sup>15</sup>

The provisions of the First Protocol attached to the Rome Convention in 1988<sup>16</sup> are very much identical to those of the Protocol on the interpretation of the Brussels Convention. Point (a) of Article 2 lists the supreme courts of the contracting states which—by virtue of Article 3—are at the same time under the obligation to refer, while point (b) entitles appeal courts to make use of the procedure. Article 3 echoes the special competence of designated national authorities to ask for uniformity decisions.

<sup>15</sup> Jonathan Fitchen, ‘Harmonising Procedural Rules in the EU’ in Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel (eds), *Cross-border Litigation in Europe* (Hart 2017) 73.

<sup>16</sup> First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, [1989] OJ L 48/1.

With the transformation of the PIL Conventions into Community instruments, one could have logically expected that the general rules of preliminary ruling procedure would be applicable to preliminary references concerning the relevant Regulations and that the limitation of the right of initiation to appellate courts and supreme courts would cease. That was however not the case. Quite the contrary; ex-Article 68 EC inserted by the Treaty of Amsterdam in 1997 was a step backwards, further restricting the scope of the courts from having access to the preliminary ruling procedure. By virtue of this Article, only courts of last instance could use this procedure; appellate courts were deprived of this right and lower courts remained excluded. This hardly explicable fall in legal protection lies most probably in the fact that there was a genuine fear of a sudden rise in the number of references if general rules had been applied.<sup>17</sup> However, despite the fear, it is even less understandable why the transfer of judicial cooperation in civil matters into the Community pillar resulted in a lowering of the level of protection by leaving appellate courts, which had been entitled under the Convention-based system to reach the Court, out of the game instead of at least merely keeping the *status quo* and not applying the general rules. As Magnus points out, ironically Danish appellate courts still had the possibility to refer questions to the Court because the Convention remained applicable in the case of Denmark, not participating in the judicial cooperation in civil matters.<sup>18</sup> As such, the system set up by the Treaty of Amsterdam was far from offering an adequate solution; in fact it weakened the guarantees of uniform interpretation and established new inequalities in favour of those not joining the Regulation. Lenaerts maintains that, among the many problems associated with ex-Article 68 EC along with ex-Article 35 of the Treaty on European Union, establishing other kinds of restrictions of similar consequences with regard to judicial cooperation in criminal matters, 'paramount are their detrimental effects for the rule of law'.<sup>19</sup>

In fact, ex-Article 68 EC had the consequence that those who wished their rights under EC law to be enforced had to push their case up to the last instance and exhaust all ways of remedies.<sup>20</sup> These individuals could however be discouraged

<sup>17</sup> According to Ulrich Magnus that fear was clearly overestimated, taking into account the yearly number of references concerning the Brussels Convention (Ulrich Magnus, 'Introduction', in Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (Sellier 2007) 41.

<sup>18</sup> *ibid.*

<sup>19</sup> Koen Lenaerts, 'The Unity of European Law and the Overload of the ECJ – the System of Preliminary Rulings Revisited' in Ingolf Pernice, Juliane Kokott and Cheryl Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2005) 219.

<sup>20</sup> See also on this point Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities – Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346 final 5.

to do so by the time such procedures take and by the court fees they must pay for reaching the last instance court.

Ex-Article 68 EC was applicable from the time the relevant Regulations could be applied at national level until the Lisbon Treaty entered into force in December 2009, this period being different for each Regulation, the Brussels I Regulation being affected the most by the restrictions, for seven years. Finally, the Lisbon Treaty abolished the above divergences by extending the general rules on preliminary ruling to PIL Regulations as well. Inequalities between other EU Member States' courts and Danish courts were remedied somewhat earlier in 2005 by an Agreement between the EU and Denmark<sup>21</sup> according to which the rules of Brussels I Regulation would replace those of the Convention with respect to Denmark and Danish courts would request the Court of Justice preliminary ruling under the same circumstances as any other court of a Member State.<sup>22</sup>

It should also be recalled that ex-Article 67 (2) required the Council, at the end of the transitional period of five years following the entry into force of the Treaty of Amsterdam, to take a decision with a view to adapting the provisions concerning the jurisdiction of the Court of Justice. Although this transitional period elapsed in 2004, no such decision was taken by the Council, which was sharply criticised for that by both the Commission and the European Parliament, which held that 'in this area which so closely touches on the rights of individuals, an increased access to justice is equally essential to enhance legitimacy'.<sup>23</sup> In 2006 the Commission put forward a proposal for a Council decision aligning the jurisdiction in this area to the general rules of the Treaty.<sup>24</sup> The European Parliament approved the draft decision in April 2007.<sup>25</sup> The draft decision was finally not adopted; the discrepancies were abolished by the Lisbon Treaty signed some months later in December 2007 with effect as of December 2009.<sup>26</sup>

At the same time in the mid 2000's, other kind of challenges appeared parallel to the endeavour to have Title IV (judicial cooperation in civil matters) and Title VI (judicial cooperation in criminal matters) measures under the general

<sup>21</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L 299/62.

<sup>22</sup> Morten Broberg and Niels Fenger, *Preliminary References of the European Court of Justice* (OUP 2014) 8.

<sup>23</sup> See in particular the Commission's statement quoted in the Council minutes of 2004 December where extension of the co-decision procedure was decided for the area of freedom, security and justice, cited in footnote 2 of the COM (2006) 346 final.

<sup>24</sup> Draft Council decision adapting the provisions concerning the Court of Justice in fields covered by Title IV of Part Three of the Treaty establishing the European Community (COM (2006) 346 final).

<sup>25</sup> European Parliament legislative resolution of 25 April 2007 on the draft Council decision adapting the provisions concerning the Court of Justice in fields covered by Title IV of Part Three of the Treaty establishing the European Community [2008] OJ C 74 E/506.

<sup>26</sup> Differences remained concerning the validity of EU acts.

rules of preliminary references. With the appearance of new areas covered by EU Regulations, a clear need dictated by the practice arose for a very rapid response to questions coming from the area of freedom, security and justice, especially in cases where people were deprived of their liberty, where procedures touched upon the personal status of individuals or in situations involving parental authority or custody of a child.<sup>27</sup> In such cases, it was quite clear that awaiting an interpretation by the Court could not be tolerated given the average length of ordinary preliminary ruling procedures and not even with the duration of an expedited procedure (if ordered).<sup>28</sup> Although the main motivation behind having special procedural rules for urgent cases in the above categories was to have a better handling of cases concerning criminal matters, issues falling under judicial cooperation in civil matters and especially under Brussels II bis Regulation have also been concerned. The debate on the urgent preliminary ruling procedure was launched by the President of the European Court of Justice after the failure of the Constitutional Treaty in 2006<sup>29</sup> and resulted in the amendment of the Statute of the Court and its Rules of Procedure in 2008. Article 23a of the Statute gave authorisation to the Rules of Procedure to provide for an urgent preliminary ruling procedure in the area of freedom, security and justice and allowed derogations from the general rules on the deadline for written observations, on the involvement of the Advocate General and on participants in the procedure. It also made it possible to omit the written stage of the procedure. Based on this authorisation, a new Article 104(b) was inserted in the Rules of Procedure. In the current version of the Rules, a separate Chapter (Chapter 3) is devoted to urgent preliminary procedures in the areas covered by the former Title VI (Articles 29 to 42) of the Treaty on European Union concerning police and judicial cooperation in criminal matters, and Title IV (Articles 61 to 69) of Part Three of the EC Treaty concerning visas, asylum, immigration and other policies related to the free movement of persons, including judicial cooperation in civil matters currently dealt with under Title V TFEU. The procedure can be launched on a reasoned request of the referring court or *ex officio* by the Court. The Court decides on its application. As the purpose of the new procedure was to decide issues of interpretation within 2–3 months instead of 16–18 months, being the average length of ordinary preliminary ruling procedures, the new procedure is characterised by important limitations concerning the time-limit for written submissions, the scope of those who might present such submissions and the availability of translations of procedural

<sup>27</sup> Supplement to the Information Note on references from national courts for a preliminary ruling following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice, 2008, para. 7.

<sup>28</sup> The length of an expedited procedure is 4–8 months.

<sup>29</sup> Vanessa Ricci, 'The European Court of Justice Case-law Strengthens the Penal Area' in Saskia Hufnagel, Clive Harfiels and Simon Bronitt, *Cross-border Law Enforcement* (Routledge 2012) 29.

documents. The document is served first only on the parties of the main proceedings, on the Member State from which the reference is made, on the European Commission and on the institution which adopted the act in question if the validity of the act is disputed. Only these parties are invited to lodge written observations. All others entitled, by virtue of Article 23 of the Statute, to lodge observations in an ordinary procedure can only join the case at the oral phase.

As Yüksel points out, the urgent preliminary ruling procedure seems to work well for the time being; however, time constraints might undermine its efficiency once the number of cases dealt with under this procedure significantly increases.<sup>30</sup> The data seem to confirm his prognosis. In 2015 the average length of urgent preliminary ruling procedures was 1.9 months<sup>31</sup> while in 2016 the time taken for these cases was definitely longer (2.7 months on average) which—according to the Annual Report of the Court—is still very satisfactory.<sup>32</sup> The lengthening reflects the increase in cases (from five to eight) where an urgent procedure was granted.

Based on the above, one can arrive at the conclusion that the area of freedom, security and justice is peculiar as far as the preliminary ruling procedure is concerned, given the fact that, following serious limitations concerning the courts and tribunals entitled to initiate preliminary ruling procedure, special guarantees—compared to the ordinary preliminary ruling—were established under the urgent procedure for references concerning this area. Hence, the imitations were followed by benefits.

## II. The impact of the changing system of preliminary references in the area of freedom, security and justice

Already under the Convention-based system, national courts other than appellate courts or supreme courts were deprived from referring questions to the Court. Their references were not acceptable even if the answer of Court had been necessary for the correct interpretation of a provision of any of the Conventions in a genuine legal dispute. In its judgment in *Marseille Fret*<sup>33</sup> the Court declined jurisdiction in a preliminary reference from the *Tribunal de commerce de Marseille*, a first instance French court and later in 2016 in another one bearing on the interpretation of the

<sup>30</sup> Burcu Yüksel, 'EU Institutions and PIL' In Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel (eds), *Cross-border Litigation in Europe* (Hart Oxford) 49.

<sup>31</sup> Court of Justice of the European Union, Annual Report 2015, Judicial Activity (European Union 2016) 9.

<sup>32</sup> Court of Justice of the European Union, Annual Report 2016, Judicial Activity (European Union 2017) 82.

<sup>33</sup> Case C-24/02 *Marseille Fret SA v Seatrano Shipping Company Ltd.* [2002] ECR I-3383.

Rome Convention from a first instance German court (*Landgericht Itzehoe*).<sup>34</sup> This deprivation of courts, often handling legal disputes revealing important questions of the Conventions, definitely had the effect of furthering divergent interpretations in the contracting states. The possibility of the competent authorities of Member States to seise the Court in the event of diverging jurisprudence in already settled cases, as foreseen by the relevant protocols, does not seem to compensate for this lacuna, especially since this possibility has never been used.

On the other hand, the Court seemed to interpret the restrictive provisions on the referring courts in an extensive manner. It allowed, for example, a reference from a Danish labour court (*Arbejdsret*) proceeding at first instance but without the possibility of its decisions being appealed.<sup>35</sup> It was thus neither acting in an appellate capacity nor was it a supreme court listed in the relevant Protocol. It was however definitely proceeding at last instance. The Court in its judgment maintained that

[I]n those circumstances, a literal interpretation of the Protocol, declaring that the national court has no jurisdiction to refer questions for preliminary ruling, would have the result that in Denmark questions concerning the interpretation of the Brussels Convention, arising in actions such as the present, could never be the subject of a reference for a preliminary ruling.<sup>36</sup>

The Court therefore ruled that the reference was admissible.

Looking at the number of cases referred to under the Brussels Convention, one can clearly see that, even if from the overall number of references (133) supreme courts referred a much higher number of cases to the Court (83), a considerable number of cases were nevertheless sent by appellate courts (52). In order to illustrate the potential and hidden harmful impact of the post-Amsterdam rules taking away the possibility of appellate courts to refer, it should be underlined that some of the leading cases of the Convention emanated from appellate courts,<sup>37</sup> which under ex-Article 68 EC were later deprived from consulting the Court and could not have contributed to shaping the case-law on the Brussels I Regulation. And this should be seen knowing that the Court's case-law on the Convention remained equally

<sup>34</sup> Case C-397/15 *Raiffeisen Privatbank Liechtenstein AG v Gerhild Lukath* (ECLI:EU:C:2016:16).

<sup>35</sup> Case C-18/02 *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation* [2004] ECR I-1417.

<sup>36</sup> *Ibid*, para 16.

<sup>37</sup> See in particular Case C-346/93 *Kleinwort Benson Ltd v City of Glasgow District Council* [1995] ECR I-615 or Case C-281/02 *Andrew Owusu v N.B. Jackson* [2005] ECR I-1383 from the Court of Appeal, Case *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767 from the *Oberlandesgericht München*, Case C-70/09 *Alexander Hengartner and Rudolf Gasser v Landesregierung Voralberg* [2010] ECR I-7233 from the *Oberlandesgericht Innsbruck* or Case C-412/98 *Group Josi Reinsurance Company SA v UGIC* [2000] ECR I-5925 from the *Cour d'Appel, Versailles*.

valid and applicable for the Regulation, which in fact reproduced the provisions of the former.

The Rome Convention was concerned by a definitely lower number of interpretation difficulties and this did not change even after the Conventions' transformation into Community instrument. From the seven references seeking the interpretation of the Convention, beyond the already mentioned reference from the first instance German court that was refused for lack of jurisdiction, only one reference was sent by an appeal court and the remaining five emanated from supreme courts. It should also be added that while the provisions of the Brussels Convention became the subject of interpretation very soon in 1976,<sup>38</sup> the first ever preliminary reference concerning the Rome Convention is from 2008,<sup>39</sup> when the Rome I Regulation was already adopted. It means at the same time that while by the time of the adoption of the Brussels I Regulation its provisions had already been filled with the interpretation of the Court, there was no such case-law available for the Rome I Regulation.

It is therefore worth seeing how the conversion of the Brussels Convention into a Community instrument affected the intensity of references. Between the entry into force of the Regulation in March 2002 and the entry into force of the Lisbon Treaty in 2009, only those courts where no legal remedy was available against their decisions were entitled to seize the Court. Compared to the courts enumerated in Article 2 of the relevant protocols of the two Conventions, these courts are not exclusively and necessarily supreme courts,<sup>40</sup> even if in the majority of cases they are in fact identical to those named in the former protocols. In the given period, 18 references concerning the interpretation of the Brussels I Regulation reached the Court, two of which emanated from courts proceeding at last instance but which were not supreme courts.

It should however be underlined that, in these cases, we will not find references to or facts on why some courts that were not supreme courts were entitled to seize the Court. Neither in *Ilsinger*,<sup>41</sup> where the Court answered questions submitted by the *Oberlandesgericht Wien* proceeding at second instance, nor in *Voralberger Gebietskrankenkasse*,<sup>42</sup> in which the *Landesgericht Feldkirch* acted as appeal court,

<sup>38</sup> Case 12/76 *Industrie Tessili Italiana Como v Dunlop* [1976] ECR 1473.

<sup>39</sup> Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV* [2009] ECR I-9687.

<sup>40</sup> See for instance Case C-347/08 *Voralberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG*. [2009] ECR I-8661 from the *Landesgericht Feldkirch* Mixed or Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571 from the *Court of Appeal*.

<sup>41</sup> Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961.

<sup>42</sup> Case C-347/08 *Voralberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG*. [2009] ECR I-8661.

did the Court examine (at least not in the judgments) whether the referring court was in fact competent to refer.

Following the entry into force of the Lisbon Treaty and thus after the extension of the general rules on preliminary references to PIL instruments, the first reference from a first instance court (*Tribunal de grande instance de Paris*) seeking the interpretation of the Brussels I Regulation was joined with a reference from the *Bundesgerichtshof* and was referred to the Grand Chamber of the Court dealing with legally complex or challenging cases. The famous *eDate Advertising and Martinez* case<sup>43</sup> concerned the determination of the place where the harmful event occurred or may occur in the event of violation of personality rights through publication on the internet. The first reference from a lower court hence certainly became a leading case concerning the Regulation. In 2010, five references were sent to the Court by lower courts while six references arrived from supreme courts. In 2011 three cases were referred by supreme courts and two cases by lower courts. The importance of lower courts' references is further underlined by the fact that in 2011 a reference from the *Landesarbeitsgericht Berlin-Brandenburg*,<sup>44</sup> acting as appeal court, was handled by the Grand Chamber by interpreting the concept of immunity of the state acting in contractual relations, and another leading case on the interpretation of *res judicata*, the *Gothaer* case,<sup>45</sup> was referred by the *Landgericht Bremen* proceeding at first instance. Data concerning 2012 further supports the conclusion that national courts not acting as last instance courts are indeed confronted with important questions of interpretation, in which the guidance of the Court is necessary. The number of references from lower courts was nine in 2012, while last instance courts only referred four cases. Among the leading judgments of the Court we can find the *Emrek*<sup>46</sup> case as a reference from the *Landesgericht Saarbrücken*. In 2013 three cases were referred by not last instance courts and seven by last instance courts (as supreme courts). From the cases referred to by lower courts, the *Hejduk*<sup>47</sup> case, dealing again with the effects of placing online with regard to delicts or quasi-delicts, is worth mentioning. Concerning the references from 2014, only two non-last

<sup>43</sup> Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez, Robert Martinez v MGN Limited* [2011] I-10269.

<sup>44</sup> Case C-154/11 *Ahmed Mahamdia v République algérienne démocratique et populaire* (ECLI:EU:C:2012:491) a reference from the *Landesarbeitsgericht Berlin-Brandenburg*. In the *Mahamdia* case it was even more important for the *Landesarbeitsgericht* to be able to consult the Court as it was examining the case for the second time after the *Bundesgerichtshof* set aside its previous judgment.

<sup>45</sup> Case C-456/11 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* (ECLI:EU:C:2012:719) a reference from the *Landgericht Bremen*.

<sup>46</sup> Case C-218/12 *Lokman Emrek v Vlado Sabranovic* (ECLI:EU:C:2013:666) a reference from the *Landgericht Saarbrücken*.

<sup>47</sup> Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* (ECLI:EU:C:2015:28) a reference from the *Handelsgericht Wien*.

instance courts consulted the Court while six sets of questions were referred by supreme courts. In 2015 the proportion is three to four in favour of supreme courts while in 2016 two to six. In order to have a full picture, it is worth having a look at the references concerning the reformed Brussels I bis Regulation replacing the Brussels I Regulation and entering in force in 2015, thus under the application of the general rules on preliminary references. The first references concerning the reformed instrument reached the Court in 2015, both of which were submitted by lower courts. In 2016 the overall number of references was five; three referred by supreme courts, the remaining two by non-last instance courts. In 2017 (until 15 October) the number of references from lower courts is somewhat higher (four) compared to the references of last instance courts, of which there are two.

It is quite evident on the basis of the above data that the fear of an overwhelming number of cases referred by non-last instance courts that the drafters of the Treaty of Amsterdam might have envisaged was not justified in the light of the rather moderate number of references sent by lower courts after the general rules on preliminary references applied. In fact, it is even more regrettable that these lower courts were left on their own for some years with the interpretation of the Brussels I Regulation (and other PIL instruments). It is also important to underline that, from the references of the post-Lisbon period, it can be seen that first instance courts—not even entitled under the Convention to seek preliminary ruling—contributed major cases to the jurisprudence concerning the Brussels Regulation.

As far as the Rome Convention is concerned, as already mentioned, the first referral seeking the interpretation of the Convention is from 2008. It was a referral from the Dutch Supreme Court (*Hoge Raad*). In 2010 two courts, an appellate court, the *cour d'appel de Luxembourg*, and the Belgian *Hof van Cassatie* as supreme court, asked the Court to interpret the Convention. The first two referrals were decided by the Grand Chamber. In 2012 again, the Dutch and the Belgian supreme courts consulted the Court. Finally, in 2013, a reference from the French *Cour de cassation* reached the Court, while the reference of the German *Landgericht Itzehoe* was rejected for lack of jurisdiction as the referring court was a first instance court.

It is easy to see that, with regard to the Rome I Regulation, the fear of an extremely high number of references from lower courts was even less justified than it was for the Brussels I Regulation, taking into account especially that, at the time of negotiating the Treaty of Amsterdam, no question concerning the interpretation of the Rome Convention had yet been referred. The Rome I Regulation entered into force in July 2008 and it had to be applied to contracts concluded after 17 December 2009. Any reference based on Article 68 EC was therefore logically and technically excluded and some years had to pass until the first legal disputes reached national courts. Interestingly, the first two references within the

general framework of Article 267 TFEU were received by the Court in 2014 from Lithuania.<sup>48</sup>

The third Convention transformed into a Community Regulation was the Convention of 1998 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. It was first adopted as a Regulation in 2000<sup>49</sup> and replaced by another in 2003.<sup>50</sup> As the Regulation of 2000 was only concerned with a single reference, focus should be put on the Regulation of 2003. Like the other PIL instrument, the Brussels I Regulation, touching upon jurisdiction, recognition and enforcement of judgments, the Brussels II bis Regulation has attracted many cases, the first questions being referred in 2006 by the Finish Supreme Court (*Korkein hallinto-oikeus*) as a logical consequence of the limitation of the right of initiative to the courts against whose decision there is no remedy available. It was followed by two referrals in 2007, two in 2008 and two in 2009. In 2010, when the possibility to refer was opened to any court applying the Regulation, five references reached the Court, two of them being sent by lower courts, the *Amtsgericht Stuttgart* and the *Court of Appeal of England*. After no referral in 2011, in 2012 a non-last instance court, the *High Court of Ireland* turned to the Court. In 2013 the number of references was two, one of them sent by the *Court of Appeal of England*. In 2014 four supreme courts and one lower court availed themselves of the possibility to refer. From the seven references in 2015, four emanated from lower courts and three from supreme courts. In 2016, two lower courts seised the Court, while in 2017 (until 15 October) there were two references again, one from a lower court and one from a supreme court.

As far as the use of the urgent preliminary ruling procedure in the field of judicial cooperation in civil matters is concerned, the Brussels II bis Regulation is one of the instruments under which the use of an urgent preliminary ruling procedure might be justified. As the Court notes in its *Report on the use of the*

<sup>48</sup> Joined Cases C-359/14 and C-475/14 “*ERGO Insurance SE v “If P&C Insurance AS and “Gjensidige Baltic” AAS v “PZU Lietuva” UAB DK* (ECLI:EU:C:2016:40) references from the District Court of the City of Vilnius and the *Lietuvos Aukščiausiasis Teismas* (Supreme Court of Lithuania). Indeed, in 2013 a first instance Finnish court already sought the interpretation of the Regulation (Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* (ECLI:EU:C:2015:86)) but in that given case the interpretation of the Regulation’s provisions was not necessary in order to solve the legal dispute in the main proceedings.

<sup>49</sup> Council Regulation (EC) No 1347/2000 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings [2000] OJ L 160/19.

<sup>50</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1.

*urgent preliminary ruling procedure by the Court of Justice of January 2012*<sup>51</sup> when analysing the experiences of the first three years of the urgent preliminary ruling procedure, half of the 12 cases dealt with under this procedure concerned the Brussels II bis Regulation. By the time of writing this study, from the overall number of references (34) decided in urgent preliminary ruling procedure, 12 references sought the interpretation of the Brussels II bis Regulation. The fact that seven of them were referred by non-last instance courts demonstrates that there was a clear need for these tribunals to have recourse to the preliminary ruling procedure when applying the Regulation.

The Rome II Regulation was adopted in 2007 as a new instrument without a previous Convention to be transformed. It entered into force in July 2008. The first reference on its interpretation was submitted by the *High Court* in 2010, already under the regime of the Lisbon Treaty. Again, in 2014 it was the Italian first instance court, the *Tribunale di Trieste* which turned to the Court, followed by the *Landesgericht Korneuburg*. Two cases, a joined one from two Lithuanian courts (a first instance and a last instance court) and one from the Austrian *Oberster Gerichtshof* concern the interpretation of both the Rome I and Rome II Regulations.<sup>52</sup>

The Rome III Regulation, adopted in 2010 and to be applied from July 2012, has so far been concerned by two but highly interconnected references from a non-last instance court (*Oberlandesgericht München*) in 2015 and 2016.<sup>53</sup> In the *Sahyouni* cases, the German appeal court interrogates the Court on the applicability of religious law when the divorce was declared under religious law in a third country and the national law extends the scope of the Regulation to matrimonial property and related aspects of divorce. The second referral was necessary because in the first case the Court stated in an order its lack of jurisdiction finding the factual and legal background supporting the application of the Regulation through national rules extending its scope to be insufficient. The *Oberlandesgericht München* therefore presented a new reference a month after the order.

Figures show that there would have most probably been an interest at the level of lower courts to consult the Court even during the years when they were not entitled to do so. We have not much information about cases settled by national courts interpreting the relevant provisions of the Conventions or Regulations on

<sup>51</sup> Report on the use of the urgent preliminary ruling procedure by the Court of Justice <[https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en\\_rapport.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en_rapport.pdf)>.

<sup>52</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* (ECLI:EU:C:2016:612) a reference from the *Oberster Gerichtshof*, Joined Cases C-359/14 and C-475/14 “*ERGO Insurance*” SE v “*If P&C Insurance*” AS and “*Gjensidige Baltic*” AAS v “*PZU Lietuva*” UAB DK (ECLI:EU:C:2016:40) references from the District Court of the City of Vilnius and the *Lietuvos Aukščiausiasis Teismas* (Supreme Court of Lithuania).

<sup>53</sup> Case C-281/15 *Soha Sahyouni v Raja Mamisch* (ECLI:EU:C:2016:343) and Case C-372/16 *Soha Sahyouni v Raja Mamisch*.

their own but at least we can have a closer look at the *Marseille Fret* case in which the questions of the first instance court, the *tribunal de commerce de Marseille*, remained unanswered because of lack of jurisdiction of the Court. The French court interrogated the Court on the compatibility of English anti-suit injunctions with the Brussels Convention. The issue was clearly relevant and has long been debated in the legal literature. A binding interpretation of the Court was therefore undoubtedly necessary. For that, however, one had to await a reference from a higher court. It was therefore only later, in the *Turner* case,<sup>54</sup> at the request of the British House of Lords, that the Court finally held that anti-suit injunctions are inconsistent with the principle of mutual trust on which the Convention is based.<sup>55</sup>

It can also be seen that, the limitations on having recourse to the preliminary ruling procedure being identical with regard to all Conventions and Regulations, the instruments on jurisdictional rules, recognition and enforcement have definitely been affected by a higher number of interpretations than those on conflict of laws rules. The Commission, in its proposal to the Council to align jurisdictional rules in the area of freedom, security and justice to the general rules of preliminary ruling procedures, even notes that

[W]hile the Court has been able to make the Brussels I Convention an extremely effective instrument in the service of litigants since 1971, conversely, since it has not been able to exert its role of standardising concepts under the Rome Convention of 1980 on the law applicable to contractual obligations, there are wide divergences in the interpretation of that convention in the different Member States.<sup>56</sup>

### III. The activity of the various national courts of different Member States' in initiating preliminary ruling procedures

In the legal literature, what might be the reason behind the intensity and frequency of preliminary references coming from certain Member States and whether

<sup>54</sup> Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*. [2004] ECR I-13565.

<sup>55</sup> Zeno Crespi Reghizzi, ' "Mutual Trust" and "Arbitration Exception" in the European Judicial Area' in Andrea Bonomi and Paul Volken (eds), *Yearbook in European Private International Law*, vol. 11 (Swiss Institute of Comparative Law 2009) 433.

<sup>56</sup> Draft Council decision adapting the provisions concerning the Court of Justice in fields covered by Title IV of Part Three of the Treaty establishing the European Community COM (2006) 346 final 4.

there are national judicial attitudes determining the openness of national judges to consult the Court have long been debated. Indeed, the yearly statistics of the Court's Annual Report demonstrate that some Member States' courts are typically active, producing a high number of references every year, especially compared to their size and the number of national judicial bodies. We should definitely mention the German, the Italian, the Dutch, the Austrian, the Hungarian and the Romanian courts among them.<sup>57</sup> Once frequency shows a certain tendency, it is worth seeking some logical reasons behind it. In a 2013 article, Morten Broberg and Niels Fenger tried to identify so-called structural factors which might provide at least some explanation to the data on the activity of Member States' courts.<sup>58</sup> Among these factors, they indicate the population size of the Member State concerned, litigation level and the level of compliance with EU law. They maintain that their empirical research supports the assumption that population size and litigation patterns are relevant factors—although with different impact—influencing the judicial activity in preliminary ruling proceedings; however, they were not able to show that the compliance factor has a significant influence on the variations between Member States in the number of references. Ernő Várnay further identifies some non-structural factors, such as the language skills of judges, their general competence in EU law or special training in EU affairs offered to them or and the way and manner in which the requests and interests of the parties are taken into account by judges.<sup>59</sup>

Under the present subsection, we will try to identify whether the national courts that are active in sending references in the field of judicial cooperation in civil matters are the same as those generally active in referring questions or whether there are some Member States whose courts or tribunals are especially active in this field and whether there might be questions which are particularly important for some Member States.

Looking at the references on the Brussels I Regulation (87) one should recall that between 2002 and the end of 2009 only last instance courts were entitled to refer. This explains the very high proportion of references from supreme courts (57). The most active supreme court is the Austrian *Oberster Gerichtshof* with 13 referrals, out of which 8 were sent in the post-Lisbon period. This is not so surprising, as Austrian courts (with an average of 20 referrals a year) are traditionally more active

<sup>57</sup> The number of German references is every year around 80; in 2013 it reached its maximum so far with 97 cases referred by German courts. For the historic data see the Annual Report of the Court of Justice of the European Union, 2016, 108.

<sup>58</sup> Morten Broberg and Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?' (2013) 19 *European Law Journal* 488.

<sup>59</sup> Ernő Várnay, 'Az előzetes döntéshozatali eljárás – nemzetközi kitekintés' in András Osztovits (ed) *A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében (2004–2014)* (HVG Orac 2014) 51.

than the courts of the two other countries, Sweden and Finland, which acceded at the same time.<sup>60</sup> Even so, their activism is noteworthy considering, that the second highest number of references, which come from the German *Bundesgerichtshof* (7) and the Dutch *Hoge Raad* (7) is considerably lower. The French *Cour de cassation* is the next in line with five references, which must be seen as a reflection of the interest of French courts in asking for the Court's help in PIL cases in the light of the rather moderate number of referrals from French courts, which is approximately equivalent to the yearly referrals of Dutch and Austrian courts and one quarter of the references that German courts normally send to the Court. It is also worth noting that, from the overall number of preliminary references referred to the Court in 2014 by Finnish courts (8) in all areas of EU law, three were sent by the Finnish Supreme Court, the *Korkein oikeus*, on the interpretation of the Brussels I Regulation alone. Among the supreme courts with several references the Latvian *Augstākās Tiesas Senāts* with four referrals and the Lithuanian *Aukščiausiasis Teismas* with three references must be mentioned. In addition to this, two cases were referred by the Italian *corte di cassazione* and a single case each was referred by the Belgian, Czech, Danish, Estonian, Greek, Hungarian, Irish, Polish, Portuguese, Romanian, Slovenian, Swedish and UK supreme courts.

When analysing the references that lower courts sent after they became entitled to do so after December 2009, it is striking that even if their supreme courts have been frequent referrers, no Finish lower court contacted the Court and the only Lithuanian reference from a district court was joined with a reference of the *Aukščiausiasis Teismas*. The majority of lower courts' references (39) are from first or second instance German courts (11 for the Brussels I Regulation and two pending references for the Brussels I bis Regulation). Among them the *Landgericht Krefeld* must be mentioned as having referred three cases concerning completely different provisions and aspects of the Brussels I Regulation. Taking that, one can presume that at this particular court there is much interest in the correct interpretation of EU instruments and understanding EU law in general, which is supported by the fact that other references outside the scope of PIL instruments and revealing topical problems were sent to the Court by the *Landgericht Krefeld*.

Austrian lower courts are as active as the *Oberster Gerichtshof*, four cases were referred to the Court, of them three by the *Handelsgericht Wien* proceeding at first instance. Dutch lower courts and Hungarian lower courts referred three cases each. The significance of first instance courts' references cannot be underlined enough. Before 2009, neither the *Landgericht Krefeld* nor the *Handelsgericht Wien*—becoming frequent referrals after 2009—could have asked for guidance from the

<sup>60</sup> Theo Öhlinger, 'Die Europäisierung des österreichischen Rechts' in Paul Luif (ed) *Österreich, Schweden, Finnland: Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau 2007) 124.

Court although they most probably had been seised with legal disputes in which the Brussels I Regulation or any of the PIL instruments had to be interpreted.

The questions raised in the references concerning the Brussels I Regulation are typically of a jurisdictional nature; much fewer are targeted at recognition and enforcement. As far as the references from the most active supreme court, the *Oberster Gerichtshof*, are concerned, all of them except one<sup>61</sup> concerned the interpretation of provisions on the determination of jurisdiction. Two of them significantly contributed to the PIL case-law on reinterpreting certain jurisdictional rules because of the use of websites.<sup>62</sup> From the summaries of the disputes in the main proceedings, one can trace back how lower courts interpreted the relevant provisions of the Brussels I Regulation before the case reached the highest judicial level and whether first instance and appeal courts followed the same reasoning or they disagreed with each other. The fact that second instance courts dealt with the matter after the possibility to refer was opened for them and they still did not refer while disagreeing with the first instance court's interpretation on EU law could demonstrate a sort of self-confidence in applying and interpreting EU law at the level of national courts. Of course, with regard to references concerning the Brussels I Regulation, such an approach could only be indicative for the post-Lisbon period, as before that second instance courts could not turn to the Court even if they wanted to. Such a disagreement between the first and second instance courts can be seen in two cases referred later by *Oberster Gerichtshof* to the Court. The first one is the *Wintersteiger AG*<sup>63</sup> case of the early post-Lisbon period, where the Court gave a wide ranging and novel interpretation of the concept of the 'place where the harmful event occurred' in a case of trade mark infringement through the internet. Later, in 2016, in *Kareda*<sup>64</sup> the main issue was whether the national court could have jurisdiction in the given case by interpreting the concept of the 'place of performance' in a credit agreement as being the domicile of the debtor or the registered office of the credit institution. The first instance court (*Landesgericht St Pölten*) declined jurisdiction while the *Oberlandesgericht Wien* found the decision of the first instance court erroneous after interpreting the Brussels I Regulation itself. Following the referral of the *Oberster Gerichtshof* (which did not reveal its position in the reference) the Court approved the interpretation of the first instance court, the *Landesgericht*. In all other cases where first and second instance courts disagreed, second instance courts were still excluded from the possibility to refer, and so the

<sup>61</sup> Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041.

<sup>62</sup> Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527.

<sup>63</sup> Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* (ECLI:EU:C:2012:220).

<sup>64</sup> Case C-249/16 *Saale Kareda v Stefan Benkö* (ECLI:EU:C:2017:472).

case needed to be taken to the highest level by the parties if they considered that interpretation by the Court would be necessary. On its own, the fact that different instance courts had a different understanding of the same European provision would strongly support such a necessity. We can cite the early cases of *Falco and Color Crack*, and the leading case *Pammer* on the intermediary role of websites in interpreting the concept of activities directed to other Member States as a necessary element of consumer contracts.

The next category of Austrian last instance references is where lower courts agreed on the interpretation of the relevant provisions but the *Oberster Gerichtshof* had some doubts, for which to dissipate it turned to the Court.<sup>65</sup> Closely connected to *Pammer*, in *Mühlleitner*<sup>66</sup> the main question concerning the jurisdiction of Austrian courts was whether, in cross-border consumer contract cases, where the jurisdiction is determined according to the habitual residence of the consumer, even the conclusion of contracts must be necessarily done at distance. The first and second instance courts gave a positive answer while the *Oberster Gerichtshof* disagreed on the basis of the already existing *Pammer* judgment and as the Court's judgment proves, it was right to do so.

In almost all of these cases, the *Oberster Gerichtshof* gave a detailed explanation of why it thought the issue was crucial and which were the eventual outcomes of interpretation without always supporting one of them. In many of the cases where it expressed its viewpoint, its interpretation was confirmed by the Court. Both facts demonstrate a conscious approach in handling preliminary references.

At the level of lower Austrian courts, the *Handelsgericht Wien* itself referred three questions to the Court. Interestingly this court is not one of those concerned as first instance court by any of the earlier or later references from the *Oberster Gerichtshof*.

As in the case of the *Oberster Gerichtshof*, in many of the references of the German *Bundesgerichtshof* we can often find a detailed description of the viewpoint of the referring court concerning the interpretation of the relevant provision.<sup>67</sup> From the seven references of the *Bundesgerichtshof*, three were referred before the entry into force of the Lisbon Treaty and four after that. What is peculiar however,

<sup>65</sup> Case C-45/13 *Andreas Kainz v Pantherwerke AG* (ECLI:EU:C:2014:7); Case C-340/16 *KABEG v Mutuelles du Mans assurances* (ECLI:EU:C:2017:576); Case C-144/12 *Goldbet Sportwetten GmbH v Massimo Sperindeo* (ECLI:EU:C:2013:393); Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827.

<sup>66</sup> Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* (ECLI:EU:C:2012:542).

<sup>67</sup> Case C-297/14 *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others* (ECLI:EU:C:2015:844); Case C-387/12 *Hi Hotel HCF SARL v Uwe Spoering* (ECLI:EU:C:2014:215); Case C-381/08 *Car Trim GmbH v KeySafety Systems Srl*. [2010] ECR I-1255; Case C-204/08 *Rehder Peter Rehder v Air Baltic Corporation*. [2010] ECR I-6073; Case C-463/06 *FBTO Schadeverzekeringen NV v Jack Odenbreit* [2007] ECR I-11321.

is the relatively high number of lower court references from Germany. After 2010 references from almost exclusively first instance courts (11) and two referrals from appeal courts reached the Court. It clearly shows the need on behalf of lower courts—at least in Germany—to have access to the preliminary ruling procedure. One of the first instance court references decided in Grand Chamber contributed in a considerable way to the PIL case law when interpreting the concept of immunity with regard to employment contracts with embassies of third states.<sup>68</sup> From the overall number of German references (20), three concerned recognition or enforcement while all the others touched upon jurisdictional questions.

The *Hoge Raad* referred three questions before the Lisbon Treaty entered into force and four after that. The reference activity of lower courts after 2010 is not striking; only two first instance courts addressed the Court. What is however high, compared to the overall number of Dutch references, is that three cases concerned recognition and enforcement. Two of the Dutch references were decided by the Grand Chamber, both having been submitted by the *Hoge Raad*.<sup>69</sup> The substance of the Dutch references is diverse; typical problems appearing at Dutch courts cannot be identified.

The only Member States from which the courts have not sent any references for the interpretation of the Brussels I (Ibis) Regulation are Slovakia and Spain. The latter is even more interesting as the Spanish government is one of the governments that is very active in submitting written observations in preliminary ruling procedures concerning the Brussels I Regulation. It contributed in 15 cases by expressing its views on the interpretation of the relevant provision of the Regulation. The right of Member States' governments to submit written observations stems from Article 23 of the Statute of the European Court of Justice. The motivations of the governments to contribute to a case might differ. Member States in which the referring court is located usually raise their voice, given the fact that the questions often indirectly concern the compatibility of national legislation or judicial practice with EU law.<sup>70</sup> With regard to preliminary references concerning PIL instruments, other Member States might also be indirectly concerned especially when relating to recognition or enforcement of judgments if the case concerns recognising or enforcing a judgment delivered by their court. However,

<sup>68</sup> Case C-154/11 *Ahmed Mahamdi v République algérienne démocratique et populaire* (ECLI:EU:C:2012:491) a reference from the *Landesarbeitsgericht Berlin-Brandenburg*.

<sup>69</sup> Case C-406/09 *Realchemie Nederland BV v Bayer Crop Science AG* [2011] ECR I-09773; Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*. [2010] ECR I-1107.

<sup>70</sup> That is not always the case for frequently referring national courts' Member States. One can see for instance that in the case of preliminary references concerning the Brussels I Regulation the Austrian and the German government did only submit observations in approximately half of the cases emanating from these countries.

other governments usually only submit observations if they are interested in the outcome of the procedure as they face similar problems or if the case in question reveals a new legal phenomenon which is of major importance for the European instrument concerned. The very high number of Spanish observations despite the absence of Spanish references (both on the Brussels I (Ibis) Regulation and earlier on the Brussels Convention) and even in cases where there was no indirect Spanish concern demonstrates that European PIL instruments and their application is still in focus. That is supported by a report drawn up by Virgós and Cambronero<sup>71</sup> in which it is stated that

Spanish courts systematically have recourse to the Brussels Convention or Brussels I Regulation and the interpretation made by the European Court of Justice, in order to reinforce one specific interpretation of the national rules or, under certain circumstances, to complete any existing legal vacuum (*analogia iuris*). Consequently, the influence of the Brussels I Regulation and its related case law is paramount.<sup>72</sup>

Other governments often appearing in court cases on the Brussels I Regulation are Austria, Germany, Greece and Switzerland. The participation of the first two Member States is not surprising as their courts are already frequent referers concerning the Brussels I (Ibis) Regulation and thus interpretation questions concerning the Regulations might at the same time be of practical importance for them, even if they do not always raise their voice in their own 'home' cases. There is a less logical explanation for the involvement of the Greek government, given the fact that there has been a single reference from Greece seeking the interpretation of the Regulation on behalf of the Areios Pagos. As for Switzerland, it is entitled to submit observations in cases concerning the Brussels I (Ibis) Regulation to the Court by virtue of the Lugano Convention.<sup>73</sup> The interpretation problems under the Regulation are of specific importance to it, as they have a direct impact on the interpretation of similar or identical provisions of the Lugano Convention.

It is also worth having a look at the cases which attracted the highest number of Member States' governments in submitting written observations, as these cases point to legal or practical aspects which were considered important for the application of the Regulation. Most national governments (10) participated in the *Trade*

<sup>71</sup> Lex Mundi Project, Comparative study of "residual jurisdiction" in civil and commercial disputes in the EU (Spain) <[http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_spain\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_spain_en.pdf)> accessed 26 April 2018.

<sup>72</sup> See *ibid* para 4.

<sup>73</sup> See Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 [2007] OJ L 339/3 art 2 in conjunction with art 64 (1).

*Agency* case<sup>74</sup> concerning the non-recognition of a judgment for being contrary of public policy but lacking reasoning. Eight governments submitted written observations in the *eDate Advertising* case<sup>75</sup> on determining the place where the harmful event occurred in the event that personality rights were violated through placing information on the internet. Seven Member States contributed in the *Gazprom* case<sup>76</sup> on the scope of the Regulation concerning the recognition of arbitral awards and the same number of Member States appeared in *Pammer*.<sup>77</sup> The importance of the last three of the above cases is also underlined by the fact that they were referred to the Grand Chamber and all of them became leading cases of the Brussels I Regulation.

As to Brussels II bis Regulation, the first preliminary reference was sent by the Finnish Administrative Supreme Court in 2006.<sup>78</sup> Interestingly, in this decision, when determining the legal basis of the referral, reference is made only to Article 234 EC (general legal basis of preliminary references at that time) and not to Article 68 EC, which should have been the Article entitling references in judicial cooperation in civil matters. In all other decisions between 2006 and 2009, we find proper reference to Article 68 EC, except for references under the urgent preliminary ruling procedure, which were exempted already one year earlier from the restrictive regime under Article 68 EC and were submitted to the general rules under Article 234 EC. It means at the same time that if the Court approved the request for an urgent preliminary ruling procedure, references of lower courts (even first instance courts) could be allowed. An example is the reference of the *Višje sodišče v Mariboru* (Court of Appeal of Maribor) in October 2009.<sup>79</sup> In the post-Lisbon period, the first reference from a lower court not decided in the urgent procedure was sent by the *Court of Appeal of England and Wales* in 2010<sup>80</sup> and it can be stated that the referring courts remained supreme courts even after the passage to the general regime. However, urgent preliminary ruling procedures have been often successfully requested by lower courts. From the 13 cases dealt under the urgent procedure, eight emanate from lower level courts: four were referred by first instance courts, another four by appeal courts and five by supreme courts.

<sup>74</sup> Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* (ECLI:EU:C:2012:531).

<sup>75</sup> Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez, Robert Martinez v MGN Limited* [2011] ECR I-10269.

<sup>76</sup> Case C-536/13 "*Gazprom*" *OAO v Lietuvos Respublika* (ECLI:EU:C:2015:316).

<sup>77</sup> Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527.

<sup>78</sup> Case C-435/06 „C” [2007] ECR I-10141.

<sup>79</sup> Case C-403/09 *PPU Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.

<sup>80</sup> Case C-497/10 *PPU Barbara Mercredi v Richard Chaffe* [2010] ECR I-14309.

Having a look at the referring courts, one can see that the particularly active national courts are not identical to those often seeking the interpretation of Brussels I Regulation. Even if the overall number of references concerning the Brussels II bis Regulation is much lower, it is easy to see that the Swedish, Finish and Irish courts, with three references each, are more concerned by issues relating to the latter Regulation. The Austrian courts' activity (two references from the *Oberster Gerichtshof*) is not as striking as it had been regarding the Brussels I Regulation. Likewise, the number of German references is three while the most references (4) have been sent by UK courts. It should still be added that Lithuanian courts, with two references, seem to be as active as with the Brussels I Regulation.

The interest of governments submitting observations in cases on the interpretation of Brussels II bis Regulation is relatively high, even in PPU cases, where considerable limitations apply to Member States' governments becoming involved in the procedure. Governments other than the government of the Member State from which the reference emanates are not entitled to submit written observations but can present their views at the oral hearing, which is the most important phase of the urgent preliminary ruling procedure. Moreover, the time-limits to decide whether or not to join the case or to prepare for the hearing are very short. It should also be added that Brussels II bis cases often indirectly concern Member States other than the one whose national court referred the question, as many of these cases concern the recognition of judgments delivered by other Member States' courts. The governments of these states are interested in intervening in order to safeguard the reliability of their judicial system. Despite the limitations concerning the urgent preliminary ruling procedure, the first PPU case<sup>81</sup> already attracted five Member States; beyond the Member States directly concerned by the case (Lithuania and Germany), we can find the French, the Latvian and the Dutch governments as participating states. The number of intervening governments was even higher in the second case, the *Deticek* case,<sup>82</sup> where five governments appeared at the Court in addition to the two countries concerned (Slovenia and Italy). In the *Povse* case<sup>83</sup> the number of participating states rose to eight. Even if the interest in contributing fell in later PPU cases, there have always been some governments beyond those directly concerned by the case which wished to present their views. The French government and the Latvian government have, for instance, often raised their voice in PPU cases. In cases not handled in a PPU procedure, the Spanish government can be identified as being active again.

<sup>81</sup> Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271.

<sup>82</sup> Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.

<sup>83</sup> Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] ECR I-6673.

#### IV. Subject-matter of references submitted to the Court

Although each and every preliminary question is unique and formulated in the light of the interpretation problems arising in specific legal disputes, one can identify certain categories of subject-matters or recurring problems that might be considered as typical, not only in the same Member State but around the EU in general. In the case of the Brussels I Regulation, it is definitely possible to establish certain clearly identifiable groups of problems or questions on the basis of the quite high number of references touching upon this instrument. Still, we have to add that these cases must be seen in the light of the already existing case-law on the Brussels Convention, meaning that many concepts or provisions have already been shaped by the Court through the interpretation of the Convention and therefore the case-law concerning the Regulation can often only be seen as a further fine-tuning of them. The need for fine-tuning might be explained in several ways, such as the emergence of new problems due to the interference with other European or national procedural rules, to technological developments changing the methods of cross-border trade and communication or to traditional questions that could not reach the Court because of the limitations concerning the referring courts.

It is self-evident that certain autonomous concepts of the Regulation, especially those determining its scope, had to be clarified by the Court. A number of questions therefore asked for further explanation of the concept of ‘civil and commercial matters’ and thus for the specification of the scope of the Regulation. Already in the early years of the Convention, references asking for the clarification of its scope by determining the limits of ‘civil and commercial matters’ had reached the Court. The first referral is from 1976.<sup>84</sup> After that, four cases were sent to the Court seeking the interpretation of the concept. With regard to the Regulation, the need for further fine-tuning of the concept has not only been characteristic in the early period but seems to be a recurring element, even in recent cases. Many of them concerned very specific claims or actions arising from competition procedures, insolvency proceedings or tax procedures. In 2015 the Hungarian *Fővárosi Ítéltábla* (Municipal Court of Appeal) asked the Court<sup>85</sup> whether the repayment of a fine imposed in competition law proceedings would fall within ‘civil and commercial matters’. The Court’s answer was negative. Two years earlier, another kind of competition law-related claim had to be judged in the light of the Regulation. In *FlyLAL*,<sup>86</sup> the Court decided upon

<sup>84</sup> Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] 1541.

<sup>85</sup> Case C-102/15 *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich* (ECLI:EU:C:2016:607).

<sup>86</sup> Case C-302/13 *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS* (ECLI:EU:C:2014:2319).

a Lithuanian reference that seeking legal redress for damage resulting from alleged infringements of European Union competition law comes within the notion of ‘civil and commercial matters’. In another Lithuanian reference of 2013, the Court found actions for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in the Member State and taken against a service recipient established in another Member State to be within the scope of the Regulation. Again, claims under insolvency proceedings have been the subject-matter of another Lithuanian reference in 2010. In the *F-Tex SIA* case,<sup>87</sup> the Court ruled that an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside, which the liquidator derives from the national law applicable to those proceedings, is covered by the concept of civil and commercial matters.

In 2012 the question of the Danish *Østre Landsret*<sup>88</sup> was answered by finding, under the scope of the Regulation, an action whereby a public authority of one Member State claims, against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State.

Another conceptual issue to decide in a number of cases concerning the Regulation was whether, in a given situation, there is a contractual relationship between the parties or what ‘matters relating to a contract’ should mean. This distinction is important in order to give a clearly separation of contractual claims from tort claims. The *Kareda*, *Brogssitter*, *Granarolo*, *Profit Investment* and *Corman-Collins* cases should be mentioned here. It was in *Brogssitter*<sup>89</sup> that the Court ruled that it is the purpose of the contract which should be taken into account when establishing whether a conduct may be considered as a breach of contract. This understanding was confirmed in *Granarolo*,<sup>90</sup> when analysing under which circumstances long term tacit business relationships could be considered contractual. As a counterpart of cases concerning ‘matters relating to a contract’, we can find cases on the interpretation of ‘matters relating to tort, delict and quasi-delict’, among them *ÖFAB*.<sup>91</sup>

<sup>87</sup> Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB ‘Jadecloud-Vilma’* (ECLI:EU:C:2012:215).

<sup>88</sup> Case C-49/12 *The Commissioners for Her Majesty’s Revenue & Customs v Sunico ApS and Others* (ECLI:EU:C:2013:545).

<sup>89</sup> Case C-458/12 *Marc Brogssitter v Fabrication de Montres Normandes EURL and Karsten Fräβdorf* (ECLI:EU:C:2014:148).

<sup>90</sup> Case C-196/15 *Granarolo SpA v Ambrosi Emmi France SA* (ECLI:EU:C:2016:559).

<sup>91</sup> Case C-147/12 *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* (ECLI:EU:C:2013:490).

The third identifiable category of cases embraces those references which inquired about the effect of jurisdiction clauses. This is another group of cases where a solid case-law with a very high number of judgments (16) was already available under the Convention. While references concerning the Convention mainly focused on the effect and validity of such clauses, references on the Regulation touched upon specific circumstances, especially when third parties or representatives of either party tried to invoke the jurisdiction clauses. *Leventis*,<sup>92</sup> *Assens Havn*<sup>93</sup> and *Refcomp SA*<sup>94</sup> belong to this latter group while *Hőszig*<sup>95</sup> can be seen as a fine-tuning of the Convention case-law, specifying in which cases a jurisdiction clause can be considered as precise and based on the consent of the parties.

The fourth category of cases deals with the interpretation of the concept of *lis pendens* within the meaning of Article 27 of the Regulation. The identification of *lis pendens* situations is even more important, as they exclude parallel proceedings in other Member States and thus irreconcilable judgments. Therefore, in doubtful cases, it is essential to determine when a court was ‘deemed to be seized’. The first reference on the interpretation of the court first seized is from 1984<sup>96</sup> and was followed by seven judgments, meaning that by the time of the entry into force of the Regulation a considerable case-law was already available on *lis pendens*, mainly focusing on the room of manoeuvre of the court second seized in specific cases and the interpretation of what ‘same cause of action’ means. As far as the Regulation is concerned, we have five cases on the determination of *lis pendens*, *HanseYachts*,<sup>97</sup> *Aannemingsbedrijf Aertssen NV*,<sup>98</sup> *Cartier*,<sup>99</sup> *Nipponkoa*<sup>100</sup> and *Weber*.<sup>101</sup> Most of them can be considered as fine-tuning of previous case-law, some of them, such as *Weber*, even as softening the rigidity of the earlier rather formal Court reading of *lis pendens*, by moving away from the strict application of the first seized court priority rule if the second seized would have exclusive jurisdiction in order to limit potential abuse and ‘torpedo-scenarios’.<sup>102</sup>

<sup>92</sup> Case C-436/16 *Georgios Leventis and Nikolaos Vafeias v Malcon Navigation Co. Ltd and Brave Bulk Transport Ltd* (ECLI:EU:C:2017:497).

<sup>93</sup> Case C-368/16 *Assens Havn v Navigators Management (UK) Limited* (ECLI:EU:C:2017:546).

<sup>94</sup> Case C-453/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others* (ECLI:EU:C:2013:62).

<sup>95</sup> Case C-222/15 *Hőszig Kft. v Alstom Power Thermal Services* (ECLI:EU:C:2016:525).

<sup>96</sup> Case 129/83 *Siegfried Zelger v Sebastiano Salintri* [1984] ECR 2394.

<sup>97</sup> Case C-29/16 *HanseYachts AG v Port D'Hiver Yachting SARL and Others* (ECLI:EU:C:2017:343).

<sup>98</sup> Case C-523/14 *Aannemingsbedrijf Aertssen NV and Aertssen Terrassements SA v VSB Machineverhuur BV and Others* (ECLI:EU:C:2015:722).

<sup>99</sup> Case C-1/13 *Cartier parfums — lunettes SAS and Axa Corporate Solutions assurances SA v Ziegler France SA and Others* (ECLI:EU:C:2014:109).

<sup>100</sup> Case C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (ECLI:EU:C:2013:858).

<sup>101</sup> Case C-438/12 *Irmengard Weber v Mechthilde Weber* (ECLI:EU:C:2014:212).

<sup>102</sup> Christian Heinze and Björn Steinrötter, ‘The Revised Lis Pendens Rules in the Brussels I bis Regulation’ in Vesna Lazic and Steven Stuij (eds), *Brussels I bis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Springer, Asser Press 2017) 4–5.

Hence *Weber* in fact was reflected some of the practical negative consequences of the existing case-law.

Interestingly, these cases—although being of major practical importance—did not greatly reveal the interest of national governments as they (often including the Member State concerned) tended to refrain from submitting observations, especially in the later cases. Among the *lis pendens* cases, *Cartier*, a reference from the French *Cour de cassation*, should be mentioned: in this, the Court found a ‘wise and pragmatic way’ to resolve a problem on which French academic opinions diverged.<sup>103</sup> The Court ruled that, except in the situation where the court second seised has exclusive jurisdiction by virtue of the Brussels I Regulation, the jurisdiction of the court first seised must be regarded as being established, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position, which is regarded in national procedural law as being the first defence on the substance submitted before that court, is adopted.

Interpretation problems also arose in cases with several defendants domiciled in various Member States. The *Hydrogen peroxide* case<sup>104</sup> handled this aspect with regard to several defendants participating in the same cartel found to be contrary to the competition law provisions of the Treaty. *Solvay*<sup>105</sup> contributed to making patent litigation more efficient when there are several defendants by enabling the court with no jurisdiction to adopt provisional measures, even where the validity of a patent is raised, and thereby confirming the practice of Dutch courts.<sup>106</sup> The judgment can also be seen as overruling the Court’s previous approach under the Convention. *Painer*,<sup>107</sup> *GlaxoSmithKline*,<sup>108</sup> *Freeport*<sup>109</sup> and *Reisch*<sup>110</sup> should also be added to this category of cases.

It goes without saying that certain core concepts of the Regulation, such as the determination of the ‘place of delivery’, ‘place of performance’ or the ‘place where the harmful event occurred’ or the meaning of a commercial activity being ‘directed to’ a Member State has always been crucial and remained crucial as well under the

<sup>103</sup> Paul Beaumont and Burcu Yüksel, ‘CJEU Civil and Commercial cases’ in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds), *Cross-border Litigation in Europe* (Hart Publishing 2017) 565.

<sup>104</sup> Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (ECLI:EU:C:2015:335).

<sup>105</sup> Case C-616/10 *Solvay SA v Honeywell Fluorine Products Europe BV and Others* (ECLI:EU:C:2012:445).

<sup>106</sup> Mari Korsten, Marion Bruin and Jaap Bremer, ‘The revival of cross-border injunctions’ (2013–2014) *Patents in Europe* 26–29.

<sup>107</sup> Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR 12533.

<sup>108</sup> Case C-462/06 *GlaxoSmithKline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard* (ECLI:EU:C:2008:299).

<sup>109</sup> Case C-98/06 *Freeport plc v Olle Arnoldsson* [2007] ECR I-8319.

<sup>110</sup> Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827.

Regulation.<sup>111</sup> What is however peculiar under the Regulation is that, due to technological developments and the expansion of IT tools, mainly because of dissemination of information through the Internet, some of these notions, in particular the last two, had to be reinterpreted. The group of Internet-related cases should be seen as a special category of Brussels I Regulation cases, whatever subject-matter they touch upon.<sup>112</sup> The first reference of this kind reached the Court in 2008. In the joined cases *Pammer and Hotel Alpenhof* (both being cases referred by the *Oberster Gerichtshof*), the Court was required to determine under what circumstances certain commercial activities advertised and available for consumers through a website can be deemed as directed to another Member State. The role of websites in consumer contracts was later fine-tuned by the Court in *Mühlleitner* in 2013 and in *Emrek* in 2014.

At the same time, on-line publication through the internet inevitably led the Court to reconsidering the determination of the 'place where the harmful event occurred' in cases of infringement of personality rights. Two references, one from a French tribunal and another from the *Bundesgerichtshof*, in 2009 and 2010 respectively queried the Court on it, resulting in the judgment in joined cases *e-Advertising and Martinez*, in which the Court ruled that a person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which the content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised. The same line of reasoning was followed in *Wintersteiger*,<sup>113</sup> in which the infringement of a trademark registered in one Member State was realised through placing it on-line on a website of a referencing service provider operating under a country-specific top-level domain of another Member State. The determination of jurisdiction in the event of copyright infringement through a website operated

<sup>111</sup> For the concept of 'place of delivery' or 'place of performance' see Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA*. [2011] ECR I-4987; Case C-381/08 *Car Trim GmbH v KeySafety Systems Srl*. [2010] I-01255, for the 'place where the harmful event occurred' see Case C-12/15 *Universal Music International Holding BV v Michael Tétéreault Schilling and Others* (ECLI:EU:C:2016:449); Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* (ECLI:EU:C:2015:28); Case C-387/12 *Hi Hotel HCF SARL v Uwe Spoering* (ECLI:EU:C:2014:215); Case C-147/12 *ÓFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* (ECLI:EU:C:2013:490); Case C-45/03 *Andreas Kainz v Pantherwerke AG* (ECLI:EU:C:2014:7), Case C-189/08 *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA*. [2009] ECR I-06917, for the meaning of 'directed to' see Case C-297/14 *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others* (ECLI:EU:C:2015:844).

<sup>112</sup> On the evolution of the Court's internet-related case-law concerning various areas of EU law, see in particular Koen Lenaerts, 'The Case Law of the ECJ and the Internet (2004-2014)' (2014) 1 *ELTE Law Journal* 9.

<sup>113</sup> Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* (ECLI:EU:C:2012:220).

by a company established in a third country but available in the Member State of the court seised was handled by the Court in *Pinckney*; it upheld the accessibility criterion with a limitation regarding the damages that might be sought and this was confirmed with regard to photographs in *Hejduk*.<sup>114</sup> In *Concurrence SARL*, the jurisdictional interpretation issues had to be solved in relation to an infringement of the prohibition on online resale outside a selective distribution network.

In 2014, a reference from the *Landgericht Krefeld* revealed a completely new aspect of contracts concluded by electronic means, namely the impact of the provisions of consumer contracts concluded through click-wrapping.<sup>115</sup>

Of course references on recognition and enforcement, such as those which are about the determination of the scope of the Regulation itself, should be seen as a separate category of cases regardless of the subject-matter concerned.

Finally, a particular aspect of European PIL instruments must be mentioned, namely their impact on the quite different approach and perception that common law has in the field of private international law. In this respect it is important to note that the Brussels Convention was drawn up before the UK's accession to the EEC and thus it was completely based on civil law traditions and terminology. Any alignments made to the Convention upon the UK's accession were purely politically or economically motivated and no amendments were proposed to bring in common law elements.<sup>116</sup>

This in fact means that common law lawyers had to cope with a completely different approach to assuming or declining the jurisdiction of English courts. This is basically because European rules on jurisdiction are alien to common law, which has been based on a practical approach. They reflect somewhat inflexible, rather rigid, *ex ante* determined rules based on predictability and leaving not much discretion to the court to assume or decline jurisdiction.<sup>117</sup> Gardella and di Brozolo call it 'controlled flexibility'. Briggs mentions the determination of the almost hypothetical 'place where the harm occurred'<sup>118</sup> as one of the difficulties. Even more important, however, is the ruling out of the application of the *forum non conviens* doctrine. According to this technique, in international adjudication English courts 'have an inherent power to stay and dismiss actions before them whenever necessary to prevent injustice'.<sup>119</sup> Such

<sup>114</sup> Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing 2016) 517.

<sup>115</sup> Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* (ECLI:EU:C:2015:334).

<sup>116</sup> Anna Gardella and Luca G. Radicati di Brozolo, 'Civil Law, Common Law and Market Integration' (2003) 51 *American Journal of Comparative Law* 614. An example Gardella and di Brozolo give of where economically motivated changes have been brought to the jurisdictional rules is jurisdiction over insurance contracts, see 618.

<sup>117</sup> *ibid* 612.

<sup>118</sup> P.S. Morris is citing Briggs in its book review on Briggs's *Private International Law in English Courts* (2014) in P. Sean Morris, 'The modern transplantation of continental law in England: How English private international law embraces Europeanisation, 1972-2014' (2016) 12 *Journal of Private International Law* 595.

<sup>119</sup> *ibid* 621.

a doctrine is of course irreconcilable with the spirit of the Brussels Convention and Regulation. Anti-suit injunctions of English law are also reflections of the discretionary power that English judges enjoy when deciding in issues of jurisdiction, this time by restraining the commencement of proceedings in foreign courts.

Interestingly, overturning common law concepts or ruling out the application of certain doctrines followed by English courts was often not decided in preliminary ruling cases from English courts but from other Member States' courts. The non-conformity of the *forum non conveniens* doctrine in the field of application of the Regulation was confirmed in *Custom Made Commercial*,<sup>120</sup> a reference from the *Bundesgerichtshof*. The reference of the French *Cour d'appel de Marseille* in *Josi Group*<sup>121</sup> affects the interpretation of the above principle in cases where the defendant is domiciled in the EU but the plaintiff is established or domiciled in a third country and therefore shed a light on the *Harrods* precedent of the *Court of Appeal*, which could be maintained following a settlement of the parties rendering the preliminary reference of the *House of Lords* deprived of substance. Although the non-applicability of anti-suit injunctions was decided in an English case at a referral of the *House of Lords* in 2002,<sup>122</sup> it must be stressed that, before this reference, a first instance French court already brought this issue to the Court but under the prevailing regime was not entitled to refer and therefore its question was not answered. The prohibition of adopting anti-suit injunctions was later extended in *West Tankers* to measures which aimed to prohibit arbitration proceedings, even if arbitration falls outside the scope of Brussels I Regulation, because they could prevent a court of another Member State from exercising the jurisdiction conferred on it by the Regulation.

And finally, the judgment in *Car Trim* on a reference from the German *Bundesgerichtshof* concerning the determination of the place of performance negated the earlier perception of Lord Bingham in the famous *Scottish & Newcastle International Ltd* case<sup>123</sup> according to which the Regulation would not have a uniform concept of delivery.

As far as the Brussels II bis Regulation is concerned, it is striking that markedly fewer cases concern judgments in purely matrimonial matters than parental responsibility or child custody. From the already decided 28 cases, only four were related to divorce proceedings or annulment of marriage.<sup>124</sup>

<sup>120</sup> Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH*. [1994] I-2913.

<sup>121</sup> Case C-412/98 *Group Josi Reinsurance Company SA v UGIC* [2000] ECR I-5925.

<sup>122</sup> Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changeport SA* [2004] ECR I-3565.

<sup>123</sup> *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11.

<sup>124</sup> Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* (ECLI:EU:C:2016:772); Case C-489/14 *A v B* (ECLI:EU:C:2015:654); Case C-168/08 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko* [2009] ECR I-6861 and Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403.

The remaining cases touched upon different aspects of the Regulation, a crucial issue being the assessment of the ‘habitual residence of a child’ determining jurisdiction in cases of parental responsibility and child custody. In these cases, the national courts were either seeking general guidelines from the Court for their assessment when determining the habitual residence of a child<sup>125</sup> or asked for more specific instructions concerning special circumstances, for example in the case of a child born and having spent their early months in a Member State other than the one in which the parents were habitually resident<sup>126</sup> or in the case of a wrongful retention.<sup>127</sup> Three of the four cases touching upon the determination of the ‘habitual residence of a child’ had been dealt in an urgent preliminary ruling procedure. Closely linked to the above problem are cases on the determination of jurisdiction where the habitual residence of a child changed and the modification of a previous final decision based on its former residence is sought<sup>128</sup> or when it should be ascertained whether another Member State’s court would be better placed to deal with the case.<sup>129</sup>

The concept of ‘parental responsibility’ had been interpreted in three cases<sup>130</sup> and the meaning of the rights of custody clarified in two cases.<sup>131</sup>

A specific category of the Brussels II bis cases concerns eventual non-recognition of decisions for reasons of public policy,<sup>132</sup> for the serious infringement of the child’s rights<sup>133</sup> or the possibility of national courts where recognition is sought to adopt provisional measures<sup>134</sup> or to refuse the recognition for any other procedural grounds.<sup>135</sup> Non-recognition issues seem to be the largest category of cases under the Regulation.

<sup>125</sup> Case C–497/10 PPU *Barbara Mercredi v Richard Chaffe* (ECLI:EU:C:2010:829) and Case C–523/07 „A” (ECLI:EU:C:2009:225).

<sup>126</sup> Case C–111/17 PPU *OL v PQ* (ECLI:EU:C:2017:436).

<sup>127</sup> Case C–376/14 PPU *C v M* (ECLI:EU:C:2014:2268).

<sup>128</sup> Case C–499/15 *W and V v X* (ECLI:EU:C:2017:118).

<sup>129</sup> Case C–428/15 *Child and Family Agency v J. D.* (ECLI:EU:C:2016:819).

<sup>130</sup> Case C–215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* (ECLI:EU:C:2015:710); Case C–404/14 *Proceedings brought by Marie Matoušková* (ECLI:EU:C:2015:653); Case C–4/14 *Christophe Bohez v Ingrid Wiertz* (ECLI:EU:C:2015:563).

<sup>131</sup> Case C–400/10 PPU. *McB. v L. E.* [2010] ECR I–8965; Case C–491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I–14247.

<sup>132</sup> Case C–455/15 *P v Q.* (ECLI:EU:C:2015:763); Case C–435/06 „C” [2007] ECR I–10141.

<sup>133</sup> Case C–491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I–14247.

<sup>134</sup> Case C–92/12 *Health Service Executive v S.C. and A.C.* (ECLI:EU:C:2012:255); Case C–296/10 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] I–11163; Case C–211/10 PPU *Doris Povse v Mauro Alpago* [2010] ECR I–6673; Case C–403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I–12193; Case C–256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I–07353.

<sup>135</sup> Case C–195/08 *Inga Rinau* [2008] ECR I–5271.

## V. Conclusions

After reading the previous pages, one could logically ask whether such a kind of quantitative rather than qualitative assessment of preliminary references is able to bring us to adequate and useful conclusions as far as the interpretation of European private international law instruments is concerned. Of course, the conclusions we can draw from the data analysed here are fragmented and one-sided; however, in certain respects they are illustrative. They are able to show how much instruments adopted in the field of judicial cooperation in civil matters were for quite a long time—and even after their transformation to Community acts—treated as semi-European legal acts somewhere at the borderline of EU acts and international instruments, where seeking the Court's help in interpretation problems was more a privilege than the general rule. This very fact suggests that lower courts and especially first instance courts, which had been completely deprived of the possibility to refer cases, had to cope with interpretation problems on their own. This role of 'lonely interpreters' most probably had an influence on their later behaviour and openness or reticence towards using the preliminary reference as a customary instrument. Figures however show that this period of deprivation did not entirely discourage lower courts from availing of the possibility to seize to the Court after they were already entitled to do so. We can however not quantify and qualify the detrimental effects of the pre-Lisbon limitations.

It can also be seen that while issues of jurisdiction, recognition and enforcement are often brought to the Court and the number of references in these fields is extremely high, with regard to both the Brussels I and Brussels II bis Regulations, questions on conflict of laws rules rarely reach the Court: the references concerning Rome I and Rome II Regulations are modest in number and no judgment has been delivered yet on the interpretation of the Rome III Regulation. We know however that these Regulations are frequently applied, meaning that interpretation problems either do not arise at all or, what is more probable, they are solved at national level, remaining isolated.

We can hope that, with the consolidation of the post-Lisbon rules and the national courts becoming more acquainted with them, the time of preliminary references in European private international law will be with us in due course.

*Tamás Szabados*

# Companies in EU Private International Law – An EU Law Perspective

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## I. Introduction

Substantive harmonisation or unification is absent in several fields of European private law. The lack of substantive legislation has however been compensated to a certain extent by the unification of conflict of laws rules in some of these fields. We can refer here to contract law or non-contractual obligations.

Contractual and non-contractual obligations have been affected by substantive law harmonisation only superficially. In parallel, however, European Union (EU) legislation has been much more successful by adopting conflict of laws rules in these areas.<sup>1</sup> This is hallmarked respectively by the Rome I<sup>2</sup> and the Rome II Regulations,<sup>3</sup> which resulted in the application of uniform EU-wide conflict of laws rules.

As opposed to the development of contract law and non-contractual obligations, EU law deeply penetrated company law. A number of directives were adopted to regulate various company law issues. It is true that EU company law is not like national company laws: EU company law does not cover all aspects of the life and operation of a company. Instead, the directives focus on certain specific questions. Notwithstanding this, EU law regulates many aspects of company law and the company law of the Member States is largely framed by the rules determined by the EU company law directives. Interestingly, this relatively detailed substantive law regulation is coupled with the absence of EU-level conflict of laws rules on companies.

However, in the texture of the EU rules on companies, there are undoubtedly lacunae and they cause complications in two fields in particular, namely transfer of the company seat (including cross-border conversion) and groups of companies. Here,

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<sup>1</sup> See the lecture by Professor Lajos Vékás at the conference 'Nemzetközi magánjog – Az új kodifikáció tükrében' held at Eötvös Loránd University (ELTE), Budapest on 29 September 2017 with the title 'Európai uniós és tagállami nemzetközi magánjog' and his article Lajos Vékás, 'Európai uniós és tagállami nemzetközi magánjog' (2017) 64 Magyar Jog 589, 589.

<sup>2</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>3</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/49.

both substantive and conflict of laws rules are missing. However, from the perspective of conflict of laws, the nature of the complications is different in these two fields. A transfer of seat may result in a change of the governing law and is thus connected to the issue of how to determine the law applicable to companies. The treatment of groups of companies under private international law primarily requires the characterisation of the legal issues concerned. Characterisation may lead to the application of different conflict of laws rules and connecting factors. As characterisation may result in concluding that the question concerns the legal status or the internal affairs of the company, the determination of the law governing companies is of equal significance here. The reason these two fields are problematic is that these issues have not been regulated by the EU company law directives that provide for a substantive law solution. The absence of EU-level substantive law regulation results in the role of private international law rules taking on greater value. This is the subject of this contribution, which primarily focuses on the law governing companies.

## II. Contract law and company law: Are they really parallel?

Contract law and company law are many times put in parallel in the context of EU law. Their similarity is revealed primarily in relation to the autonomy enjoyed by the parties to a contract or the shareholders of a company and their freedom to choose the applicable law for the contract, as well as the legal questions related to the legal status and internal matters of the company.<sup>4</sup> Choice of law gives rise to regulatory competition, both in contract and company law,<sup>5</sup> though the possibility of choice of law and the attendant regulatory competition is more limited in company law.

In both substantive contract law and in the private international law rules on contracts, private autonomy has a fundamental role. National substantive contract laws recognise the freedom of contract, based on which the parties can shape their contractual relationship according to their will. This is supplemented by the possibility of choice of law at the level of the private international law that allows the parties to ‘contract out’ from the law otherwise governing the contract.

In spite of some similarity, two different approaches and development paths may be revealed behind contract law and company law. Contract law was not subject to

<sup>4</sup> See Marc-Philippe Weller, Nina Benz and Chris Thomale, ‘Rechtsgeschäftsähnliche Parteiautonomie’ (2017) 25 *Zeitschrift für Europäisches Privatrecht* 250.

<sup>5</sup> Stefan Grundmann, ‘Regulatory Competition in European Company Law – Some Different Genius?’ in Guido Ferrarini, Klaus J. Hopt and Eddy Wymeersch (eds), *Capital markets in the age of the Euro* (Kluwer Law 2002) 561, 561.

a comprehensive substantive law harmonisation or unification in the EU. In certain narrow areas, such as consumer contracts, directives have been adopted, but most of the areas of contract law have remained unaffected by EU legislation and as such stay within the competence of the Member States. Although the Commission of the European Union (Commission) tended to expand the reach of EU contract law rules by various means, these efforts have been unsuccessful so far. The Commission lent its support to the creation of the Principles of European Contract Law (PECL),<sup>6</sup> set up an expert group for the creation of the Draft Common Frame of Reference (DCFR)<sup>7</sup> and more recently put forward a proposal for an EU Regulation on the Common European Sales Law (CESL).<sup>8</sup> Although the endeavours of the CESL were already quite limited in comparison to the PECL or the DCFR, even this proposal lacked the support of the Member States and other stakeholders. Finally, the Commission decided to take the CESL off the agenda and focus instead on an even more limited area, rules on contracts for the supply of digital content<sup>9</sup> and contracts on the online sale of goods.<sup>10</sup> While EU legislation was relatively fruitless concerning substantive rules of contract law, its efforts have been crowned with success as far as the unification of the conflict of laws rules of contracts is concerned, through the Rome I Regulation. By allowing the parties the choice of law and providing for predictable conflict of laws rules in absence of choice of law, the Rome I Regulation undoubtedly reduces the risk and uncertainty related to international contracts.

Regarding company law, we can notice an opposite path of development. Substantive law legislation pervaded much more deeply into company law than contract law. The outcome of EU company law legislation has been a number of directives aligning national company laws in certain specific areas and regulations creating truly European company forms. The harmonisation of company law has not been comprehensive. It has remained somewhat fragmented, focusing only on certain questions of company law and harmonisation still leaves the Member States with some room to manoeuvre. Notwithstanding these limitations, European legislation has without doubt penetrated national company law to a significant extent. Although company law directives do not cover the whole life of companies, from their establishment until termination, company law directives regulate important issues related

<sup>6</sup> Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, Parts I and II (Kluwer 2000).

<sup>7</sup> Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Sellier 2009).

<sup>8</sup> Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final.

<sup>9</sup> Commission, 'Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM (2015) 634 final.

<sup>10</sup> Commission, 'Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods' COM (2015) 635 final.

to the operation of companies in the EU and set common standards for them. Areas covered by the company law directives include the formation of public limited liability companies, minimum capital, maintenance and alteration of capital, disclosure requirements, domestic and cross-border mergers, divisions,<sup>11</sup> shareholder rights,<sup>12</sup> single-member private limited liability companies,<sup>13</sup> takeover,<sup>14</sup> accounting and financial reporting.<sup>15</sup> Thanks to the purview of harmonisation, conflict of laws issues arise more rarely. The operation of private international law rules intervenes in areas not covered by EU substantive company law legislation. While conflict of laws legislation was adopted concerning contractual obligations, legal persons or companies remained intact from legislative intervention as to conflict of laws.

If the parties to a contract did not avail of choice of law, the governing law is specified by the detailed provisions of the Rome I Regulation. Contrary to this, the law governing companies is not determined by any secondary EU legal source, but has been left in principle to the laws of the Member States without prejudice to the freedom of establishment provisions of the Treaty on the Functioning of the European Union (TFEU)<sup>16</sup> and the related case law of the CJEU.

National company laws also permit a considerable freedom for the shareholders of a company, but this is usually more limited in comparison to contract law. The choice of law is undoubtedly present, at least in an indirect form. While Article 3 of the Rome I Regulation explicitly recognises the freedom of choice of law, the possibility of a more limited indirect choice of law regarding companies follows from the judgments of the Court of Justice of the European Union (CJEU). In fact, this indirect choice of law based on the judgments of the CJEU is a 'substitute' for uniform EU-level private international legislation regarding the law applicable to companies. First, the freedom of establishment provisions allow a company to be set up in another Member State. By selecting the place of incorporation, the law

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<sup>11</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46.

<sup>12</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184/17.

<sup>13</sup> Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies [2009] OJ L 258/20.

<sup>14</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L 142/12 (Takeover Directive).

<sup>15</sup> See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19; Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards [2013] OJ L 243/1.

<sup>16</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union [2016] OJ C 202/1, arts 49–55.

governing the company is also chosen. Second, in the relation between a company and a host Member State, the judgments of the CJEU in fact require the application of the incorporation doctrine. The use of the incorporation theory amounts, in essence, to granting a choice of law for the owners. Third, under the judicial practice of the CJEU, companies can convert themselves into the company form of another Member State even if the sole purpose of the transaction is to change the applicable law and benefit from more favourable rules.

Private international law enquiries come primarily into the forefront regarding the potential change of the governing law as a result of the transfer of the company seat or the treatment of international groups of companies. These two areas illustrate two different problems. The issue of the transfer of seat demonstrates that the cross-border transfer of the company seat and the attendant change in the applicable law necessitate the law governing companies at an EU level to be determined, while the treatment of groups of companies in private international law underlines the significance of characterisation and the specification of the scope of the applicable law. I will therefore take these two fields under closer scrutiny.

### III. Transfer of the company seat

The CJEU has gradually expanded the freedom of companies and their shareholders to pursue business activity across the EU, as well as the possibility of choice of law. An indirect choice of law is available for companies in several ways.

First, the owners can decide where to incorporate a company and thus choose the governing law already in the phase of forming the company. The second paragraph of Article 49 TFEU explicitly refers to the right to set up undertakings. This freedom is not affected even by the fact that the company carries out (entirely) its activity in a Member State other the place of incorporation. This has been made clear by the CJEU in the *Centros*<sup>17</sup> and *Inspire Art*<sup>18</sup> judgments, which demonstrate that the selection of the place of incorporation for the purpose of benefiting from a more favourable legal regime, even though the company carries out its business activity entirely in another Member State through a branch, may not be restricted by the latter Member State.

<sup>17</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

<sup>18</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

Second, once a company has been set up, it may transfer its seat and this may give rise to a change in the applicable law. This allows choice of law after the formation phase. As the registered and the real seat are moveable connecting factors, the owners of a company have an influence on the applicable law.

The issue of the change in the law applicable to the company may be present concerning all forms of company mobility. It is not only linked to the transfer of seat, but may be also the consequence of an international merger or demerger. If a company transfers its registered seat or its real seat, it may result in the change in the law governing the company depending of the private international law rules of the state of the *forum*.

In *Überseering*, the CJEU found that where a company formed in accordance with the law of a Member had moved its actual centre of administration to another Member State, the host Member State could not deny the company legal capacity and the capacity to bring legal proceedings before its national courts.<sup>19</sup>

Third, cross-border conversion by the transfer of the registered office always implies a change in the applicable law and may accordingly be used for choice of law. The *Cartesio* judgment represented a significant step in increasing the autonomy of companies and their shareholders in selecting the preferred jurisdiction through a cross-border conversion.<sup>20</sup> The previous cases involved the establishment of a branch in a Member State other than the place of incorporation or the transfer of the real seat. They did not address the possibility of cross-border conversion, that is the ‘qualified’ form of the transfer of seat where the company transfers its registered office (but not necessarily its real seat), adapting itself to the law of the host Member State. In the *Cartesio* judgment, the CJEU recognised obiter dicta the companies’ right to convert themselves into the company form of another Member State, ‘to the extent that it is permitted under that law to do so’.<sup>21</sup>

The possibility of cross-border conversion was further developed in the subsequent *VALE*<sup>22</sup> and *Polbud*<sup>23</sup> judgments. These judgments expanded the freedom of choice of law regarding cross-border conversions. In relation to the cross-border conversion of an Italian company to a Hungarian company form, the *VALE* judgment required the interpretation of the statement made by the CJEU in *Cartesio*, according to which the home Member States cannot impede the conversion of a company into the company form of another Member State ‘to the extent that it is permitted under that law to do so’. The Hungarian court of registration denied

<sup>19</sup> Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919, para 94.

<sup>20</sup> Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* [2008] ECR I-9641.

<sup>21</sup> *Cartesio*, para 112.

<sup>22</sup> Case C-378/10 *VALE Építési Kft.* (ECLI:EU:C:2012:440).

<sup>23</sup> Case C-106/16 *Polbud — Wykonawstwo sp. z o.o.* (ECLI:EU:C:2017:804).

the possibility of the cross-border conversion on the grounds that Hungarian law provided only for domestic conversions but not for international ones. First of all, the CJEU noted that company transformation operations are covered by the freedom of establishment<sup>24</sup> and then held that the national legislation treating domestic and international conversions differently has a deterrent effect on the exercise of the freedom of establishment by companies seated in other Member States.<sup>25</sup> The restriction of the freedom of establishment could not be justified in the given case either by the fact that EU legislation was absent on the cross-border conversion of companies or overriding reasons in the public interest.<sup>26</sup> Hungarian law completely ruled out the possibility of a cross-border conversion for companies having a seat in another Member State, going beyond that is necessary to protect the interests potentially concerned.<sup>27</sup> As in the Member States the domestic conversion of companies is usually possible, intra-EU cross-border conversions cannot be prohibited.

The recent *Polbud* judgment has broadened even further the possibility of choice of law through a cross-border conversion. Previously, there was uncertainty whether the freedom of establishment provisions permit transferring solely the registered office of a company, even if the company retains its real seat and pursues its business activity entirely in the Member State of origin. Different answers were given to this question in the legal literature.<sup>28</sup> In the *Polbud* case, the CJEU settled this issue. *Polbud*, a Polish private limited liability company (sp. z o.o.) wanted to convert itself into a company governed by Luxembourg law (S.à.r.l.). The company, under its new name, *Consoil*, was entered in the Luxembourg Companies Register but the cross-border conversion was refused by Polish court of registration on the grounds that the removal from the commercial register required first the liquidation and winding up of the company. In order to be governed by Luxembourg law, the company transferred its registered office to Luxembourg. The peculiarity of the case was that the CJEU departed from the assumption that the company's commercial activities and its real seat were not transferred to Luxembourg.

The CJEU stated that the freedom of establishment involves the cross-border conversion of companies.<sup>29</sup> If a company complies with the rules of the host Member State, it can convert itself into the company form of that Member State. In *Polbud*, the CJEU declared explicitly for the first time that the Member States are free to determine the connecting factor used to designate the law applicable to

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<sup>24</sup> *VALE*, para 24.

<sup>25</sup> *VALE*, para 36.

<sup>26</sup> *VALE*, paras 38-39.

<sup>27</sup> *VALE*, para 40.

<sup>28</sup> Jessica Schmidt, Cross-border mergers and divisions, transfers of seat: Is there a need to legislate? (European Union 2016) 13.

<sup>29</sup> *Polbud*, para 33.

companies in terms of private international law.<sup>30</sup> As a consequence, a company also has to comply with the connection specified by the host Member State to qualify as a company under the law of that Member State. The connection so required must also be met by a company intending to carry out a cross-border conversion. The CJEU stated that companies can thus transfer their registered office to another Member State, even without transferring their head office and even if they do not want to conduct business activity in the host Member State, provided that this is possible under the law of the host Member State.<sup>31</sup> Doing this to benefit from a more favourable legislative environment does not constitute abuse under the freedom of establishment provisions of the TFEU.<sup>32</sup> In this respect, the CJEU referred back to the *Centros* and the *Inspire Art* judgments.

Regarding the requirement of Polish law rendering the liquidation of the company as a precondition for deleting the name of the company from the commercial register, the CJEU held that it was liable to impede or prevent the cross-border conversion of the company and as such constituted a restriction to the freedom of establishment.<sup>33</sup> Although a restriction on the freedom of establishment might have been justified on the grounds of protecting the interests of creditors, minority shareholders and employees, as well as by preventing abuse, the CJEU did not accept any of these justifications, because the national rule on obligatory liquidation did not comply with the requirement of proportionality.<sup>34</sup>

As a consequence, the *Polbud* judgment extends the possibility of choice of law by transferring registered office separately. Nevertheless, the extent to which allowing the transfer of the registered office to another Member State without conducting economic activity there is compatible with the earlier practice of the CJEU on the concept of establishment is questionable. In the *Gebhard*<sup>35</sup> and *Cadbury Schweppes*<sup>36</sup> judgments, the CJEU defined the concept of establishment as requiring the actual pursuit of economic activity in another Member State.

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<sup>30</sup> *Polbud*, para 34.

<sup>31</sup> *Polbud*, para 38.

<sup>32</sup> *Polbud*, para 40.

<sup>33</sup> *Polbud*, para 51.

<sup>34</sup> *Polbud*, paras 52–65.

<sup>35</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 25.

<sup>36</sup> Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-7995, paras 53–55.

## IV. Limits of choice of law

As demonstrated above, the CJEU case law gives room for the choice of law in company law matters. Nevertheless, the possibility of transferring the company seat (cross-border conversion) and thus the indirect choice of law by changing the seat is subject to certain limitations, which are partly due to the differences in the conflict of laws rules of the Member States and also the absence of EU-level substantive rules on the transfer of the company seat.

Certain limits stem from the difference of the private international rules of the Member States. Although several authors argue that, due to the *Centros*, *Inspire Art* and *Überseering* judgments, the incorporation theory in practice fully supplanted the real seat theory due to the freedom of establishment case law of the CJEU,<sup>37</sup> the real seat doctrine may be still applicable under certain circumstances.<sup>38</sup> First of all, the real seat theory may remain applicable in the relation between the company and the Member State where the company has been incorporated. In the *Cartesio* judgment, the CJEU stated that Member States have the power to determine the connecting factor required of a company to qualify as incorporated and operating under the law of the Member State concerned, and to specify the conditions for maintaining this status.<sup>39</sup> For this reason, the Member State of origin may prohibit a transfer of seat that takes place by retaining the law governing the company, because this may involve breaking the connecting factor required under the national law of the Member State of incorporation. As discussed above, *Polbud* confirmed this and made clear that the private international law of the Member States can apply any connecting factor to determine the law governing companies.<sup>40</sup>

Accordingly, a Member State following the real seat theory may continue to apply this connecting factor and require that the real seat and the registered office of the company shall be located at the same place if the company intends to remain subject to the law of this Member State. Even in the relation between a company and the host Member State, the rules of the real seat may be applied if they do not restrict the freedom of establishment.<sup>41</sup> Thus, the application of rules more lenient than those of the Member State of incorporation is not excluded in principle.

<sup>37</sup> Marc-Philippe Weller, 'Das autonome Unternehmenskollisionsrecht' (2017) 37 *Praxis des Internationalen Privat- und Verfahrensrechts* 167, 168–169; Jan Knop, *Gesellschaftsstatut und Niederlassungsfreiheit*, (Cuvillier 2008) 60–65.

<sup>38</sup> See also Tamás Szabados, *The Transfer of the Company Seat within the European Union* (Eötvös 2012) 77–96.

<sup>39</sup> *Cartesio*, para 110.

<sup>40</sup> *Polbud*, para 34.

<sup>41</sup> Gerald Spindler and Olaf Berner, 'Der Gläubigerschutz im Gesellschaftsrecht nach Inspire Art' (2004) 50 *Recht der internationalen Wirtschaft* 7, 10.

Nevertheless, the restrictions on emigration based on the real seat doctrine may be avoided by a cross-border conversion that may not be hindered by the Member State of origin if the company undertakes to be subject to the law of the host Member State. Second, the real seat may be used as a connecting factor concerning companies incorporated in third countries. Third, non-profit making entities are not covered by the scope of application of the freedom of establishment provisions, thus the real seat doctrine may be applied to them. The effect of the application of the real seat doctrine may be the prohibition of the transfer of seat in the situations presented above.

There are limits to the indirect choice of law, related to the fact that EU-level substantive law rules are missing as far as the transfer of the company seat (cross-border conversion) is concerned. The Member States are free to use their own rules regarding a transfer of seat as long as they are compatible with the freedom of establishment provisions of the TFEU and the related case law. Restrictive measures may be adopted if justified, based on an explicit exception laid down by the TFEU or overriding reasons related to the public interest, such as the protection of creditors, minority shareholders and employees.

Domestic rules may be applied to international conversions. It is noteworthy, for example, that, notwithstanding the ruling of the CJEU, VALE Kft. could not rely on the freedom of establishment after all. Considering the facts of the case, the Supreme Court of Hungary, referring the case to the CJEU, found that VALE Srl. had already been deleted from the Italian commercial register when the articles of association of VALE Kft. were adopted for the purpose of registering the conversion in Hungary. The *Kúria*, the successor of the Hungarian Supreme Court, stated that the rule of Hungarian company law, that the articles of association of the legal successor company must be adopted at the latest until the deletion of the legal predecessor, applies even with regard to cross-border conversion.<sup>42</sup> As a consequence, the continuity of the legal personality of the company was missing and it could not be entered into the Hungarian registry. Interestingly, the same question arose in German court practice with a different outcome. In relation to the cross-border conversion of a Luxembourg S.à.r.l. into a German GmbH, the *OLG Nürnberg* found the conversion possible, even though the company was deleted from the Luxembourg registry when registration was sought in Germany.<sup>43</sup>

<sup>42</sup> *Kúria*, 29 November 2012, Gfv. VII. 30.277/2012/4.

<sup>43</sup> *OLG Nürnberg* 19.6.2013 – 12 W 520/13 see (2015) 35 *Praxis des Internationalen Privat- und Verfahrensrechts* 163. See Leonhard Hübner, 'Der grenzüberschreitende Formwechsel nach Vale – zur Satzungssitzverlegung von Luxembourg nach Deutschland' (2015) 35 *Praxis des Internationalen Privat- und Verfahrensrechts* 134.

Cross-border conversions may not be treated differently from domestic ones, but at the same time the host Member State may adopt specific rules necessitated by the cross-border nature of the transaction.

## V. An approach of non-intervention?

The need for EU-level legislation became a truism concerning the cross-border mobility of companies. Most often, such a plea is made with regard to the cross-border transfer of seat or conversion, but other fields could also be mentioned, such as international demergers. The cross-border presence and mobility of companies is intertwined with the need to determine the governing law on various issues related to companies. Notwithstanding the demand for predictable substantive and conflict of laws rules, EU legislator has so far decided in favour of not intervening.

The EU is quite often compared with the US. This policy of non-intervention is reminiscent of US law, where the determination of the law applicable to companies takes place at the level of the state and federal legislation left this issue untouched. Transferring seat and cross-border conversion are not regulated at federal level, and so American states are free to regulate the mobility of companies. An operation similar to the EU cross-border conversion is set out in the Model Business Corporation Act and this ‘domestication’ procedure has been implemented in a number of US states. However, a qualification must be made. The states of the US follow the incorporation theory, even in the absence of unification, through federal law. In the EU, Member States are free to apply any connecting factor, the place of incorporation or the real seat, although the judgments of the CJEU curtailed this freedom concerning the relation between the company and the host Member States. In the EU, although conflict of laws rules differ in the Member States, the harmonisation of substantive company law rules has occupied a larger scope than in the US, where federal intervention has been limited to securities regulation and certain questions of corporate governance.<sup>44</sup>

Even if the conflict of laws rules of the home Member State did not hinder the transfer of seat, there are no common EU-level substantive rules on the transfer of seat, which renders the process of the transfer of seat more difficult for companies. The transfer of a company seat would require the coordination of two legal systems,

<sup>44</sup> Jan von Hein, ‘Corporations in European Private International Law – From Case-Law to Codification?’ <[http://www.pilaj.jp/data/2015\\_0607\\_Corporations%20in\\_European\\_P\\_I\\_L.pdf](http://www.pilaj.jp/data/2015_0607_Corporations%20in_European_P_I_L.pdf)> accessed 26 April 2018, 1, 5–7.

which is missing at present in the EU. The law of some Member States provides certain rules, but most often a precise mechanism for the transfer of seat is wanting.<sup>45</sup>

Several proposals from academic and other expert groups recommended the regulation of the law applicable to companies, usually along with the regulation of cross-border conversion. More recently, the Group européen de droit international privé (GEDIP) drafted a proposal. As a main rule, this follows the incorporation doctrine and only if the place of incorporation or formation may not be established the governing law is ‘the law of the country within the territory of which its central administration is located at the moment of formation of the company. However, if the company is manifestly more closely connected with the law of another country, that law will apply’.<sup>46</sup> The GEDIP Proposal allows the application of the overriding mandatory provisions of the *forum* and effect may be given to those of the state of the place of central administration or the place of the activities of the company.<sup>47</sup> Overriding mandatory provisions are specified in accordance with the definition given by the Rome I and Rome II Regulations.<sup>48</sup> The change in the applicable law is possible provided that it is permitted by both the law of the home and the host Member State.<sup>49</sup> The GEDIP proposal does not distinguish between EU and extra-EU situations and thus the designated law applies even if it is a law of a non-Member State.<sup>50</sup> The peculiarity of the GEDIP proposal is that it does not only provide for the determination of the law governing companies, but extends to other bodies as well, corporate or unincorporated. The non-concealed objective of the GEDIP was to draft rules suitable as a basis for EU legislation.

Meanwhile, EU institutions have continued to reflect on the need for EU legislation on determining the law governing companies since the first proposal for a Fourteenth Company Law Directive in 1997. The Stockholm Programme advocated examining whether common rules on the law applicable to companies should be introduced<sup>51</sup> and suggested that ‘the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary...’, including company law.<sup>52</sup> The Commission’s Action Plan for the implementation of the Stockholm Programme set the objective of publishing a green paper on private international

<sup>45</sup> An exception is the Spanish legislation that provides for detailed rules by Ley 3/2009, de 3 de abril, sobre modificaciones estructurales de las sociedades mercantiles BOE núm. 82 de 04 de abril de 2009.

<sup>46</sup> GEDIP Proposal, art 4.

<sup>47</sup> GEDIP Proposal, art 10 (2)–(3).

<sup>48</sup> GEDIP Proposal, art 10 (1).

<sup>49</sup> GEDIP Proposal, arts 8–9.

<sup>50</sup> GEDIP Proposal, art 2.

<sup>51</sup> The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ C 115/1, 3.4.2.

<sup>52</sup> The Stockholm Programme 3.1.2.

law aspects, including applicable law, relating to companies, associations and other legal persons by 2014.<sup>53</sup> The publication of the Green Paper, however, was dropped. In 2012, in another Action Plan, the Commission decided to conduct public and targeted consultations to consider a possible initiative on cross-border transfer of the registered office.<sup>54</sup> The Reflection Group on the Future of EU Company Law set up by the Commission found necessary the adoption of EU legislation on the cross-border mobility of companies.<sup>55</sup> In the majority opinion of the Reflection Group, ensuring the transfer of seat of companies does not require the unification of the conflict of laws provisions of the Member States, but the Reflection Group called for a comprehensive and comparative analysis of the advantages and flaws of the real seat theory.<sup>56</sup> Other members of the Reflection Group however, found EU-level regulation of the law applicable to companies to be necessary because cross-border operations may affect the law governing companies.

The European Parliament adopted resolutions on the transfer of seat, requesting the Commission to adopt legislation to this end.<sup>57</sup> The resolutions of the European Parliament do not demand a uniform private international law regime on the law applicable to companies, let alone stating that, from the time of the transfer of the registered office, the company should be subject to the law of the host Member State.

The Commission ordered a Study on the Law Applicable to Companies.<sup>58</sup> The study refers back explicitly to the GEDIP Proposal and, in accordance with the GEDIP Proposal, it recommends the application of the law of the state of incorporation, or for an unincorporated entity the law of the state where it has been formed.

<sup>53</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Delivering an area of freedom, security and justice for Europe's citizens—Action Plan Implementing the Stockholm Programme, Brussels, 20.4.2010, COM (2010) 171 final, 25.

<sup>54</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies COM (2012) 740 final, 12.

<sup>55</sup> Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011, 17–19.

<sup>56</sup> Report of the Reflection Group On the Future of EU Company Law, 24.

<sup>57</sup> European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)) [2013] OJ C 239E/18; Cross-border transfers of companies' registered offices European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)) [2010] OJ C 87E/5; European Parliament resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat [2008] OJ C 263 E/671.

<sup>58</sup> Carsten Gerner-Beuerle, Federico M Mucciarelli, Edmund-Philipp Schuster and Mathias M. Siems (eds), *Study on the Law Applicable to Companies, Final Report* (Publications Office of the European Union 2016) 292–295.

There is a subsidiary rule pursuant to which if the applicable law may not be determined on the basis of the above rule, the law to which the company is most closely connected should be applied.

Even so, no EU legislative act has been adopted so far, neither on the transfer of seat nor on the determination of the law applicable to companies. It is difficult to predict whether this number of expert groups and proposals really signifies something about the intention of the Commission to put forward a legislative proposal in the near future on the cross-border transfer of seat (conversion) and the determination of the law governing companies in the EU.

The hesitation of the EU legislator is in fact a policy choice. As long as there is no EU-level legislation, it gives room for the autonomous law-making of the Member States. Until the time of the adoption of EU-level rules on cross-border transfer of seat or conversion and the law governing companies, the Member States are free to determine either the place of incorporation or the real seat as a connecting factor and they may regulate the free movement of companies while respecting the freedom of establishment provisions of the TFEU and the related case law. This also implies that the Member State of the real seat of the company may apply its own rules in an emigration situation and may impose restrictions, for example, on the grounds of the protection of creditors, minority shareholders or employees. With regard to the harmonisation of the cross-border mobility of companies as well as the law applicable to companies, the harmonisation measure would determine any restriction available for the Member States. They would thus lose their room to manoeuvre to impose restrictions on companies justified by Article 52 TFEU or overriding requirements relating to the general interest. Until then, the lack of private international rules on the law governing companies is mitigated by the possibility of indirect choice of law rendered possible by the judicial practice of the CJEU.

## VI. Groups of companies

The development of the regulation of groups of companies does not differ much from the issue of the transfer of seat. General EU-level substantive rules on groups of companies are missing. Articles 49 and 54 TFEU allow subsidiaries, branches and agencies to be set up, thereby creating groups of companies, even if this takes place solely to benefit from a more favourable legal regime as recognised in *Centros* and *Inspire Art*. More specifically, the *Cadbury Schweppes* judgment stated that use of subsidiaries to avail of more lenient tax rules is not incompatible with the freedom of establishment, unless setting up the subsidiary constitutes a wholly artificial

arrangement that does not reflect the reality.<sup>59</sup> At the level of secondary legal sources, the Takeover Directive affects the creation of groups of companies, while the new Insolvency Regulation contains provisions on the insolvency proceedings of members of groups of companies.<sup>60</sup> Although the EU made efforts to adopt a directive on groups of companies, also called the Ninth Company Law Directive, these attempts have remained so far unsuccessful. The European Commission set up expert groups, such as the High Level Group of Company Experts,<sup>61</sup> the Reflection Group on the Future of European Company Law,<sup>62</sup> and the Informal Company Law Expert Group<sup>63</sup> to examine, *inter alia*, the aspects of the substantive law regulation of company groups. By its Action Plan on Company Law, the Commission intended to put forward an initiative on the information available on groups and the recognition of the concept of ‘group interest’.<sup>64</sup> Academic groups, such as the Forum Europaeum on Company Groups<sup>65</sup> and the European Company Law Experts,<sup>66</sup> also embraced proposals for the substantive law regulation of certain aspects of the operation of groups of companies. However, these proposals have not so far been formulated into legislation. Groups of companies are addressed outside company law, for example, by EU competition law. As indicated above, EU company law directives address groups of companies only regarding their creation and termination, therefore, the ‘interval’ between these two points must be filled with the national law designated with the help of private international law.<sup>67</sup>

<sup>59</sup> Cadbury Schweppes, paras 36–37 and 49–75.

<sup>60</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19, Chapter V.

<sup>61</sup> Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, Chapter V.

<sup>62</sup> Reflection Group on the Future of European Company Law, Chapter 4.

<sup>63</sup> The Informal Company Law Expert Group (ICLEG), Report on information on groups, March 2016 <[http://ec.europa.eu/justice/civil/files/company-law/icleg-report-on-information-of-groups-march-2016\\_en.pdf](http://ec.europa.eu/justice/civil/files/company-law/icleg-report-on-information-of-groups-march-2016_en.pdf)> and Report on the recognition of the interest of the group October 2016 <[http://ec.europa.eu/justice/civil/files/company-law/icleg\\_recommendations\\_interest\\_group\\_final\\_en.pdf](http://ec.europa.eu/justice/civil/files/company-law/icleg_recommendations_interest_group_final_en.pdf)>.

<sup>64</sup> Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies Strasbourg COM (2012) 740 final, 14–15.

<sup>65</sup> ‘Corporate Group Law for Europe: Forum Europaeum Corporate Group Law’ (2000) 1 European Business Organization Law Review 165.

<sup>66</sup> European Company Law Experts, A proposal for reforming group law in the European Union – Comparative Observations on the way forward, October 2016, <<https://europeancompanylawexperts.wordpress.com/reforming-group-law-in-the-eu/>>.

<sup>67</sup> For a comprehensive analysis on groups of companies and private international law, see in detail Moritz Renner, ‘Companies, transnational groups of’ in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), Encyclopedia of Private International Law (Elgar, 2017, Cheltenham) 411; Moritz Renner, ‘Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe’ (2014) 43 Zeitschrift für Unternehmens- und Gesellschaftsrecht 452.

Groups of companies appear most often in an international dimension. Even so, substantive regulation at international or EU-level is missing. Somewhat paradoxically, groups of companies are therefore regulated by national laws. In the absence of EU-level harmonisation of the substantive rules on groups of companies, Member States are free to determine the law applicable to groups of companies. This was confirmed by the CJEU in the *Impacto Azul* case.<sup>68</sup> In this case, Portuguese law imposed joint and several liability only on parent companies having their seat in Portugal for the obligations of their subsidiaries, while parent companies seated elsewhere escaped from such a liability. The CJEU found that this provision did not restrict the freedom of establishment of parent companies seated in other Member States and declared that ‘having regard to the fact that the rules concerning corporate groups are not harmonised at EU level, the Member States remain, in principle, competent to determine the law applicable to a debt of a related company’.<sup>69</sup>

Most of the laws of the Member States provide for some substantive rules on groups of companies, but private international law acts and civil codes containing conflict of laws rules do not contain any specific connecting factor applicable to groups of companies. National rules do not provide for a general all-embracing conflict of laws rule concerning groups of companies. EU private international law does not specifically address groups of companies or the members within a group of companies, let alone the Insolvency Regulation. The expert proposals do not discuss the private international law aspects of groups of companies either and it seems that the EU legislator will not act in this field in the near future.

According to the nature of the legal relationship, cases may be distinguished where the conflict of laws question concerns the determination of: (1) the law applicable to the status of the entities within the group of companies; (2) the law applicable to the legal relationships between the members of the group and (3) the law applicable to the legal relationships with third parties.

The treatment of groups of companies in private international law is primarily an issue of characterisation and thus it is not necessary for the EU legislator to establish a general all-embracing connecting factor for groups of companies. The choice of the appropriate connecting factor depends on the issue to be addressed. In the case of a group of companies, depending on the question, the application of the personal law of the company may arise, ie the law governing the legal status and the internal matters of the company (eg, in the case of an issue concerning the organisation of the company), the connecting factor applicable to the contractual relationships (eg, with regard to a domination contract or other contracts entered into

<sup>68</sup> Case C-186/12 *Impacto Azul Lda v BPSA 9 – Promoção e Desenvolvimento de Investimentos Imobiliários SA and Others* (ECLI:EU:C:2013:412).

<sup>69</sup> *Impacto Azul*, para 35.

between the members of the group) or the connecting factor applicable to non-contractual obligations (eg, in the event of an action brought by a third party against the parent company regarding a non-contractual relationship between the subsidiary and the third party).<sup>70</sup> With regard to contractual or non-contractual qualification, the Rome I and Rome II Regulations apply respectively with the advantage of the possibility of choice of law.<sup>71</sup> In questions related to the legal status and the internal matters of the company, domestic private international law rules apply. For the latter category of cases, those questions mentioned regarding the cross-border transfer of seat (conversion) and the determination of the law governing companies are of equal significance. There is, however, an additional problem. As far as the relationships between the parent and the subsidiary are concerned pertaining to an issue qualifying as a matter related to the legal status and the internal affairs of the company, it must be decided whether the law applicable to the parent or the subsidiary governs the given issue. The answer depends on national law. The dominant view favours the application of the law governing the subsidiary, taking into account the fact that most of the legal disputes between the parent company and the subsidiary concern the rights of the subsidiary (or its shareholders or its creditors).<sup>72</sup>

The provisions on groups of companies of the Member State where the real seat of the company belonging to a group of companies is located may not be applied to a company registered in another Member State, unless this is justified by overriding reasons related to the public interest, such as the protection of creditors, minority shareholders or employees. This may be deduced from the earlier judgments of the CJEU (*Überseering*, *Centros* and *Inspire Art*).

The difficulty of distinguishing the legal relationships concerned and, accordingly, the determination of the governing law based on different legal sources may lead to a multiplication of the governing law. However, this seems unavoidable because of the variety of the legal relationships arising in relation to the operation of a group of companies. The conflict of laws rule applicable to the given issue must be selected with the help of characterisation and the applicable law will be designated by the conflict of laws rule thus selected. Interestingly, the proposals on the regulation of groups of companies addressed only substantive law questions; private international laws issues in fact received no attention.

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<sup>70</sup> Renner, 'Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe' (n 67) 479.

<sup>71</sup> Renner, 'Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe' (n 67) 477 and 480–481.

<sup>72</sup> Renner, 'Companies, transnational groups of' (n 67) 416. Herbert Kronke, 'Grenzüberschreitende Personengesellschaftskonzerne – Sachnormen und Internationales Privatrecht' (1989) 18 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 473, 476.

EU law does not provide for a special connecting factor for groups of companies. It is to be noted, however, that not even characterisation is regulated by EU law. EU conflict of laws regulations are subject to an autonomous characterisation. Although the Rome I and Rome II Regulations do not expressly regulate characterisation, they give some guidance. The provisions on the material scope of application of the Rome I and Rome II Regulations that specify questions excluded from the scope of application of the Rome I and Rome II Regulations facilitate it. Both the Rome I and Rome II Regulations contain a ‘company law’ exception.<sup>73</sup> Since the provisions of the Rome I and Rome II Regulations must be construed consistently with the Brussels I Regulation,<sup>74</sup> the case law related to the Brussels I Regulation may be also applicable to the Rome I and Rome II Regulations. In relation to the Brussels Regulation, the CJEU, for instance, established that the concept of ‘matters relating to contract’ may not be interpreted narrowly.<sup>75</sup> Such a broad interpretation may limit the respective scope of application of the conflict of laws norms on non-contractual relationships and companies. Outside the scope of application of EU conflict of laws regulations, characterisation takes place in accordance with national private international law. This is the case, in particular, concerning the characterisation of issues subject to the law applicable to companies.

Instead of determining specific conflict of laws rules for groups of companies, it would be crucial for a future EU legislation on the law governing companies to regulate in detail the scope of the law applicable to companies. The precise specification of the scope of the law applicable to companies facilitates the delimitation and characterisation of questions falling under the scope of application of the conflict of laws rules on companies on the one hand and on contractual or non-contractual obligations on the other.

## VII. The options of intervention – Questions for a future EU private international law legislation concerning companies

The last decades were spent waiting for EU legislation on the cross-border transfer of seat or conversion and the law governing companies. If, in the future, the EU legislator decides in favour of legislative intervention, he will face almost the same

<sup>73</sup> Rome I Regulation, art 1 (2) f) and Rome II Regulation, art 1 (2) d).

<sup>74</sup> Rome I Regulation, preamble (7) and Rome II Regulation, preamble (7).

<sup>75</sup> Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] ECR I-481, para 48.

challenges as a national legislator intending to codify the law applicable to companies and the transfer of the company seat (cross-border conversion).<sup>76</sup>

The first question will be the form of intervention. Earlier the chances of the Fourteenth Company Law Directive were discussed; nowadays those calling for EU legislation wish to see a regulation instead.

The scope of such a legislative act raises also questions: The EU has the option to provide for pure conflict of laws rules by determining the law applicable to companies or may choose to lay down substantive provisions for the cross-border transfer of seat of companies or it can also adopt a hybrid set of rules combining the two. It has also been proposed to adopt a comprehensive cross-border mobility directive covering cross-border conversions and mergers as well as demergers.<sup>77</sup> Since several company law directives have been consolidated recently, including the directive on cross-border mergers,<sup>78</sup> in a single directive, Directive (EU) 2017/1132, any new rule on cross-border conversion or division could be perhaps well fitted into this directive.

If conflict of laws rules will be determined for companies, they will most probably follow the incorporation doctrine as advocated by almost all scholars and academic groups dealing with this topic.<sup>79</sup> If the EU legislator decides in favour of the codification of the law applicable to companies, the precise scope of the applicable law should be also determined.

The issue of determining the applicable law arises most frequently in relation to companies. This may be put, however, into a broader perspective. It must be asked whether entities other than companies within the meaning of Article 54 TFEU should be covered by a future EU legislative act in terms of the applicable law and cross-border mobility. Article 54 TFEU does not cover non-profit-making entities and entities without legal personality. This is significant for associations and foundations. They are mostly non-profit making entities excluded from the scope of application of the freedom of establishment provisions. Member States retain their competence to regulate non-profit oriented entities and entities without legal personality.

In practice, there are cases concerning such entities intending to transfer their seat that may also have a conflict of laws consequence. For example, the *OLG*

<sup>76</sup> See Tamás Szabados, 'Challenges of the Codification of the Law Applicable to Legal Persons from the Perspective of Recodifying Hungarian Private International Law' (2015) 3 ELTE Law Journal 81.

<sup>77</sup> See Schmidt (n 28) 37.

<sup>78</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310/1.

<sup>79</sup> Schmidt (n 28) 34; Hans Jürgen Sonnenberger and Frank Bauer (eds), *Vorschlag der Spezialkommission für die Neugestaltung des Internationalen Gesellschaftsrechts auf europäischer/deutscher Ebene* (Mohr Siebeck 2007) *Vorschlag für eine Regelung auf europäischer Ebene*, art 2 (1); *Vorschlag für eine autonome deutsche Regelung im EGBGB*, art 10 (2); GEDIP Proposal, art 3; Gerner-Beuerle, Mucciarelli, Schuster and Siems (n 58) 294–295.

*Zweibrücken* rejected the transfer of the registered seat of an association from France to Germany because non-profit-making entities do not fall under the scope of the freedom of establishment provisions.<sup>80</sup>

In this context, the comparative analysis of the Member States of the EU demonstrates that there are usually no specific conflict of laws norms for entities other than companies: National legislators use two options in principle to address entities other than companies. First, they determine connecting factors general to legal persons, not distinguishing between companies and other legal persons. To supplement such a rule, there are also codifications that contain a norm of reference that orders to apply the law governing legal persons also to entities without legal personality.<sup>81</sup> Second, some private international law codifications may take as a point of departure a broad ‘company’ concept, which includes legal persons other than companies in addition to companies.<sup>82</sup> In this way, the governing law concerns this broad category of ‘companies’. The two methods lead to the same outcome: The same conflict of laws rules apply both to companies and other entities.

A further question is what to do with companies established in third countries. The freedom of establishment provisions cover countries of the European Economic Area (EEA). At present, Member States are free to apply the real seat theory to companies incorporated in third countries unless they did not enter into an international convention with the third country concerned that provides for the application of the incorporation doctrine. Member States following the real seat theory thus follow a two-channelled approach, the application of the incorporation theory regarding EEA countries and application of the real seat theory concerning third countries.<sup>83</sup> It must be decided whether the future EU legislation, which will probably introduce the incorporation theory, is intended to be limited to companies incorporated in the EEA or also to companies set up in third countries. This is a significant question. Applying the incorporation doctrine universally gives a uniform and more predictable solution.<sup>84</sup> Many times, it is much easier to identify the place of registration of a company than the place of the real seat. However, the application of the incorporation doctrine multiplies companies governed by the (perhaps exotic) law of non-Member States that may pose a challenge for judicial practice. Nonetheless, it must be noted that this is already now the reality in the Member States following the incorporation doctrine.

<sup>80</sup> OLG *Zweibrücken*, 27.09.2005, 3 W 170/05.

<sup>81</sup> Hungarian Private International Law Act, art 22 (5); Polish Private International Law Act, art 21; Estonian Private International Law Act, art 17.

<sup>82</sup> See Swiss Private International Law Act, art 150 and the Dutch Civil Code, art 10:117.

<sup>83</sup> See BGH, 27.10.2008 – II ZR 158/06.

<sup>84</sup> Von Hein (n 44) 14.

The EU avoided a two-channelled solution in the Rome I and Rome II Regulations. It is therefore expected that a similar path will be followed regarding the law applicable to companies, and the applicable law will be determined based on the same connecting factor, irrespective of whether it leads to the application of the law of an EEA Member State or the law of a third country.

## VIII. Summary

1. Contract law and company law are often put in parallel because choice of law is available in both areas. While in contract law, this is ensured by an EU regulation, the Rome I Regulation, in company law this possibility follows from the case law of the CJEU.

2. At the same time, the two areas show up two different paths of development. Contract law was affected by substantive law harmonisation only marginally, mainly focusing on consumer contracts. However, the absence of uniform substantive law rules is compensated by unified conflict of laws rules laid down by the Rome I Regulation. As opposed to this, the company law of the Member States is largely harmonised by directives, while conflict of laws rules have not been adopted by the EU.

3. This gives rise to complications in two areas: the transfer of seat (cross-border conversion) and the treatment of groups of companies. These are areas not penetrated by substantive EU legislation. In these fields, the private international law rules of the Member States still play an important role.

4. This role will definitely be kept as long as EU legislation does not interfere with creating uniform substantive law and/or conflict of laws rules. If EU legislation decides in favour of intervention by a directive or regulation, it will face questions similar to those which must be answered by national legislations. These questions include the determination of the scope of the applicable law, the extension of conflict of laws rules governing companies to entities other than companies and companies established under the law of a third country.

The interest in EU private international law or conflict of laws has steadily grown during the last decade. The unification of private international law in the EU is now at the forefront of academic debates. Several regulations have been adopted by the EU in various fields, such as the laws applicable to contracts, divorce and succession.

The studies in this volume approach the problem of unification from different angles. The first paper covers the interface between the harmonisation of substantive contract law and private international law, extending the research beyond the borders of the EU, while the second one compares conflict of laws issues in arbitration and litigation. A separate paper is devoted to the application and interpretation of uniform private international rules in the European Union and the tension between uniformity and diversity in this field. The book concludes with an analysis of a major challenge and regulatory gap: the free movement of companies in the EU and the law applicable to them.

The authors are all teachers at the Faculty of Law at Eötvös Loránd University, Budapest and conducted their research under the aegis of the Jean Monnet Centre of Excellence established there. Their work will contribute to a deeper understanding of EU law in this field and will serve as a background to the recently accepted new Hungarian Code on Private International Law, Act XXVIII of 2017.



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