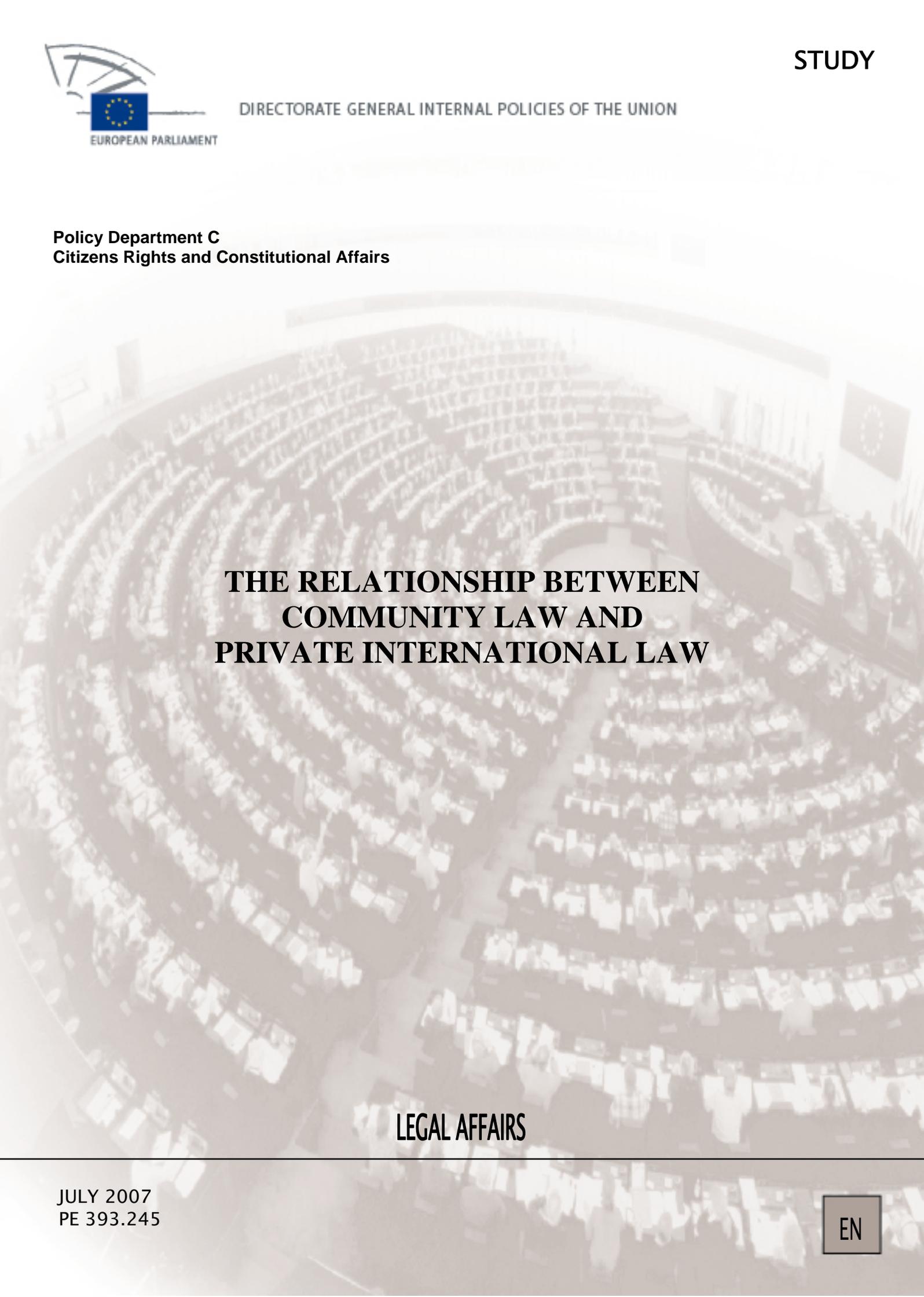


Policy Department C  
Citizens Rights and Constitutional Affairs



**THE RELATIONSHIP BETWEEN  
COMMUNITY LAW AND  
PRIVATE INTERNATIONAL LAW**

**LEGAL AFFAIRS**

JULY 2007  
PE 393.245

EN





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**Directorate-General Internal Policies  
Policy Department C  
Citizens Rights and Constitutional Affairs**

# **THE RELATIONSHIP BETWEEN COMMUNITY LAW AND PRIVATE INTERNATIONAL LAW**

## **STUDY**

### Summary

This note takes into consideration the evolution of the legal basis of the private international law rules common to the Member States and sets out to distinguish the following stages and categories of private international law legislation within the context of Europe:

- private international law conventions concluded between Member States, but which have no legal basis in the Treaties;
- agreements concluded between Member States under the third pillar following the adoption of the Maastricht Treaty;
- acts of secondary legislation under Title IV of the EC Treaty, as introduced by the Amsterdam Treaty, which "communitise" earlier agreements;
- new private international law rules contained in acts of secondary legislation amending private international law rules between the Member States and between those States and third countries which are directly adopted on the basis of the Title IV of the EC Treaty in the absence of an existing convention;
- new Community rules adopted on the basis of Title IV in a field already partially governed by agreements concluded within a non-Community framework such as the Hague Conference on Private International Law, to which all the Member States are parties.

This note shows that, having long been an external phenomenon, private international law rules are increasingly entering the Community framework. This development is the source of a body of original and autonomous European rules which apply to the Member States in their relationship among themselves and in their relationships with third countries.

The note draws attention to the special role played by the European Parliament in the emergence of original European private international law rules.

It also demonstrates the corresponding need for harmonisation of the new system of private international law rules common to the Member States with their existing international commitments under the Hague Conference, and for increased judicial control guaranteeing uniform application of the new provisions and legal certainty for European citizens.

**PE 393.245**

This note was requested by: The European Parliament's committee on Legal Affairs.

This paper is published in the following languages: FR, EN.

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Manuscript completed in July 2007

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Brussels, European Parliament

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## 1. Introduction

The term **private international law** denotes ‘the rules of international order which apply directly to private individuals only’<sup>1</sup>. Private international law can be regarded as national law, as it is the States themselves who draw up private international law rules in the absence of international treaties.

Private international law does not carry the same meaning in all the Member States of the European Union. In countries such as Germany and Portugal, private international law refers only to rules on conflicts of law. In other Member States, it represents a far broader concept which includes rules relating to international jurisdiction of courts and the recognition of foreign judgments<sup>2</sup>.

It is clear that the differences between the national legal systems are likely to affect legal certainty. Individuals are often unable to tell which law is applicable, owing to both the significant amount of relevant legislation and the multiplicity of potentially competent jurisdictions. Conversely, this situation can lead to phenomena such as ‘forum shopping’, where individuals choose the applicable law in the light of what is most favourable to them.

Also, the ratification process of private international law conventions concluded between Member States has encountered many difficulties, which not only delayed their entry into force but also resulted in the conventions not entering into force in all of the European Union Member States.

Finally, judicial review of the implementation of these conventions, concluded though they were between the Member States, can only be subject to the Court of Justice’s interpretation if the Court’s jurisdiction is specifically provided for by the contracting States in the convention itself or one of its additional protocols.

The relationship between Member States’ private international law and Community law remains unclear in the doctrine<sup>3</sup>. However, points of convergence are emerging more clearly with time.

It is for these reasons that it is of interest to survey the process of communitisation of private international law in the European Union Member States, the major changes arising from this process and the changes implied for the Community of Law, in terms of both judicial control and the international commitments of the Member States and the Community itself.

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<sup>1</sup>H. Batiffol, P. Lagarde, *Traité du droit international privé*, LGDJ, Paris, 1993, p. 12

<sup>2</sup> Green Paper of 14.1.2003 on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, p. 9.

<sup>3</sup> R. Michaels, EU law as private international law? : re-conceptualising the country-of-origin principle as vested rights theory, ZERP-Diskussionspapier 5/2006, Zentrum fuer Europaeische Rechtspolitik an der Universitaet Bremen, 2006, Bremen, p. 2.

## **2. The approximation of private international law rules among Member States**

The first noteworthy stage in the move to approximate private international law rules among the Member States of the European Community took place before the entry into force of the Maastricht Treaty

During this period, the Member States concluded traditional international conventions on the basis of Article 293 of the EC Treaty.

### **2.1. The Brussels Convention**

The Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was signed on 27 September 1968 by the six founding countries of the European Economic Community.

The Convention came into force on 1 February 1971 and was applied in 15 States of the European Union. The accession of new Member States to the Community would lead to the following adaptations: the 1978 Luxembourg Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the Saint Sébastien Convention of 26 May 1989 in relation to the accession of Greece<sup>4</sup>, Spain and Portugal<sup>5</sup>, and the Convention of 29 November 1996 brought about by the accession of Austria, Finland and Sweden<sup>6</sup>.

Some Member States did not ratify all of the amending conventions. For example, the version currently in force in Belgium is the one that followed the accession of Spain and Portugal on 26 May 1989.

The signing of the Convention was provided for under Article 220 of the EC Treaty (which became Article 293), under which *'Member States shall (...) enter into negotiations with each other with a view to securing for the benefit of their nationals (...) the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'*. The Convention was ratified by all of the signatory States. The instruments of ratification were deposited with the Secretary-General of the Council of the European Communities.

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<sup>4</sup> Brussels Convention of 25 October 1982.

<sup>5</sup> Saint Sébastien Convention of 26 May 1989.

<sup>6</sup> Convention of 29 November 1996.

The Convention regulates both the jurisdiction of Member States within the international order and the recognition and simplified enforcement of judgments handed down in other Member States. It applies to any dispute on civil and commercial matters.

The Convention is not a Community act within the meaning of Article 249 of the EC Treaty. It is, however, linked to Community law. Article 57(3)(c) provides that the rules on the jurisdiction of the Member States and the recognition and enforcement of judgments *'which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts'* are to take precedence over those laid down in the Brussels Convention.

The Court of Justice has stressed the link between Community law and the Convention since the first judgments handed down in interpretation of the following: *'the Convention of 27 September 1968 must be interpreted having regard both to its principles and objectives and to its relationship with the treaty'*<sup>7</sup>. This link relates to the recognition of the principle of primacy over national legislation.

The Brussels Convention does not replace the existing bilateral conventions between the Member States except where the latter govern jurisdiction or recognition and enforcement in the same field as the Brussels Convention. The Convention does not derogate from the multilateral conventions to which the Member States are or will be parties.

The Brussels Convention is supplemented by a protocol of 3 June 1971 on interpretation by the Court of Justice of the European Communities. Under Article 1 of the Protocol, the Court is competent to interpret the Convention and is awarded jurisdiction to give preliminary rulings on questions of interpretation. The procedure laid down in the Protocol corresponds to that of Article 234 of the EC Treaty.

## **2.2. The Rome Convention**

The Rome Convention on the law applicable to contractual obligations ('Rome I') of 19 June 1980 came into force on 1 April 1991. The Convention, initially signed by 9 Member States and subsequently by all the new Member States, is currently in force in all the Member States.

On the other hand, the Funchal and Rome Conventions on the accession of Spain, Portugal, Austria, Finland and Sweden have yet to be ratified by all of the Member States. It follows that, taking into account the amendments introduced by these conventions, there are now two different versions of the Rome Convention in existence in the European Community.

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<sup>7</sup> CJEC of 6 October 1976, Case No. 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, Rec.1976, p.1473.

The Rome Convention is a similar instrument to those adopted on the basis of Article 293 of the EC Treaty. It applies to contractual obligations in situations involving a conflict of laws and is founded on the principle of freedom of choice.

The Convention has a 'universal' character, which implies that the rules of conflict that it establishes may lead to the law of a non-European Union State being applied.

To date the Court of Justice has not been awarded jurisdiction to give rulings on the interpretation of the Convention. However, in a joint declaration, the Member States have confirmed that they are ready to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice. The Convention is supplemented by two Protocols conferring jurisdiction on the Court of Justice. However, these have yet to be ratified by Belgium.

### **2.3. The Lugano Convention**

The Lugano Convention was signed on 16 September 1988 between the EFTA countries, Poland and the European Union. The Convention's content corresponds to that of the Brussels Convention.

The Convention recognises the primacy of the Brussels Convention over other conventions, but not over the regulation, which constitutes a unilateral Community act.

The Lugano Convention does not confer jurisdiction to interpret on the Court of Justice. However, given the similarity between the texts of the two Conventions, influence of Court of Justice case-law on the interpretation of the Brussels Convention is not excluded.

The Lugano Convention replaces conventions existing between Member States from the time of its entry into force.

Preparatory work to bring the Convention up to date is underway. The revision of the Lugano Convention seeks to extend to the contracting States the principles laid down in Regulation (EC) No 44/2001 (see below). This revision has been delayed owing to the differing interpretations of the rules applicable to relations between internet traders and consumers as regards the contracts entered into by consumers, as well as to discussions on the establishment of a special legislative instrument with Denmark.

Furthermore, it was necessary to establish whether the European Community had exclusive external Community competence, or simply 'mixed' competence, for the conclusion of the revised Lugano Convention.

In its opinion of 7 February 2006, the Court of Justice stressed that Switzerland, Norway and Iceland only had one remaining negotiating partner: the European Community, represented by the European Commission. The Member States of the European Union, on the other hand, had observer status. At the Lugano Diplomatic Conference of 9 to 12 October 2006, agreement was reached on almost all the items raised in the final discussions. The definitive text of the Convention was drawn up at the beginning of March 2007.

### **3. The Maastricht Treaty**

Private international law is perhaps best represented in European Union law by the Maastricht Treaty.

It was the Maastricht Treaty that provided for judicial cooperation in civil matters between the Member States, through the intergovernmental framework of the third pillar 'Justice and Home Affairs'.

The international convention concluded between Member States remains to be the legal instrument which inserts private international law into European law. The legal basis of these conventions can be found in Articles K1(6) and K3 line 2 EU.

The three conventions adopted on this legal basis constituted the final stage before the start of the Communitisation process in this field:

- Convention on insolvency proceedings (23 November 1995); this was unable to enter into force, failing a signature from a Member State within the prescribed period. The new Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings followed on from the work in this field. The Regulation was modified by Council Regulation (EC) No 603/2005 of 12 April 2005 and would be modified once again by the proposed Council Regulation amending annexes A and C of Regulation (EC) No 1346/2000 on France [COM(2006) 38 final].

- Convention on the service of judicial and extrajudicial documents in civil or commercial matters (26 May 1997); This Convention did not enter into force. The content of the Convention was taken over by the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The Regulation, like the 1997 Convention, was modelled on the 1965 Hague Convention, to which it made certain improvements.

The Regulation applies to the United Kingdom and Ireland, who decided to participate in its adoption.

The agreement between the Community and Denmark, which was ratified by Denmark on 18 January 2007 and entered into force on 1 July 2007, also makes it applicable to Denmark.

The Regulation would be modified by the proposed Regulation of 11 July 2005 of the European Parliament and the Council amending Regulation (EC) No 1348/2000 [COM(2005) 305 final].

- Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters of 28 May 1998, known as the Brussels II Convention.

The Brussels II Convention, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was signed on 28 May 1998 by the 15 countries of the European Union. The scope of the Convention encompasses the rules or decisions on the relaxing or dissolution of matrimonial ties and on measures relating to parental responsibility<sup>8</sup>. The Convention replaced the existing conventions between the Member States from the moment of its entry into force<sup>9</sup>.

The Convention could be considered to be more integrated into European law than that of Brussels I<sup>10</sup>. The Convention refers to ‘Member States’ and not to ‘contracting States’, as referred to in Brussels I.

Besides the legal basis, the other differences related to the review procedure of the Convention.

Brussels II constitutes a Council Act taken on the basis of Article K3 §2 c of the Treaty on European Union. This Council Act was proposed for ratification by the Member States. For this reason, Brussels II is halfway between an Act of European law and a classic intergovernmental convention<sup>11</sup>.

As regards the review procedure, according to Article 49 § 3 of the Convention, the amendments could be presented by the Member States and the Commission. They would then be approved by the Council who would ‘recommend that the Member States adopt them’<sup>12</sup>.

It seemed that the signatory States did not wish the Convention to become an integral part of the *Acquis Communautaire*. The provision on the arrival of any new Member States states that the Convention is ‘open to the accession’ of these new States, without imposing any obligation on them, which stands in contrast to Brussels Convention I.

As regards the Court of Justice’s jurisdiction, the Brussels II Convention also confers jurisdiction to interpret on the Court through the Protocol annexed to the Convention. The Protocol includes the two types of appeal provided for in the 1971 Protocol<sup>13</sup>

The Brussels II Convention was not ratified by the Member States and did not, therefore, enter into force.

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<sup>8</sup> Taken only when a judgment is rendered on the matrimonial bond.

<sup>9</sup> Article 38 of Brussels § II.

<sup>10</sup> H. Gaudemet-Tallon, “La Convention dites “Bruxelles II”: Convention concernant la compétence, la reconnaissance et l’exécution des décisions en matière matrimoniale”, *Droit international Prive, Année 1998-1999*, Ed. A. Pedone, Paris, 2001, p. 101 s.

<sup>11</sup> H. Gaudemet-Tallon, *La Convention dites “Bruxelles II”(...)*, p. 102.

<sup>12</sup> *Ibid.*

<sup>13</sup> Article 4, Article 6.

## 4. The Communitisation of private international law

### 4.1. The phenomenon of Community harmonisation of private international law

Communitisation in the context of private international law is an example of its standardisation, consisting firstly in replacing the different private international law rules laid down by national law or conventional international law with a single Community rule.

Original rules of Community law have to be created in the field of private international law to cater for the high level of integration between the Member States' legal systems as a result of the development of the internal market and in order to create a European area of 'Freedom, Security and Justice'.

In order to allow this Communitisation, the authors of the Amsterdam Treaty transferred 'judicial cooperation in civil matters' from the third pillar of the Treaty on European Union to the new Title IV of the EC Treaty 'visas, asylum, immigration and other policies related to free movement of persons'.

The United Kingdom and Ireland<sup>14</sup> made it known on the occasion of the signing of the Amsterdam Treaty that they did not wish to see Title IV of the EC Treaty be applied automatically. These Member States have the right to opt in, which allows them to declare their will to participate in the adoption of each individual act. Title IV does not apply to Denmark, except in the case of a subsequent agreement with the European Community.

The Amsterdam Treaty established the process of the Community harmonisation of private international law which would later be fulfilled in the 1998 Vienna Action Plan<sup>15</sup>. Subsequently, the Tampere European Council of 15 and 16 October 1999 drew up three priority action lines for the creation of the area of 'Freedom, Security and Justice', whose objectives include the mutual recognition of judicial decisions and judgments<sup>16</sup>. As the Commission stressed, the harmonisation of the private international law rules is crucial to the realisation of this objective<sup>17</sup>.

The 2000 programme of mutual recognition defined the measures relating to the harmonisation of the conflict-of-law rules necessary to facilitate the implementation of the principal of mutual recognition.

In 2004, the European Council stressed in The Hague Programme that the work relating to mutual recognition should be a key priority and that the projects should be actively pursued<sup>18</sup>.

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<sup>14</sup> Protocol No. 4 on the position of the United Kingdom and Ireland

<sup>15</sup> OJ C 19 to 23 January 1999, p. 1, point 51 c)

<sup>16</sup> Presidency conclusions of 16.10.1999, § 28 to 39

<sup>17</sup> COM (2002) 654 final, p. 9

<sup>18</sup> OJ No C 053 of 3 March 2005, p. 1-14

In extending the Community's scope in this field, Title IV of the EC Treaty established a legal basis for the adoption of the Community Acts in the field of private international law, namely Articles 61 point (c) and (EC) 65.

The new Acts established on this basis are Acts that had been adopted before the Amsterdam Treaty in the form of conventions on the basis of Articles K1 No 6, K3 line 2 EU, or previously on the basis of Article (EC) 293.

Since the Treaty of Amsterdam, the Regulation and the Directive have been the two instruments at the Community legislator's disposal. The Community legislator's choice of Regulation is designed to increase legal certainty and guarantee the uniform application of harmonised rules, as the Commission explains in its green paper of 14 January 2003: 'the instrument being directly applicable and its application avoiding the uncertainties of the transposal of a directive'<sup>19</sup>.

The Community has adopted several new instruments<sup>20</sup> on the basis of Articles 61 c and (EC) 65.

As previously pointed out, the new Community competence in the field of judicial cooperation in civil matters under Article 61 point (c) together with Article 65 of the EC Treaty is intrinsically linked to the idea of the completion of the single market, as recalled by the first line of Article (EC) 65.

The question was raised whether, following the entry into force of Title IV, Acts in this field could still be based on other legal bases, in particular Article (EC) 293.

The author is of the opinion that this is not possible. The adoption of this new legal basis exhausts the Community's competence and rules out the use of the previous legal basis of Article (EC) 293. In addition, Articles (EC) 61 and 65 should be considered as a *lex specialis* in relation to Article (EC) 293<sup>21</sup>.

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<sup>19</sup> Ibidem, p. 17

<sup>20</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Council Decision establishing a European Judicial Network in civil and commercial matters.

<sup>21</sup> J. Basedow, The communitarisation of the conflict of laws under the treaty of Amsterdam, CMLR 2000, p.699 s; H. Dohrn, Die Kompetenzen der Europäischen Gemeinschaft im Internationalen Privatrecht, Mohr Siebeck, Tübingen, 2004, p. 224

## 4.2. The communitising acts

### 4.2.1. The 'Brussels I' Regulation

In the framework of the process of communitisation, the 1968 Brussels Convention was replaced by Regulation No 44/2001 of 22 December 2000, known as Brussels I, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The new Regulation incorporates the substance of the Brussels Convention and contains amendments to the text of the Convention and applies to all the proceedings instituted and to all the authentic instruments formally drawn up after 1 March 2002.

The key innovations particularly concern the following aspects: the registered office of legal persons is given an autonomous definition in place of a reference to the rules of international law pertaining to the Member State where the court is sitting; the alternative jurisdiction of the contractual court is revised with, from that point on, the place of performance of the obligation in question being fixed independently in the sale of goods and the supply of services.

In addition, in order to improve the effectiveness of the *lis pendens* arrangement, the Regulation provides an autonomous definition of the court in which proceedings are pending. Finally, the procedure was revised in order to speed up exequatur procedures and hence the enforcement of decisions to the creditor's benefit.

The United Kingdom and Ireland declared that they would apply Regulation 44/2001.

On the basis of the Council decision of 20 September 2005, Denmark reached an agreement with the European Community on the application of the provisions of the Brussels I Regulation. This agreement came into force on 1 July 2007.

The adoption of a Community regulation amended the Court of Justice's jurisdiction to interpret on the basis of preliminary rulings. While the Brussels Convention provided for a system identical to that of Article 234, under the Brussels I Regulation preliminary rulings fall within Article 68 ECT.

Paradoxically, this new legal basis restricts the Court of Justice's power to interpret, since Article 68 provides that only the national courts '*against whose decisions there is no judicial remedy under national law*' can submit a preliminary ruling.

In order to put an end to this situation, a draft decision aligning the Court's competences in the field of Title IV of the EC Treaty to those of Article 234 ECT is at present pending before the Council following a favourable opinion from the European Parliament (see below).

With regard to relations between the Member States of the European Union and non-members, Article 59 of the Convention did not hinder a contracting State's engagement with a third country. However, Article 72 of the Regulation provides that only agreements which the Member States undertook '*prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention*' are not affected by the Regulation. According to Statement No 1 of the Council and the Commission on Articles 71 and 72, '*The Council and the Commission will pay particular attention to the possibility of engaging in negotiations with a view to the conclusion of international agreements that would mitigate the consequences of Chapter III of the Regulation for persons domiciled in third States*'. According to line 3 of the statement, '*establishing this area within Europe should not rule out the possibility of concluding international agreements of broader geographical scope with third States or international organisations which might allow the creation of a global or regional legal environment conducive to the circulation of judgments in civil and commercial matters*'. However, the Regulation does not stand in opposition to agreements reached between a Member State and a third country on subjects covered by the Regulation, so long as the Regulation is in no way affected by the agreements in question.

The European Parliament proposed, among other amendments, extending the existing derogation through which consumers were able to make referrals to their own court for disputes on online commerce. However, the amendment was not accepted by the Commission and the Council.

#### **4.2.2 Brussels II Regulation**

Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, known as the 'Brussels II' Regulation, replaced the 'Brussels II Convention'. The Brussels II Regulation of 29 May 2000 incorporates the substance of the convention of 28 May 1998, thereby filling a gap in the application of the Convention, the first Article of which excluded questions linked to the persons' state. The Regulation introduced uniform modern standards for jurisdiction on annulment, divorce and separation.

It also provided for rules between the Member States to facilitate the rapid and automatic recognition of judgments given on such matters. The Regulation subsequently established uniform standards of jurisdiction in matters of parental responsibility for children of both spouses.

Subsequently, this Regulation was replaced by Regulation (EC) 2201/2003, known as the 'new Brussels II Regulation'<sup>22</sup> which entered into force on 1 March 2005.

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<sup>22</sup> Regulation (EC) 2201/2003 of 27 November 2003.

The new Brussels II Regulation did not amend the rules on matrimonial matters and applies to judgments relating to a divorce handed down after this date. It also applies to judgments relating to legal separation or marriage annulment. It also added an item regarding parental responsibility in general, not only in cases of divorce. In particular, it includes provisions on rights of custody and access to children, and civil aspects of international child abduction. The Regulation does not apply in Denmark; however, it does apply in the United Kingdom and Ireland.

The European Parliament, in its resolution of 20 November 2002 on the new Brussels II Regulation (the Banotti report), showed itself to be mindful of the return of a child that has been the victim of an abduction or a refusal of the right to access. It declared that, in any legal decision, the best interests of the child is the primary consideration and that any decision involving the return of an abducted child should indicate the time limit within which the return of the child must take place.

The text adopted by the Council on 11 November 2003 sets out to achieve this, by establishing that the court applied to must issue its judgment no later than six weeks after the application is lodged.

Certain difficulties were encountered during preparation of this Regulation, owing to the existence of the following international texts governing all or part of these issues:

- the conventions concluded within the framework of the Hague Conference: the Convention of 1 June 1970 on the recognition of divorces and legal separations, the Convention of 25 October 1980 on the civil aspects of international child abduction and the Convention of 19 October 1996 on the protection of children;
- the conventions concluded within the framework of the Council of Europe: the Convention of 20 May 1980 on the recognition and enforcement of decisions concerning custody of children;
- the conventions concluded within the framework of the CIEC: the Convention of 8 September 1967 on the recognition of divorces;

and finally, within the framework of the European Union, the Brussels I Regulation on matters relating to maintenance obligations.

The Brussels II Regulation does not include rules on applicable law. The need for an additional act in this field in to complete the system of harmonisation resulted in the European Council inviting the Commission in November 2004 to present a Green Paper on the conflict of laws in matters relating to divorce (Rome III).

The Commission's Green Paper on applicable law and jurisdiction in divorce matters of 14 March 2005 constitutes a response to the 1998 Vienna European Council's reminder that the common area of justice's objective is to make life simpler for citizens, particularly in fields that have an impact on their everyday lives, such as divorce.<sup>23</sup> According to the Commission, the draft Regulation must pursue the objective of enhancing legal certainty.

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<sup>23</sup> COM (2005), 82 final, p.3.

On 17 July 2006, the Commission presented the Council's proposed Regulation amending Regulation (EC) No 2201/2003 on jurisdiction and introducing rules concerning applicable law in matrimonial matters.

In order to ensure greater legal certainty, the draft provides for harmonised conflict of law rules on matters relating to divorce and legal separations. Moreover, the proposal gives spouses of different nationalities the possibility to choose both the law applicable and the court with jurisdiction and prevents the imposition of a tribunal by one of the spouses, a practice known as 'forum shopping'.

#### 4.2.3 The 'Rome I' Draft Regulation

On 13 January 2003, the European Commission presented a Green Paper in anticipation of the Rome Convention's conversion into a Community instrument, in which it explained the need for this conversion (COM (2002) 654 final).

In its paper, the Commission stressed that, at the time, the Rome Convention was the only such Convention which took the form of an international treaty on matters relating to private international law at Community level. According to the Commission, this development should lead to greater coherency in Community legislative policy on matters relating to private international law, the assignment of jurisdiction to the Court of Justice under improved conditions and the easier application of standardised conflict rules.

As regards the substance, although the Commission stated it had not made any changes, it should be noted that the proposal presented constituted a significant advance.

For example, the Commission pointed out that the Member States undertook to consider the advisability of revising Article 5 concerning consumer protection at the time of Austrian accession to the Rome Convention. The solution adopted in the Rome Convention often produced hybrid solutions in which **the law applicable to the professional and the mandatory provisions of the law applicable to the consumer were applied in parallel.**

By way of response to this problem, paragraph 1 of Article 5 of the proposal provides for *'a new, simple and foreseeable conflict rule consisting of applying only the law of the place of the consumer's habitual residence, without affecting the substance of the professional's room for manoeuvre in drawing up his contracts'*.

Moreover, the Commission stressed the close link between the Rome Convention and the Brussels Convention (already converted into a Regulation), bringing to the fore the need to adapt the Rome Convention for the sake of the coherence of private international law.<sup>24</sup> Similarly, in presenting the situation regarding the body of case law, the Commission stressed the Convention's *'insufficient precision'*.

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<sup>24</sup> Ibid., p. 18.

On 15 December 2005,<sup>25</sup> the Commission submitted a proposal for a Regulation. The Regulation's objective was to adopt uniform rules on the law applicable to contractual obligations, in order to make judicial decisions more predictable.

The Regulation's great advantage is the possibility it gives of requesting the Court of Justice to give preliminary rulings. It should be noted that, at present, owing to Belgium's delay in implementing the protocols on the Court of Justice's interpretation of the Rome Convention, the Court has yet to recognise this jurisdiction. As well as changing it, the draft Regulation sets out to modernise the Convention.

The draft submitted aims to modernise the rules relating to the law applicable to the majority of contracts concluded by citizens or enterprises in Europe, such as those relating to consumers, work, property rentals, transport, credit and distribution, if they involve a foreign country.

The draft also seeks to ensure that the courts of all the Member States apply the same law in cases of disputes over an international contract. With regard to the freedom to choose the law applicable, the draft requires the courts to ascertain the true tacit will of the parties rather than a purely hypothetical will. The Commission sets out in particular to govern the conflicts of law in matters relating to consumer contracts or work contracts.

In addition, this process confers jurisdiction to interpret on the Court of Justice and facilitates the application of uniform rules of conflict in the new Member States.

The European Parliament declared itself to be in favour of this change in its opinion of 17 February 2005. It proposed amendments to ensure consistency with the Rome II draft. The most significant amendments concerned consumer rights and mandatory rules. As regards consumer contracts, the Parliament proposed the introduction of Article 5a, according to which the law applicable to compulsory insurance contracts must be the law of the State which prescribes the obligation to take out insurance.

The Parliament also proposed an amendment to Article 8 of the draft concerning mandatory rules, stressing the difference between national and international mandatory rules. The European Parliament proposed inserting the term 'international mandatory rules', given that the notion of mandatory rules has a more restricted and specific meaning.

It is important to distinguish this notion from that of international public policy. Contrary to the mechanism of international public policy, the court does not preclude the law that is applicable under the conflict rules, which runs contrary to public policy, but rather it applies its own rules.

Denmark would apply the 1980 Rome Convention unchanged. At the Justice and Home Affairs Council meeting of 12 March 1999, the United Kingdom and Ireland signalled their intention to be closely involved with the Community's activities on judicial cooperation in civil matters.

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<sup>25</sup> COM/2005/650 final of 15.12.2005.

## **5. Other Acts adopted on the basis of Title IV amending private international law**

Since the Amsterdam Treaty, the Community's process of harmonising private international law has no longer been limited to converting international conventions concluded between Member States into Acts of Community secondary law.

The new Title IV of the EC Treaty introduced by the Amsterdam Treaty provides the Community legislator with a legal basis for the setting up of new rules on private international law in Community law.

### **5.1 Regulation (EC) 1206/2001 on cooperation between Member State courts in the taking of evidence in civil and commercial matters**

Council Regulation No 1206/2001 of 28 May 2001 on cooperation between Member State courts in the taking of evidence in civil and commercial matters was adopted on the initiative of the Federal Republic of Germany.

The objective of the Regulation is to improve, simplify and speed up cooperation between Member State courts in the taking of evidence in civil and commercial matters.

The Regulation applies in cross-border cases in civil or commercial matters, when a Member State's court requests the competent court of another Member State to obtain evidence or asks to take evidence directly in another Member State.

The Regulation makes provision for measures setting out the detailed procedure of the transmission and execution of requests. These measures incorporate rules regarding the form and content of the request, the language, the transmission of the requests and other communications, the general provisions relating to the execution of the request, coercive measures, refusal to execute, notification of delays, the direct taking of evidence by the requesting court, and fees.

Moreover, the Regulation provides for a new mechanism which allows the requesting State to take evidence directly in accordance with its national law.

The European Parliament was in favour of the regulation, only stressing the fact that the reimbursement of the costs occasioned by the use of a special information procedure between the Court of Justice and the Member States should take place when specifically provided for by the legislation of the requesting State.

## **5.2 Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters**

Council Decision 2001/470/EC of 28 May 2001 set out to facilitate judicial cooperation between the Member States in civil and commercial matters, and to devise, implement and keep an up-to-date public information system. This network completed the existing network in the field of criminal law. The decision provided for network meetings to allow an exchange of experience to identify the problems that the Member States could face and to propose solutions to these problems. In addition, the decision provided for the gradual creation of an electronic public information system.

The decision applies to all of the Member States with the exception of Denmark.

Parliament proposed amendments some of which were included by the Commission in the amended legislative proposal, such as the establishment of a central European Union database combining the general register of cases brought in the courts, involvement of applicant countries in the network meetings and a suggestion concerning ease of comprehension of information made available to the public.

## **5.3 Regulation (EC) No 743/2002 of 25 April 2002 establishing a general framework for Community activities to facilitate the implementation of judicial cooperation in civil matters**

Council Regulation No 743/2002 of 25 April 2002 sets out to establish a general framework for Community activities to facilitate the implementation of judicial cooperation in civil matters. The Regulation applies in all of the Member States with the exception of Denmark. The Regulation ensures the continuation of the work carried out hitherto within the framework of the GROTIUS civil programme.

It sets out to encourage judicial cooperation in civil matters with a view to ensuring legal certainty and improving access to justice, to promote the mutual recognition of judicial decisions and judgments, to facilitate the approximation of laws and to eliminate obstacles created by disparities in civil law and civil procedures. Moreover, the Regulation sets out to improve mutual knowledge of legal systems and judicial systems between the Member States in civil matters. It allows for the implementation and correct application of Community instruments in the field of judicial cooperation in civil matters. The Regulation also sets out to improve public information on access to justice and judicial cooperation between systems in civil matters.

The European Parliament was able to stress the need to ensure legal certainty, particularly the rights of the defence, and to improve access to justice, as well as putting forward the idea of 'legal practitioners'. The amendments were partly incorporated in the Commission's amended proposal.

#### **5.4 Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes**

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes constitutes a response to the requests of the Tampere European Council. The Directive builds on the idea of promoting the application of legal aid in cross-border disputes for persons who lack the resources to secure access to justice. This Directive applies in civil and commercial cross-border cases, but it does not apply in tax affairs, customs and administrative affairs.

It is founded on the principal which holds that an individual who does not have sufficient resources to meet the legal costs associated with a cross-border dispute should have the right to legal aid. According to the Directive, the economic situation of a person is to be assessed by the Member States on the basis of objective factors such as income, capital or family situation.

The European Parliament proposed enlarging the scope of the directive, in terms of the content as well as the legal basis. As regards the legal basis, Parliament proposed completing the Commission's proposal – Article 61(c) – by adding Article 65(c). As regards the substance, Parliament insisted on the need for a wider definition of the Directive's scope, referring in particular to its applicability to national and cross-border disputes.

However, the Council did not accept this Parliament amendment.

#### **5.5 Directive 2004/80/EC on compensation to crime victims**

Council Directive 2004/80/EC of 29 April 2004 on compensation to crime victims sets out to ensure that all EU citizens and all legal residents in the EU can receive adequate compensation for the losses they have suffered should they fall victim to a crime within the EU. This Act should eliminate the disparities between the general schemes of State compensation of crime victims that exist in the Member States.

The Directive applies to cross-border situations, but it also contains a provision guaranteeing that the Member States will put in place relevant national provisions to provide compensation for victims of violent intentional crime committed in their respective territories.

It provides for the introduction of a State compensation system into national legislations for victims of serious crimes committed in the respective territories of the Member States.

This system must be based on the schemes currently in force in the Member States for the compensation of victims of violent intentional crime committed in their respective territories.

The directive does not prevent Member States from adopting provisions that are more favourable to the victims.

Parliament proposed several amendments, such as the complete harmonisation of standards envisaged, some of which were included by the Council.

## **5.6 Regulation (EC) 805/2004 on creating a European Enforcement Order for uncontested claims.**

The Regulation sets out to create a European Enforcement Order for uncontested claims. It provides for minimum standards to ensure the free circulation of judgments, court settlements and authentic instruments on uncontested claims, resulting in the abolition of exequatur and the introduction of automatic judgments given in another Member State. The judgment on a claim that is uncontested is certified as a European Enforcement Order by the Member State of origin under very specific conditions.

The Regulation applies in civil and commercial matters, whatever the nature of the court or tribunal. The Regulation is not restricted to the cross-border level, thus allowing it to be applied in national law.

The Regulation applies in all the Member States with the exception of Denmark.

Parliament had proposed, among other amendments, that the parties involved in a dispute should be entitled to appeal under national law against the issuing of enforcement orders or the failure to issue one.

However, this amendment was not taken up by the Council, which proposed the possibility of applying for correction of the certificate in the event of clerical errors or a request for withdrawal of the certificate in cases when it was clearly wrongly granted.

## **5.7 Regulation (EC) 1896/2006, creating a European order for payment procedure.**

The Regulation of 12 December 2006 established a European order for payment procedure to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims.

The Regulation provides for the free circulation of European orders for payment in all the Member States of the European Union, based on minimum standards. The court before which the case is brought must examine it as soon as possible, on the basis of the application form, if the requirements are met and if the claim appears to be well-founded. This examination can also be carried out by means of an automated procedure. If the requirements are met, the court will deliver the European order for payment as soon as possible.

In general, the period specified is 30 days from the date of receipt of the application form (provided in the annex).

The procedure applies to civil and commercial matters, whatever the nature of the court or tribunal.

The Regulation applies in the United Kingdom and Ireland, but not in Denmark.

## **5.8 Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure**

On 15 March 2007, the Commission adopted the draft proposal establishing a European Small Claims Procedure. The draft followed the Green Paper of 20 December 2002 on a European order for payment procedure and on measures to simplify and speed up small claims litigation (COM(2002) 746 final).

Under the Commission's proposal, the draft Regulation should apply to civil and commercial matters where the total value of a monetary or non-monetary claim excluding interests, expenses and outlays does not exceed EUR 2 000 at the time the procedure is begun.

This amount, calculated on the basis of comparisons with existing situations in the Member States, was the subject of lengthy discussions, particularly in the European Parliament. In its amendments, the European Parliament proposed that the amount should not exceed EUR 2 000 at the time the claim is received by the competent court or tribunal. Moreover, Parliament proposed that the Regulation should not apply to the liability of the State for acts and omissions in the exercise of State authority, to maintenance obligations, labour law, tenancies of immovable property, violations of privacy or rights relating to personality.

In addition, contrary to the Commission's proposal, the European Parliament and the Council pointed out that the Regulation should only apply to cross-border disputes and not to domestic disputes. This amendment followed a debate held in the Council, during which all the Member States declared themselves to be in favour of this solution.

In addition, the Commission's proposal sets out to facilitate the initiation of proceedings: the applicant can initiate European proceedings by completing an application form and sending it to the competent court or tribunal.

Moreover, the documents are served on the parties by registered letter with acknowledgement of receipt or by any simpler means. The procedure should be a written procedure, unless an oral hearing is considered necessary by the court or tribunal.

The judgment should be rendered within six months following the registration of the claim and should be directly enforceable. A judgment given in a European Small Claims Procedure should be recognised and enforceable in another Member State without the need for an additional declaration.

On 13 June 2007, the Council adopted its common position on this proposal for a Regulation.



## **5.9 Proposal for a Directive on certain aspects of mediation in civil and commercial matters**

In this proposal, the Commission proposed a simpler and more cost-effective way to solve disputes than by judicial or quasi-judicial remedies.

In this context, the concept of access to justice includes promoting access to adequate dispute resolution processes for individuals and business, and not just access to the judicial system. The proposal for a Directive provides that Member States will allow courts to suggest that the parties use this method. Mediation is not seen as an alternative to court proceedings, rather it is just one of the possible methods. In its proposal, the Commission intends to promote self-regulatory initiatives and is seeking to continue to do so through the proposed Directive.

Moreover, the draft constitutes a response in the event of the absence of, or discrepancies between, national procedural laws, which often results in the selection of a civil procedure.

The European Parliament adopted amendments at first reading aimed at modifying the definitions of mediator and mediation, ensuring the highest standards of quality, ensuring that the provisions on recognition and enforcement are legally watertight, respecting the legal traditions of the various Member States and protecting confidentiality.

The Commission proposed extending the scope of the Directive to all domestic or cross-border cases. However, Parliament preferred the Directive to be limited to cross-border disputes.

The proposal for a Directive is currently in its first reading in the Council.

## **6. The new Community Acts and the Hague Conference**

The most recent category of ‘communitised’ acts of private international law, namely the Commission’s recent proposals, sets out to incorporate into Community law the fields otherwise at least partially governed internationally by international conventions concluded by the Member States (and ratified by some of them) in the framework of the Hague Conference on private international law.

## 6.1 The Rome II Draft Regulation

Contrary to the Rome I Regulation, Rome II constitutes a new law, in the absence of a pre-existing conventional law.

However, adopted in the framework of The Hague Conference on private international law, the Convention on the law applicable to traffic accidents of 4 May 1971 partly overlaps with the scope of the draft Regulation in terms of the rules of liability and compensation of victims of cross-border road accidents.

On 22 July 2003<sup>26</sup> the Commission adopted a proposal for a Regulation of the Parliament and the Council on the law applicable to non-contractual obligations (Rome II). This draft was amended in February 2006 in order to incorporate a number of amendments adopted by the European Parliament. This resulted in the amended proposal for a Regulation of the European Parliament and the Council of 21 February 2006 on the law applicable to non-contractual obligations (Rome II).<sup>27</sup>

The Regulation does not set out to harmonise the Member States' substantive law, but rather to harmonise the rules under which the law applicable to an obligation is determined (conflict of law rules).

The Regulation sets out to standardise the conflict of law rules of the Member States in matters relating to non-contractual obligations. It is intended to apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters, with the exception of revenue, customs or administrative matters. The proposal for a Regulation is based on the freedom to choose the applicable law. The parties may agree, by an agreement entered into after the dispute arose, on the law to which they wish to submit non-contractual obligations. The choice must be expressed or result with reasonable certainty from the circumstances of the case. It may not affect the rights and obligations of third parties.

When the parties are engaged in commercial activities, this choice can be indicated in the form of a contract even before the occurrence of any event giving rise to damage.

Moreover, if a non-contractual obligation arising out of unjust enrichment concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it is governed by the law that governs that relationship.

In addition, the draft provides for certain common rules for non-contractual obligations, namely: the scope of the law applicable to non-contractual obligations, mandatory rules, direct actions against the insurer of the person liable, statutory subrogation, the plurality of actors and assimilation to habitual residence.

The European Parliament adopted the recommendation proposed by the rapporteur on the law applicable to non-contractual obligations at second reading on 18 January 2007.

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<sup>26</sup> COM (2003), 427 final.

<sup>27</sup> COM (2006), 83 final.

The European Parliament presented several amendments reintroducing the provisions that the Council had left out in its common position, including an amendment on the introduction of the principal of *restitutio in integrum* for the assessment of damages awarded to the victim of a cross-border road accident.

Moreover, the Parliament proposed reintroducing the provisions on privacy and rights relating to personality which were excluded from the scope of the Council's common position.

The Members proposed that the special rules relating to cases involving unfair competition be omitted from the text, arguing that they are covered under the general rules.

In its opinion of 14 March 2007, the Commission rejected the majority of Parliament's amendments, which included the introduction of a new rule on the violation of privacy and rights relating to personality and the introduction of the principal of *restitutio in integrum*. According to the Commission, the latter amendment sets out to harmonise the substantive law, which it did not consider to be important in an instrument that sets out to harmonise the private international law rules. The Commission also rejected the amendment concerning cases involving unfair competition.

On 15 May 2007, within the framework of the codecision procedure, the Conciliation Committee reworked an agreement on a joint text in which it proposed solutions to the issues arising from the European Parliament's amendments adopted at second reading. The Committee decided to exclude from the scope the provisions relating to privacy and rights relating to the personality (libel).

The European Parliament achieved the inclusion in the preamble to the Regulation of the principle which dictates that when quantifying the personal injuries, the courts must take into account all of the victim's actual circumstances, particularly the actual injury suffered and the actual cost of after-care and medical attention.

With regard to the relationship between the Rome II draft and the Convention on the law applicable to traffic accidents of 4 May 1971, adopted within the framework of the Hague Conference, the European Parliament stressed at first reading that the Member States that had ratified the Hague Convention<sup>28</sup> should be free to continue to apply it until a Community instrument had been adopted.

From this point of view, Article 28 of the draft Regulation allows the application of the international conventions to which one or several Member States were parties at the time of adoption.

Furthermore, the Convention states that the applicable law shall be the law of the Member State in which the accident took place (*lex loci delicti commissi*). This was also the solution approved by the Conciliation Committee on the Rome II draft Regulation.

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<sup>28</sup> The Convention entered into force in 12 Member States of the Community by ratification or accession on 5 April 2007.

A compromise was also reached on the subject of cases of unfair competition and obstacles to free competition, which would allow the application of a single law and would, therefore, limit 'forum shopping'.

## **6.2 Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM(2005)649).**

Four conventions were concluded within the framework of the Hague Conference concerning maintenance obligations: the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, the Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, the Convention of 2 October 1973 concerning recognition and enforcement relating to maintenance decisions and the Convention of 2 October 1973 on the law applicable to maintenance obligations.

The abovementioned conventions laid out conflict-of-law rules and rules concerning the recognition and enforcement of court judgments. The provisions included in these conventions are lacking in uniformity. They only apply to the signatory countries (they have, respectively, 10, 13, 15 and 9 signatory countries).

As the Commission stressed in the explanatory memorandum to its proposal, *'the different level of integration between the Member States when compared with non member countries and the scale of the objectives pursued by the European Union necessitates seeking specific Community solutions. The cooperation between the Member States, which have at their disposal not only a more consistent and complete system of jurisdiction rules and rules on recognition of judgments, but also a functioning European Judicial Network, can without doubt be much closer than with non member countries.'* For the Commission, it would therefore not only appear to be legitimate but also necessary to legislate in a field of private international law that is otherwise already covered by the international conventions to which the Member States are parties.

Similarly, maintenance obligations fall within the scope of the 1968 Brussels Convention and Regulation (EC) 44/2001.

The new proposal for a Regulation establishes rules favourable to maintenance creditors as regards designation of the competent court and the implementation of a simplified scheme to enforce judgments.

This proposal followed on from the Commission's Green Paper of 15 April 2004 on maintenance obligations. The proposal set out to improve the situation of maintenance creditors, particularly children. The aim of the proposal for a Regulation was to remove all obstacles to the recovery of maintenance in the European Union. The Commission put forward a proposal for a Regulation in order to establish a legal environment which would allow an enforceable order to be obtained which could to move unhindered and in the easiest and quickest way possible within the European judicial area without incurring taxes or liabilities.

Moreover, the Commission proposed including all measures necessary for the recovery of maintenance dues in the Community in this single instrument: provisions on conflicts of jurisdiction, conflicts of law, enforceability, enforcement of foreign judgments and cooperation. The scope should encompass all the maintenance obligations arising out of family or similar relationships.

The proposal provides for the improvement of the current situation for maintenance creditors, so that they can bring an action before an authority close to where they live. In addition, when a judgment is rendered, measures are taken to ensure that it is automatically recognised in the other Member States, without any formality. The creditors also receive aid and assistance.

Denmark is the only Member State that is not taking part in adoption of the Regulation, which is currently at the European Parliament's first reading.

## **7. The European Community's accession to the Hague Conference**

In parallel with the process of European integration of the private international law rules, on 3 April 2007 the European Community (EC) became a member of the Hague Conference on private international law by depositing its instrument of acceptance of the Hague Statute.

The Community's accession followed the individual accession of all the European Union Member States to the Hague Conference. The Community's accession process received Parliament's assent on 7 September 2006. The Council of the European Union subsequently adopted a decision relating to the European Community's accession to the Hague Conference on private international law on 5 October 2006.

The Hague Conference is a global organisation whose objective is the progressive unification of the private international law rules.<sup>29</sup>

Besides the Statute, all the EU Member States are also parties to the following two Hague Conventions: The Apostille Convention (Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents) and the Convention on child abduction (Convention of 25 October 1980 on the civil aspects of international child abduction).

Two other conventions were ratified by less than half of the 27 European Union Member States:<sup>30</sup> the Convention of 4 May 1971 on the law applicable to traffic accidents and the Convention of 2 October 1973 on the law applicable to maintenance obligations.

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<sup>29</sup> Article 1 of the Statute of the Hague Conference.

<sup>30</sup> At 13.07.2006.

In terms of the development of private international law in the sphere of Community law, this accession was indispensable. It was necessary, on the one hand, in order to ensure the requisite coherence between the communitised law and the Member States' pre-existing international commitments and, on the other hand, in order to allow communitised private international law to evolve at the international level by exercising the external powers acquired by the Community in this field.

### **7.1. The 'Rome II' Regulation**

The first clear example of this necessity arose during discussions on the Rome II proposal for a Regulation, whose scope covers in particular the conflict of law rules established by the Hague Conference of 4 May 1971 on the law applicable to traffic accidents.

In its opinion given at first reading on the Rome II proposal for a Regulation on improving the compensation of victims of traffic accidents abroad (where compensation varies greatly from one Member State to the other), the European Parliament expressed its desire to depart from the conflict-of-law rule '*lex loci delicti commissi*' advocated by the Hague Conference, in favour of applying the law of the victim's country of habitual residence to the damage assessment. This solution was rejected by the Commission on the grounds that such a solution would lead to the application to the damage assessment (law of damages) of two different laws, namely the law of the place where the event giving rise to the damage occurred and the law of the victim's place of habitual residence.

The Commission also rejected Parliament's proposal aimed at obliging the court before which the case was brought to apply the principle of '*restitutio in integrum*'.

In the conciliation procedure, Parliament was able to ensure the inclusion in the preamble to the Regulation of the principle which dictates that when the victim resides in a country other than the one in which the accident took place, the courts must take all of the victim's actual circumstances into account when quantifying the personal injuries caused by a traffic accident, particularly the actual injury suffered and the actual cost of after-care and medical attention.

Although Article 28 of the proposal for a Regulation allows the application of the international conventions to which one or several Member States are parties at the time of adoption, the Regulation takes primacy over conventions concluded exclusively between two or more Member States.

Also, it must be noted that it was at Parliament's prompting that the Commission carried out a study of the implications of Article 28 of the Regulation on the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

## **7.2 The impact of accession on the PRIMA system**

In another field, on 14 December 2006 the European Parliament adopted a resolution on the consequences of the Community's accession to the Hague Conference,<sup>31</sup> in which it raised the question of the compatibility of this accession with Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems and Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

The directives laid down a principle known as PRIMA (Place of the Relevant Intermediary Approach) the aim of which is to guarantee the legal certainty of payments and effective supervision of financial intermediaries. The Commission subsequently intends to revise the acts in order to abandon the PRIMA principle.

Parliament confirmed its commitment to the PRIMA principle, to defining a common framework for clearing and settlement activities, to effectively combating money laundering and to respecting shareholders' voting intentions. It stressed the importance of ex-ante legal security as regards the law applicable to certain matters relating to the holding, perfection and disposition of securities credited to an account held with intermediaries and the collateralisation of such securities in an international context, and of reducing the systemic risks which might result from uncertainties in this respect. Parliament commissioned a study on the consequences of accession to the Hague Securities Convention on the law and economy of the European Union. Moreover, it requested that this study be adopted by the College of Commissioners before any commitment was made on behalf of the Community to sign the Hague Securities Convention.

## **8. The role of the Court of Justice**

The Court of Justice's increased competences constitute one of the significant advances of the Community based on the rule of law arising from the development of the process of communitising private international law.

Prior to the process of communitisation, additional competences were already conferred on the Court within the framework of private international law conventions concluded between the Member States.

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<sup>31</sup> P6\_TA-PROV(2006)0608, B6-0632/2006.

Private international law has thus become an integral part of the Court of Justice's activities. The Court is confronted with private international law from two different perspectives: firstly, when responding to a request for a preliminary ruling in interpretation of a rule of Community law; secondly, when participating in the drafting of a private international law specifically for the European Communities.

It must also be noted that the national private international law rules cannot be considered totally independent of Community law.<sup>32</sup> If it is possible to find items that are common to both private international law and Community law, it is also plausible that there could be conflicts between the two fields.

The Court of Justice laid down the principle of primacy of conventions between Member States over national laws in the Sanicentral judgment of 13 November 1979.<sup>33</sup> The Court confirmed this approach in the Duijnsteé judgment of 15 November 1983.<sup>34</sup>

The Court of Justice subsequently confirmed its jurisprudence in several judgments.

In the *Firma Mund & Fester vs. Firma Hatrex International Transport case*,<sup>35</sup> the Court stated that 'the provisions of the Brussels Convention (...) and also the national provisions, to which the Convention refers, are linked to the EEC Treaty'. Consequently, it considered Community law to be incompatible with the provisions of Article 917(2) of the German Code of Civil Procedure, which authorises seizure of the defendant's assets for the sole reason that the judgment is to be enforced in another Member State. The Community judge stressed that such a provision was no longer justified in the single area of justice established by the 1968 Convention.

In another case, the Court considered the provisions of Community law concerning freedom of establishment to be incompatible with the Spanish legal provision whereby, when the person concerned is a national of both a Member State of the European Communities and a non-member country, the latter nationality is allowed to take precedence.<sup>36</sup> In another case, the Court censured the provisions of German law that impose payment of a security on a professional for the sole reason that he was a national of another Member State.<sup>37</sup>

Community law can therefore influence the functioning of national rules of applicability by testing their admissibility for signs of barriers to trade within the framework of national law, which is linked to the criterion of applicability employed in contradiction with the Treaty's requirements. Here, the conflict rules lead to the application of substantive rules which are incompatible with Community law.<sup>38</sup>

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<sup>32</sup> Ch. Kohler, "La Cour de Justice des Communautés Européennes et le droit international privé", *Droit international Privé*, Année 1993-1994, Ed. Pédone, Paris, 1996, p. 73.

<sup>33</sup> CJCE of 13 November 1979, case No 25/79, Sanicentral, Rec. 1979, p. 3423.

<sup>34</sup> CJCE of 15 November 1983, case No 288/82, Duijnsteé Rec., 1983, p. 3663.

<sup>35</sup> CJCE of 10 February 1994, C-398/92, *Firma Mund & Fester c/Firma Hatrex International Transport*, Rec.1994, p. I-467.

<sup>36</sup> CJCE of 7 July 1992, case No C-369/90, Micheletti, Rec.1992, p. I-4239.

<sup>37</sup> CJCE, of 1 July 1993, Hubbard, case No C-20/92, Rec. 1993, p. I-467.

<sup>38</sup> Ch. Kohler, op. cit., p. 75.

By way of example, the Court of Justice condemned national provisions of unfair competition which, according to the Court, should be regarded as measures having an effect similar to the quantitative restrictions on intra-Community trade.<sup>39</sup> The doctrine interprets the Court's approach as condemning the measures for being too restrictive, rather than for being incompatible with Community law.<sup>40</sup>

During the communitisation of the area of freedom, security and justice, the Amsterdam Treaty extended the Court of Justice's competences to include questions of interpretation of Title IV (or acts adopted on the basis of Title IV) and those submitted to the Court by the Council, the Commission or a Member State (Article 68, subparagraph 3), as well as those relating to preliminary rulings (Article 68, subparagraph 1). However, by way of derogation from Article 234 ECT, Article 68, subparagraph 1, limited the Court's competence to courts of final resort.

On 28 June 2006, the Commission presented a proposal for a Council decision aligning the Court of Justice's competences in the fields covered by Title IV with the general arrangements of Article 234 ECT.

This proposal reinforces the interpretation and uniform application of Community law. It also sets out to put an end to the paradox arising from the restriction of preliminary rulings imposed by Article 68 ECT to courts of final resort, although this possibility was opened up to the lower-level courts by the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters.<sup>41</sup>

The extension of the Court of Justice's competences is in accordance with the will of the European Parliament, as expressed in its resolution on the EU's progress in the creation of an area of freedom, security and justice (AFSJ) (Articles 2 and 39 of the EC Treaty).

On 25 April 2007, the European Parliament adopted the resolution approving the proposal for a Council decision. The proposal is currently with the Council.

## **9. The role of the European Parliament**

Private international law and its development has been the subject of definite interest on the part of the European Parliament. Parliament welcomes the work being done in the field of judicial cooperation in civil matters. In a report adopted on 10 October 2004 (Bourlanges report), it requested that the codecision procedure be extended to include all questions relating to judicial cooperation in civil matters from 1 April 2005.

The European Parliament, as a result of its role in the legislative process and since the Treaty of Amsterdam, is completely integrated into the preparation of the Community

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<sup>39</sup> ....

<sup>40</sup> Ch. Kohler, *op. cit.*, p. 75.

<sup>41</sup> Protocol of 3 June 1971 on interpretation by the Court of Justice of the European Communities, Article 1.

instrument in the fields of justice, freedom and security. However, it must be pointed out that the communitisation process was only partial during a 5-year transitional period (Article 67 of the EC Treaty) during which the Commission shared its right of initiative with the Member States. During this time, the European Parliament merely played a consultative role, and unanimity was the dominant system in the Council.

With the entry into force of the Nice Treaty in February 2003, Article 67's decision-making process was replaced by a qualified majority vote and by the codecision procedure within the framework of judicial cooperation in civil matters, with the exception of family law.

The European Parliament's approach shows support for communitisation, which is based on the idea that the defence of the general interests of EU citizens is better coordinated when the Community institutions play their role to the full in the decision-making process, whilst respecting the principle of subsidiarity.

As we saw when considering the Commission's legislative proposals, over and above simply incorporating the existing private international law rules, the European Parliament's proposals contributed to the work of establishing Community law's own original private international law rules.

## **10. Conclusion**

The development of Community law in the field of private international law is undeniable. Such an evolution can only be welcomed.

From an internal point of view, the progression from international conventions to Community regulations reinforces uniformity of application of the private international law rules in the Member States.

Legal certainty is also reinforced by the extended possibilities for making an appeal before the Court of Justice of the European Communities.

At the same time, the communitisation process, made possible by Title IV of the EC Treaty, allows the emergence of an original body of Community law within the landscape of private international law – a body of Community law that is better adapted to the need to develop the internal market and to the level of integration already reached by the Member States.

At the external level, the communitisation of private international law has led to the arrival of a new actor in the field of private international law conventions in the shape of the European Community.

Finally, the process of communitisation is also a process of democratisation, in that the European Parliament is involved in the conversion of conventional international law to Community law within the framework of the codecision procedure.

Through its active role in defining original standards of private international law and its support for the accession of the Community to the Hague Conference on private international law, the European Parliament has confirmed itself as a crucial actor in this process of communitisation.