Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization

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A. Introduction

I. The Topic

Harmonization of laws has always taken place at both regional and international levels. Different aspects of law have been harmonized by different organizations. However, during the last decade, in particular, harmonization of private international law has been the center of many discussions. This includes developments at the European level, namely the attempts of the European Community (EC), under the 1997 Treaty of Amsterdam, to harmonize laws on the European continent. The discussions focus on the 'communitarization' of private international law through the new Title IV of the EC Treaty, known as the section on 'cooperation in civil and judicial matters.' Under the new Title, the Community is exclusively empowered to legislate on different aspects of private international law. The granting exclusive powers in this area to the EC has led to discussions about possible conflicts between different levels of government, namely between the national and regional and between the regional and international levels.

This article provides a discussion of the latter conflicts. Since the Treaty of Amsterdam, the Community has adopted several instruments for harmonization and there are also several ongoing international projects relating to these and related issues. These attempts have already led to inconsistencies and duplication of work. Before going into the discussion, however, I will offer some explanations about private international law relating to its scope and nature, as well as the need for harmonization of rules. Further, I will analyze the harmonization of private international law within the Community, the so-called 'communitarization' of private international law. Although regional harmonization of private international law is performed by different organizations, the European Union (EU) will be the only organization of discussion at this

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European Journal of Law Reform, Vol. V, No. 1/2, 2003, pp. 127 - 172
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level. I will first discuss the legal basis for harmonization. Secondly, I will describe the Community's instruments for harmonization. In this regard, I will underline two different methods of harmonization: instruments that focus solely on private international law and instruments that touch on various issues, including private international law rules. Next, I will deal with international harmonization of private international law. I will identify the most important organizations as well as the means used by them towards harmonization. Lastly, I will analyze the possible conflicts between the harmonization at regional and international levels. As regards such analysis, the Brussels I Regulation of 2001 of the EC will be compared with three international instruments; namely the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[1] and the Bunkers[2] and HNS[3] Conventions of the International Maritime Organization (IMO). The focus of the discussion of these instruments will be their provisions on jurisdiction, recognition and enforcement of judgments, which contradict with the provisions of the Community Regulation. This is a very important conflict because it influences the Member States' positions towards the Draft Hague Convention, as well as in the IMO, the external competence of the Member States, and the future of international instruments of this kind in the broadest sense. Furthermore, it seems safe to expect more trouble in future, because of the increasing number of EC legislation harmonizing private international law and consequently an increasing number of conflicts between the regional and international levels.

However, it would be beyond the scope of the present article to identify all of the potential problems or to propose solutions. Rather, I will limit my analysis to an outline of the major points of conflict between different instruments, explaining the basis of harmonization at different levels.

II. Key Terms

Before we start our discussions, there is a need to clarify the terminology that is generally being used in this context, namely 'communitarization,' 'Europeanization,' 'harmonization' and 'unification' of laws.[4] These terms have been applied interchangeably by some authors, sometimes with nuances reflecting important features of development of law in many parts of the world. The mutual interdependence of various legal systems and their influence on each other at regional and international levels has supported the development of such terminology.

At the regional level within the EU, harmonization of laws has been one of the oldest terms used to define the process by which Member States of the EU make

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1 Available at http://www.hcch.net/e/conventions/draft36e.html.

2 International Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001, available at http://www.imo.org/conventions.

3 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 3 May 1996, available at http://www.imo.org/conventions.

4 For a discussion of the terminology see O. Lando, *Optional or Mandatory Europeanization of Contract Law*, 1 European Review of Private Law 2000, at p. 59.

changes in their national laws in accordance with Community legislation to ensure uniformity. 'Approximation of laws' also has been used by the Treaty itself under Article 94 EC in relation to directives for the establishment and functioning of the internal market to imply a similar, if somewhat less far reaching meaning.

However, the more recent terms used at the European level to analyze current developments are 'Europeanization' and 'communitarization.' Europeanization may have two different meanings; in a broad sense, it means the study of the common background and principles of the national legal systems in Europe, and in a stricter sense – the sense used in this article – the replacement of national rules by those of the European Communities, which also may be called communitarization.[5] In the area of private international law, it is used to explain the new competence of the EC to introduce measures in private international law for the proper functioning of the internal market under Article 65 EC.

The term 'conflict of laws' is also used to define this branch of law, particularly in the USA. However, this term is also criticized since it suggests the existence of a sovereign conflict, which is actually not the case regarding the issues of private international law. Here, as will be discussed in the article, there is no conflict but 'a concurrence of the legal systems connected with the case, it being the task of the judge to solve the problem either by selecting one of them or by any other acceptable method.'[6] In this article, these terms will be used indistinctively, also making reference to 'rules of private international law' or to the 'conflict rules' without differentiating between them.

On the other hand, the term 'unification' is usually used at the international level to imply international measures adopted by different States.

In this article, all terms are used interchangeably. However, for the discussions at the international level, I will use the term 'unification' to maintain consistency with the international organizations' preferred terminology.

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5 B. Von Hoffman, *The Relevance of European Community Law*, in B. Von Hoffmann (ed.), *European Private International Law*, Nijmegen 1998, at p.15.

6 G. Parra-Aranguren, *General Course of Private International Law: Selected Problems*, 210 Rec. des Cours, No. 3, 1988, at p. 38. For the variation of terminology in England, USA and France see also P. Stone, *Conflict of Laws*, New York 1995, at p. 1; D. McClean, *Perspectives on Private International Law at the Turn of the Century*, 282 Rec. des Cours. 2000, at pp. 3-4.

B. Private International Law as a Part of National Legal Systems

I. Nature of Private International Law Rules and Their Legislation at the National Level

The term private international law refers to the part of the law that comes into play when the issue before the court is a transaction, fact or event with foreign elements.[7] A foreign element is defined simply as a contact with some system of law other than that of the 'forum;' the latter being a country, the courts of which have jurisdiction for the case.[8] Private international law, by its very nature, can involve many different branches of law in different conflicts.

> 'It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case or a matter of criminal procedure. ...The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by private international law.'[9]

The connection with foreign law can happen in a variety of ways: one of the parties may have a foreign nationality or domicile, a contract may be made in one country and fulfilled in another, the headquarters or the branches of a company may be abroad, the action may concern property situated in another country, the parties of a contract may choose the application of a foreign law or jurisdiction of a foreign court where they believe the solution is more convenient than any other country, or the accident giving rise to a tort claim may occur abroad.

When a case is affected by a foreign element, the judge should look beyond domestic law and try to find the most appropriate legal system to govern the issue that has arisen. Thus, the rules of private international law do not find solutions to the dispute concerned; they fulfill their duty by referring to the most appropriate legal system.

Although private international law has to have a relation with a 'foreign law' to be applicable, it is regulated under the national legal systems. The national laws of all States include rules of private international law to be applicable internationally. Thus, as far as the name of this branch of law is concerned, it is not accurate to identify it as 'international' in this sense, since most of the rules of private international law

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7. P.M North and J.J. Fawcett, *Cheshire and North's Private International Law*, London 1999, at p.5; G. Parra-Aranguren, *General Course of Private International Law*, at p. 29; P.H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, 249 Rec. des Cours 1994, No. V, at p. 22.
8. D. McClean, *Perspectives on Private International Law*, at p. 2.
9. P.M North and J.J. Fawcett, *Cheshire and North's Private International Law*, at p. 7.

have been enacted by national legislators. Accordingly, they are not valid everywhere and their legal force is restricted to the country where they have been enacted.

II. 'Private International Law' – Substantive Distinction

Private international law encompasses three main issues: the choice of law, jurisdiction of the courts, and recognition and enforcement of foreign judgments.

Choice of law is concerned with the question as to which law is applicable to a particular case that includes foreign elements. Choice of law rules select the legal system of one country from among the countries that have a connection to the case, and make the substantive rules of that country applicable to the dispute.[10] However, this does not mean that only one legal system can be applicable to a case in question; on the contrary, different legal systems may be applicable to different parts of the dispute.

Rules of jurisdiction of a country provide for the circumstances in which the courts of that country are authorized (and willing) to proceed with a case that has some connection to at least one other country.[11]

Rules about the recognition and enforcement of foreign judgments define the conditions under which a foreign judgment is recognized and enforced, or is given effect in the country of the forum. Such situations appear for instance in cases where a decision was rendered in another country but the defendant has assets in the forum country. If the applicant want to seize these assets, there is a need to decide whether or not to recognize or permit the enforcement of the foreign judgment.[12] Provided that the foreign court had jurisdiction, the private international law of the national legal systems governs whether the recognition and enforcement of foreign judgments is possible as well as the procedures for such recognition and enforcement in that particular legal system.

In this article, as far as harmonization of private international law is concerned, all the attempts regarding harmonization of choice of law, jurisdiction of the courts and recognition and enforcement of foreign judgments will be taken into consideration.

III. The Need for Private International Law Harmonization: Harmonization of Substantive Law v. Harmonization of Private International Law

Every country has its own set of private international law rules as a part of their private national law.[13] Thus, like other branches of law, private international law rules of different countries are based on different principles and may provide for different rules for similar issues, thereby bringing divergence between conflict rules of the countries. Such

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10 P. Stone, *Conflict of Laws*, at p. 2.
11 P. Stone, *Conflict of Laws*, at p. 2.
12 P.M North and J.J. Fawcett, *Cheshire and North's Private International Law*, at p. 8.
13 P. Stone, *Conflict of Laws*, at p. 2.

divergences not only lead to different decisions in different States regarding similar situations, but also prevent the achievement of the purpose of the conflict rules.[14] To solve such diversity between different legal systems, two methods are used, namely, harmonization of internal laws of the States and harmonization of private international law. Both systems have their own advantages and disadvantages.[15]

Harmonization of internal laws of the States depends on the adoption of international conventions to set out common rules within the areas covered. In the areas where transactions are likely to traverse frontiers frequently, such as the international carriage of goods or passengers, there have been major attempts to harmonize the substantive law.[16] The Warsaw Convention relating to the carriage of goods and passengers by air, the Athens Convention relating to the carriage of passengers and their luggage by sea as well as the 1980 Vienna Convention on Contracts for the International Sale of Goods, are examples for such harmonization. Harmonization of substantive law, although being the very best solution for any conflict between different legal systems as well as for decisional harmony is usually very difficult to achieve. Legislative powers of States are based on the principle of sovereignty, giving each State virtually total freedom to do as it pleases. Therefore it is very difficult to find enough common ground for harmonized substantive law. While some areas, such as the law of obligations or contracts, may be harmonized more easily, harmonization seems nearly impossible in other areas, such as family law or law of succession.

Apart from harmonization of substantive law, another solution for maintaining decisional harmony in legal diversity is the unification of the rules of private international law. By harmonizing the conflict rules of the national legal systems, a case containing foreign elements come out in the same way irrespective of the country of trial.[17] Harmonization of private international law has usually been seen as a better option than substantive law harmonization, simply because it is more realistic. However, it should be noted that the adoption of a universal conflicts law is considered to be about as utopian an idea as the worldwide unification of substantive law.[18] Furthermore, such a universal unification of private international law would also hinder the possibility of finding new solutions to new conditions in our rapidly changing world, which is the biggest advantage of having different legal systems.[19]

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14 For the view that accepts diversity as an advantage see A.L. Diamond, *Harmonization of Private International Law Relating to Contractual Obligations*, 199 Rec. des Cours. 1986, No. 4, at p. 241. Also see, P. Stone, *Conflict of Laws*, at p. 4.

15 S. Van Erp, *European Private International Law as a Transition Stage?* 6 EJCL 2001, No. 1, at p. 4.

16 A.L. Diamond, *Harmonization of Private International Law*, at p. 242.

17 P.M North, J.J. Fawcett, *Cheshire and North's Private International Law*, at p. 11.

18 M. De Boer, *Prospects for European Conflicts Law in the Twenty-first Century*, in Patrick J. Borchers and Joachim Zekoll (eds.), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, New York 2000, pp. 206-207.

19 G. Parra-Aranguren, *General Course of Private International Law*, at p. 36.

C. Regional Harmonization of Private International Law: Harmonization in the EU

The divergences born from the different rules of private international law in different States have led to harmonization of some such rules, as mentioned above. At the regional level, a number of organizations, such as the Council of Europe and the Organization of American States, have made important attempts to harmonize conflicting rules. Within the European Union, a number of measures aimed at achieving such harmonization or 'communitarization' have been implemented. Indeed, harmonization of private international law started as early as the 1960s in the EC through international conventions. However, the Community made the most significant attempts only recently. These attempts took place either as unification of new parts of private international law or re-codification of existing parts through Community law regulations.[20]

Under the following sub-headings, I examine the scope and limits of communitarization of private international law and analyze the legal basis of the issue. Firstly, I examine harmonization under the founding treaties, and the amendments to these treaties by more recent treaties. Further, Title IV of the Treaty of Amsterdam (ToA) is analyzed in detail since it takes an important step toward judicial cooperation in civil matters. I focus on Article 65 of the Treaty and compare it with different provisions that have similar prospects. Next, I examine the measures taken within the Community to harmonize laws. Here, international conventions and regulations drafted specifically for private international law legislation, as well as directives and regulations on various subjects that include conflict rules, are covered. As far as these measures are concerned, the Treaty of Amsterdam, which is the new basis for Europeanization, and the Action Plan of 1998, are the focus of discussion.

I. Legal Basis of the Communitarization of Private International Law

1. Harmonization Under the Founding Treaty

When the Treaty of Rome was signed in 1957, harmonization of private international law was not the main concern. The Treaty mainly concentrated on the establishment of a common market. It only provided for a very limited reference to harmonization of laws under Article 220 (now Article 293 EC), and instructed the Member States to enter into negotiations with each other to secure facilitation in international business law,[21]

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[20] S. Van Erp, *European Private International Law*, at p. 1.

[21] In the second paragraph of Article 220 EC 'the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of seat from one country to another, and the responsibility of mergers between companies and firms governed by the laws of different countries.'

recognition and enforcement of judgments, and arbitral awards[22] in respect of cross-border activity.[23] In fact, the Treaty did not provide for harmonization of conflict laws as a responsibility of the Community; rather, it left the issue to intergovernmental negotiations between the Member States. International conventions, which had to be enacted by the national legislators, proved to be the only means of legislation regarding issues of private international law; Article 220 EC did not allow any other way of harmonization through EC instruments such as regulations and directives.

However, the approach toward harmonization via intergovernmental conventions has not been satisfactory because of a number of disadvantages: the slow ratification procedures, the need to negotiate and ratify an accession treaty to each intergovernmental convention each time a new Member State joins the group, and the limited scope of jurisdiction of the European Court of Justice (ECJ) to assure uniform interpretation of the conventions.

Under the Treaty of Rome, Article 94 (ex Article 100) was the main tool for harmonization of laws in the early years of integration. The Article relied on the adoption of directives on various issues related to the internal market, including some aspects of private international law harmonization. The most important deficiency of the Article was the requirement of unanimity in the Council, which impeded the Community's efforts of harmonization. In 1987, the Single European Act (SEA)[24] introduced Article 100a (now Article 95) into the Treaty framework, encouraging Community harmonization not only through directives but also through regulations.[25] This new Article provided for harmonization of legal provisions by qualified majority vote in the Council. As will be discussed below, during the explanation of communitarization of conflict laws through directives, Article 95 has been used to harmonize different aspects of substantive law, in which certain issues of conflict of laws are covered. As a matter of fact, Article 95 has been the basis of protecting the internal market against the choice of laws of a third State.[26]

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22 In the third paragraph of Article 220 EC 'the simplification of the formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards.'

23 O. Remien, *European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice*, 38 Common Market Law Review 2001, at p. 55.

24 Single European Act, Official Journal 1987 L 169.

25 In the words of the EC Treaty (Article 249 EC): 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in the Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

26 J. Basedow, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 37 Common Market Law Review 2000, at p. 696.

2. Establishment of the Third Pillar Under the Treaty on European Union (TEU)

The TEU[27] made the first important and radically different attempt regarding 'judicial co-operation in civil matters' (Art. K.1) and provided the issue as one of the matters relating to 'justice and home affairs,' the so-called third pillar of the European Union.

Under Art.K.1 of the Treaty, the primary responsibility of the States was unaltered, and remained as was provided under Article 220 of the Treaty of Rome. However, under the new Treaty, the Council was empowered to draw up conventions that would be recommended to the Member States for adoption according to their constitutional requirements.[28] Unless otherwise provided in such conventions, implementing measures would be adopted by the Council by a two-thirds majority of the High Contracting Parties. Moreover, the Treaty provided the European Court of Justice with the power of interpreting the provisions of such conventions and any dispute concerning their application, albeit by separate protocols.

The Treaty provides conventions, rather than any other EC instruments, as the only means of legislation concerning cooperation in civil matters. Although the Council was empowered to a certain extent, implementation of the conventions would still rely on the ratification of such documents by the respective governments of the Member States. For the implementation of the measures, a certain majority of the Member States had to give approval. Thus, harmonization of conflict rules under the TEU was still to an important extent a national competence, rather than a pure Community regime.[29]

The achievements and working methods of the cooperation in civil matters under the third pillar were not impressive. The slow progress in the negotiation of the conventions and the enactment proceedings of national parliaments were the main points of criticism. Under the TEU, only two conventions were signed, both of which are dealt with in more detail later: one in 1997 on service of judicial and extra-judicial documents and the other in 1998 on jurisdiction and on recognition and enforcement of decisions in matrimonial matters, the so-called Brussels II Convention.[30]

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27 Treaty on European Union, Official Journal 1992 C 191.

28 Treaty on European Union, Article K. 3 (2)(c).

29 See also T. C. Kotuby, *External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification*, XLVIII Netherlands International Law Review 2001, at p. 6; J. Israel, *Conflicts of Law and the EC after Amsterdam: A Change for the Worse?* 7 Maastricht Journal of European and Comparative Law 2000, at p. 83.

30 U. Drobnig, *European Private International Law After the Treaty of Amsterdam: Perspectives for the Next Decade*, 11 Kings College Law Journal 2000, p. 192.

3. A Turning Point for Cooperation in Civil Matters: The Treaty of Amsterdam

a. *Cooperation in Civil Matters Becomes Part of the Community Pillar*

The Treaty of Amsterdam (ToA),[31] which came into force in May 1999, has been accepted as a turning point for cooperation in civil matters. The new Treaty provides for the same structure of the Union as was established by the TEU; however, it links cooperation in civil matters with free movement of persons and transfers the judicial cooperation in civil matters from the third pillar to the first pillar, the so-called 'Community pillar' under Title IV: visa, asylum, immigration and other policy areas concerning the free movement of persons (Arts. 61-69). By this treaty amendment, judicial cooperation has for the first time been expressly recognized as a Community task.[32] However, the Community competence regarding cooperation in civil matters is still restricted in some aspects. As will be discussed below, limitations concern the territorial application of Title IV as well as the special legislative procedure and limited jurisdiction of the ECJ under Title IV.

The new system negotiated in Amsterdam should be seen as the final step in a long process towards the communitarization of judicial cooperation in civil matters. Under the Treaty of Rome (Art. 220), the competence was reserved for the Member States; the TEU created an equilibrium between the Community and the Member States, leaving the enactment of the legislation to the Member States. The ToA finalized the process and communitarized judicial cooperation in civil matters by providing the means within the Community for the creation and enactment of legislation to govern judicial cooperation.[33]

b. *Material and Territorial Scope of Article 65 EC*

The ToA requires the progressive establishment of an area of freedom, security and justice under Article 61 as a Community policy. The Article empowers the Council to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65 EC. Article 65 gives a precise meaning to judicial cooperation in civil matters by including a catalogue of measures and underscores two very important conditions

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[31] Treaty of Amsterdam, Official Journal 1997 C 340.

[32] U. Drobnig, *European Private International Law*, at p. 193. See also K. Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, in J.Basedow et al (eds.), *Private Law in the International Arena-Liber Amicorum Kurt Siehr*, The Hague 2000, pp. 62-63; J. Israel, *Conflicts of Law*, at p. 81; W. Kennett, *The Brussels I Regulation*, 50 International and Comparative Law Quarterly 2001, at p. 39.

[33] B. Von Hoffman, *The Relevance of European Community Law*, at p. 29. See also T. C. Kotuby, *External Competence of the European Community*, at p. 7; J. Israel, *Conflicts of Law*, at p. 81.

for such measures: they should 'have cross-border implications' and they should be taken 'insofar as necessary for the proper functioning of the internal market.'[34]

The list of measures mentioned under Article 65 is not exclusive. The Community may adopt measures on different aspects of judicial cooperation in civil matters not listed under Article 65 as long as they have cross-border implications and are necessary for the proper functioning of the internal market.[35] Moreover, Article 65 does not limit the Community with regard to the form of action. The Article allows the adoption of 'measures' without mentioning which measures should be taken under Title IV. It should therefore be accepted that all types of Community legislation provided for in Article 249 (ex Article 189) EC can be adopted. Accordingly, the Community can make recommendations or deliver opinions as well as issue directives, take decisions and adopt regulations.[36]

4. Article 65 as *Lex Specialis*? Competition in the Scope of Article 65 with Articles 95 and 293 EC

a. Article 65 EC v. Article 95 EC

As mentioned above and elsewhere, directives and regulations on various issues related to the creation of the internal market have also provided for conflict rules under the name of communitarization of private international law. Many of these measures have been based on Article 95 (ex Article 100a) EC. Article 95 EC is included under Title VI on approximation of laws, providing for the approximation of provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market. The Council is empowered to

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[34] According to this Article: 'Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include: improving and simplifying the system for cross border service of judicial and extra-judicial documents; cooperation in the taking of evidence; recognition and enforcement of decisions in civil and commercial cases, including decisions on extra-judicial cases; promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.'

[35] J. Basedow, *EC Regulation in European Private Law*, in J.Basedow et al (eds.), *Private Law in the International Arena-Liber Amicorum Kurt Siehr*, The Hague 2000, at p. 20; T. C. Kotuby, *External Competence of the European Community*, at p. 18.

[36] J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 706. To this extent, the Conventions signed by the Member States have started to be transposed into Community regulations.

deal with the approximation of provisions by passing measures that include directives as well as regulations.[37]

After the revision of Article 65 by the ToA, there have been discussions on whether the two provisions overlap or conflict with each other, and to what extent Article 65 is applicable in the context of Article 95, the latter being a more general rule.

As it was mentioned above, Article 65 will be applicable '...insofar as necessary for the proper functioning of the internal market.' In parallel, Article 95 provides for approximation of laws, which have as their object the establishment and functioning of the internal market. In this sense, it is obvious that aims of the two articles overlap. As Basedow argues, measures necessary for the proper functioning of the internal market within the meaning of Article 65 will certainly have 'as their object' the establishment and functioning of the internal market within the meaning of Article 95.[38]

Furthermore, Article 95 (2) makes a straightforward exception to Article 95 (1) by providing that the latter provision will not be applicable to fiscal provisions, to those relating to the free movement of persons or to those relating to the rights and interests of employed persons. Since Article 65 is applicable to the free movement of persons under Title IV, it can be said that this Article supplements Article 95 so far as the free movement of persons is concerned.[39] In other words, Article 65 will be the basis for the conflict rules applicable to the law of legal persons and companies as well as for conflict rules on domestic relations and succession that have an effect on the free movement of persons.[40] In other areas such as the free movement of services and goods, the Community conflict legislation should continue to be based on Article 95 EC.

b. Article 65 EC v. Article 293 EC

Another discussion about the applicability of Article 65 centers on its relationship to Article 293 fourth indent (ex Article 220) EC. As mentioned above, Article 293 EC has been the traditional method of communitarization of private international law rules through conventions. Despite the fact that Article 65 provides for cooperation in civil matters and transfers cooperation from the third pillar to the first pillar, Article 293 fourth indent has remained in place.[41] In other words, although the Community now has

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[37] P. Craig/ G, De Burca, *EU Law*, 2nd ed., Oxford 1998, p. 1119. However, it should be mentioned that while agreeing on the SEA, which provided for Article 95(ex Article 100a), the Member States adopted a declaration stating that the Commission should prepare its legislative proposals in the form of directives where these proposals imply changes of legal provisions in one or more Member States. On the other hand, it is often argued that this declaration has lost its power with the adoption of Article 65 EC, which provides for the adoption of any form of measure. For a comprehensive analysis of the comparison between Article 95 and 65 see J. Israel, *Conflicts of Law*, at pp. 88-98.

[38] J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 697.

[39] See J. Israel, *Conflicts of Law*, at p. 91.

[40] J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 698; T. C. Kotuby, *External Competence of the European Community*, at pp. 3, 7.

[41] See K. Boele-Woelki, *Unification and Harmonization of Private International Law*, at p. 65; J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 701; T. C. Kotuby, *External Competence of the European Community*, at p. 18.

the competence to take its own legislative measures, the Member States still have the power to conclude treaties with each other, as was the case under the Treaty of Rome, for example the enactment of the Convention on the Law Applicable to Contractual Obligations and the Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.[42]

It is important to underline that Article 293 fourth indent imposes an obligation for the Member States to negotiate 'so far as is necessary.' Therefore, States should have the power to conclude treaties under Article 293 EC in cases where the EC Treaty does not provide any other basis for necessary measures. Furthermore, the Article is not restricted to civil matters; on the contrary, the general target of reciprocal recognition and enforcement of judgments includes criminal, tax as well as administrative matters.[43] This fact also explains the reason why Article 293 fourth indent has not been deleted from the Treaty. Considering the fact that Article 65 covers specifically the cooperation in civil matters, it does not leave any space for the application of Article 293 fourth indent it that respect; it should be considered *lex specialis* to Article 293.

5. Restrictions on the Judicial Cooperation in Civil Matters

Despite the fact that judicial cooperation in civil matters, that is to say the choice of law, international jurisdiction and recognition and enforcement of foreign judgments, has been for the first time recognized as a Community task under Title IV of the ToA, the competence of the Community has been restricted in three main aspects pursuant to Articles 67, 68 and 69 of the Treaty. These restrictions are considered to limit the value of Title IV. There is concern about the effectiveness of the new legislative procedure, the limited role of the ECJ and the territorial scope of the Title IV.

a. *The New Legislative Procedure and Role of the European Court of Justice*

The legislative procedure under Article 67 has been subject to much comment. The Article provides for different legislative procedures for the first five years of the implementation of the Treaty and after those five years. During the first five years of the implementation of the Treaty, the initiative of the Commission or of one of the Member States needs to be approved by a unanimous vote in the Council after consultation with the European Parliament. The main concern about the first five years is the Council's acting by unanimity. Unanimous voting has been seen to make it very difficult for the Council to legislate. This will be all the more the case after enlargement of the EC from 15 to 25 Member States. Furthermore, the Commission does not have an exclusive right of initiative. It shares this right with the Member States. Since the Article provides for

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[42] K. Boele-Woelki, *Unification and Harmonization of Private International Law*, at p. 65.

[43] J. Basedow, *The Communitarization of the Conflict of Laws*, p.700; J. Sedlmeier, *International and European Procedural Law: Recent Developments regarding mutual recognition of judgments in Europe and worldwide*, 1 The European Legal Forum 2002, at p. 38; T. C. Kotuby, *External Competence of the European Community*, at p. 18.

the consultation procedure for the first five years, the role of the European Parliament is also very limited.

After the first five years, the Member States lose their power to initiate and the Commission appears to gain the monopoly for initiation of legislation. At this stage, the Council, acting by unanimity, shall decide to transfer all or parts of the areas covered by Title IV to be governed by the co-decision procedure. In all areas not transferred to co-decision, the Council and the Parliament will legislate under the rules provided for the procedure of cooperation.[44] As a result, under Article 67, the Council is free to choose the relevant areas that will be subject to the cooperation procedure, where it can overrule Parliament, and those that will be subject to the co-decision procedure, where Council and Parliament are equal. Thus, the Council may choose to adopt the cooperation procedure as the general rule for all areas under Article IV or for some selected areas.[45]

Another significant point about the new Title under the ToA relates to the possibility of national courts to request preliminary rulings from the ECJ.[46] The new Article 68 is considered as an integrative setback since it provides for a weakened preliminary ruling procedure in comparison with the preliminary ruling procedure provided under Article 234 EC. Unlike the latter, which allows all courts and tribunals of the Member States to apply to the ECJ for a preliminary ruling on the interpretation of the Treaty, the new Article limits such a right to the highest national courts. It is clear that this restriction in the context of Title IV reduces the usefulness of any conflict measure enacted under Article 65, as the ECJ's power to render uniform interpretations of the law will come to pass only with regard to the small numbers of civil cases that actually make it to the highest courts of the Member States.[47] However, the highest courts do not have a choice but are theoretically required to apply to the ECJ whenever they consider a decision on the interpretation or application of the Treaty as necessary for them to render judgment. The limitation on the jurisdiction of the ECJ under the second indent of the Article 67(2) may be removed by a unanimous decision of the Council taken no sooner than after five years.[48]

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44 J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 692; G. Betlem/ E. Hondius, *European Private Law after the Treaty of Amsterdam*, 1 European Review of Private Law, 2001, at p. 11; U. Drobnig, *European Private International Law*, at p. 192.

45 The latest developments in the area were provided by the Treaty of Nice. According to the new Treaty, unanimity in the measures under the Article 65 EC will be replaced by qualified majority voting. The cooperation procedure will be applicable under Article 67(5). However, family matters are excluded; they continue to require unanimity (Article 67(1) EC).

46 For comprehensive analysis of the restricted preliminary ruling procedure under Article 68 EC and its effects see J. Sedlmeier, *International and European Procedural Law*, at pp. 38-39; U. Drobnig, *European Private International Law*, at p. 192.

47 J. Israel, *Conflicts of Law*, at p. 86.

48 As regards Title IV, the Council, the Commission and the Member States are as well empowered to apply to the ECJ for a preliminary ruling on the interpretation of Title IV or of acts of the Community institutions based on this Title (Article 68(3)). In the latter case, the decision of the ECJ 'shall not apply to judgments of courts or tribunals of a Member State which have become *res judicata*' (Article 68(3)).

b. Territorial Limits of Title IV: The Position of Denmark, Ireland and United Kingdom

A second and probably more aggravating limitation on the effective applicability of Title IV is the position of Denmark, Ireland and United Kingdom.[49] The Treaty refers to two Protocols on the Position of the United Kingdom and Ireland and on that of Denmark, respectively. The Protocols exclude the participation of these Member States in measures taken under Title IV of the EC Treaty, any international convention concluded within this framework and the judicial decisions of the ECJ in this regard.[50]

As far as the positions of United Kingdom and Ireland are concerned, Article 3 of the Protocol allows these Member States to opt for participation in the adoption of a particular measure by way of a notification to the President of the Council within three months after the proposal of the measure has been presented to the Council.[51] Accordingly, in the Council meeting on 12 March 1999, both Member States announced their intention of being fully associated with Community activities in relation to judicial cooperation in civil matters.[52]

On the other hand, the Protocol on the position of Denmark does not include such an opt-in provision. However, Denmark may still inform the other Member States that it does not want to be bound by all or part of the Protocol. If such a declaration is made, Denmark subsequently would have to apply all measures that were taken within the framework of the European Union or which are in force at that time.[53]

6. Instruments for Communitarization of Private International Law

In the harmonization process of private international law within the EU, different methods have been used based on different articles of the EC Treaty. The first method of communitarization has been the drafting of legislation specifically on private international law rules, covering different aspects of the topic through instruments of international conventions and EC regulations. Sometimes, private international law provisions are included within the scope of Community legislation on various issues, either in directives or regulations, which provide for protection of the internal market against the choice of law rules of third States.

As far as the first group of instruments is concerned, a significant step was made right after entry into force of the ToA. Based on the Article 65 EC, the Council and the Commission of the Union adopted an Action Plan in 1998 'on how to best

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[49] See J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 695; O. Remien, *European Private International Law*, at p. 77; U. Drobnig, *European Private International Law*, at p. 193.

[50] G. Betlem/ E. Hondius, *European Private Law after the Treaty of Amsterdam*, at p. 17; J. Israel, *Conflicts of Law*, at p. 84.

[51] On the other hand, the Protocols also include escape clauses to make it possible to include these Member States in future legislation under Title IV.

[52] J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 696.

[53] Article 7 of the Protocol on the Position of Denmark.

implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice.'[54] The ongoing and future EC legislation on harmonization of private international law is based on this Action Plan,[55] which distinguishes urgent measures that have to be taken within two years and medium range measures to be taken within five years. Accordingly, a 'scoreboard' is prepared in regular intervals by the Commission to monitor progress in the adoption and implementation of an impressive range of measures needed to meet the targets set by the Treaty and the European Council.[56] The goal is to review progress on the creation of the area of justice, including the legislative progress in the adoption of all measures provided in the Action plan.

Under the following sub-heading, communitarization through different instruments will be covered. First of all, specific conventions and regulations on private international law will be presented. In this respect, the Brussels I Regulation will be given special emphasis to facilitate our discussion in Section E on the conflicts between the international conventions and the Brussels I Regulation. In terms of particular instruments, the provisions of the Action Plan will be mentioned, taking into account the revisions or changes that are provided in this workable system. Lastly, directives on various issues that cover conflicts legislation and procedure will be examined.

II. Communitarization through Conventions and Regulations on Issues of Private International Law

1. Conventions

a. *In the Pre-Maastricht Period*

The period before the TEU covered some very important conventions on both international procedure and conflicts legislation. As far as procedural questions are concerned, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, the so-called 'Brussels I Convention' was drafted as early as 1968, on the basis of Article 234 (ex Article 220).[57] The Brussels Convention is not an inte-

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54 The Justice and Home Affairs Council, *Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice*, 3 December 1998, Official Journal 1999 C 19, p. 1.

55 The Action Plan is also called the 'Vienna Action Plan' as it was signed in the Vienna Council meeting of December 1998.

56 For the last update of the Scoreboard see European Commission, *Communication from the Commission to the Council and the European Parliament: Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of 'Freedom, Security and Justice' in the European Union*, COM(2001) 628.

57 European Communities, *Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Official Journal 1972 L 299.

grated element of Community law and is considered a multilateral convention between the EC Member States.[58]

The Convention, which has been called the single most important private international law treaty to date, seeks to harmonize the national laws of the Member States regarding jurisdiction, recognition and enforcement of foreign judgments by focusing on the free movement of judicial decisions in parallel with the freedom of goods, services, people and capital inside the EC.[59] It establishes an enforcement procedure that constitutes an autonomous and complete system of recognition[60] and provides for the ECJ's jurisdiction for uniform application.[61] The applicability of the Brussels Convention was expanded to the EFTA Countries by the Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 – the so-called Parallel or Lugano Convention.[62]

Another very important convention adopted during this period is the Convention on the Law Applicable to Contractual Obligations of 19 June 1980, known as the Rome Convention,[63] which covers the area of choice of law and has been accepted as a corner stone in this field. Its application is not restricted to the citizens of the EU Member States; on the contrary it is applied *erga omnes* when any court in Europe acquires jurisdiction over an international case.[64] As will be mentioned later in this section, different directives on various issues also provided for conflicts provisions, which led to discussions about the scope and applicability of the Rome Convention. In this regard, the Action Plan of 1998 included the revision of the Convention as one of the priorities for the first two years, taking into account the conflicts provisions in other Community instruments.[65]

Two other conventions signed in this period have not come into force due to lack of ratification: the Convention Abolishing the Legalization of Documents in the Member States of the European Communities of 25 May 1987[66] and the Convention

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58 Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, at p. 67. For comprehensive analysis of the Brussels Convention and its success see W. Kennett, *The Brussels I Regulation*, at pp. 21-25.

59 T. C. Kotuby, *External Competence of the European Community*, at p. 21. See also J.J. Forner, *Special Jurisdiction in Commercial Contracts: From the 1968 Brussels Convention to Brussels - one Regulation*, 13 International Company and Commercial Law Review, 2002, p. 1.

60 J. Sedlmeier, *International and European Procedural Law*, at p. 36.

61 Uniformity in the application of the Convention is provided by the ECJ's jurisdiction that was legalized by the Protocol of 3 June 1971.

62 The Brussels Convention is transposed to Community legislation by the Brussels I Regulation. The Brussels I Regulation will be subject to further analysis later in the article. The Lugano Convention will remain as a convention in its revised form.

63 European Communities, *Rome Convention on the Law Applicable to Contractual Obligations*, Official Journal 1980 L 266.

64 K. Siehr, *European Private International Law and Non-European Countries*, in P.J. Borchers and J. Zekoll (eds.), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, New York 2000, at p. 290.

65 Action Plan, no. 47.

66 Bulletin (EC) (1987) 124. Only four countries have ratified the Convention: Belgium, Denmark, France and Italy.

between the Member States of the European Community on the Simplification of Procedures for the Recovery of Maintenance Payments of 6 November 1990.[67] The lack of enthusiasm among the Member States for the ratification of these conventions can be explained by the already existing international conventions on similar issues, namely the Hague Convention of 1961 and the UN-Agreement of 1956 respectively.[68]

b. *In the Maastricht Period*

While the subject was part of the third pillar of the TEU, two conventions were signed; however, neither of them has actually come into force. The first one concerns the area of insolvency, known as the 1995 European Convention on Insolvency Proceedings. It was limited to the intra-Community effects of insolvency proceedings. The second, the European Service Convention of 26 May 1997,[69] deals with service of judicial and extra-judicial documents.

Another convention supplements the Brussels Convention of 1968 – the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. The Convention, signed on 28 May 1998, is known as the Brussels II Convention and relies mainly on Brussels I in terms of structure and content. It is concerned with jurisdiction as well as recognition and enforcement of decisions on international family law, covering the fields of divorce and custody for common children of spouses, leaving open, however, the many questions in international succession cases.[70]

c. *In the Amsterdam Period*

With regard to conventions, the Amsterdam Period that started in 1998 has mostly concentrated on the revision of the already existing conventions and their conversion to EC legislation as provided under the Action Plan. The revision of the Brussels and Lugano Conventions were the first items on the agenda. The second item was the revision of the Convention on the Law Applicable to Contractual Obligations, known as the Rome Convention. In this context, the replacement of the conventions with Community directives and regulations that include conflicts provisions has to be taken into account.[71]

2. Regulations

Based on Articles 61 and 65 of the ToA, regulations have been accepted as the most important means for the harmonization of private international law rules in the Com-

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[67] Only Ireland, Italy, Spain and the UK have ratified the Convention.

[68] U. Drobnig, *European Private International Law*, at p. 195.

[69] European Communities, The European Service Convention, Official Journal 1997 C 261, p. 1.

[70] O. Remien, *European Private International Law*, at p. 56. For comprehensive analysis of Brussels II see U. Drobnig, *European Private International Law*, at pp. 196-197.

[71] Para. 40 (c) of the Action Plan.

munity after 1998.[72] The European Commission has underlined the importance of legislation through regulations stating that the change of form 'is warranted by the need to apply strictly defined and harmonized rules to jurisdiction and the recognition and the enforcement of judgments' and by the advantage of regulations, which contain 'unconditional provisions that are directly and uniformly applicable in a mandatory way and, by their very nature, require no action by the Member States to transpose them into national law.'[73]

a. *Brussels I Regulation*

The first legislation that was incorporated into the EC system according to the provisions of the ToA and the system that is established by the Action Plan is the Brussels I Regulation of 22 December 2000.[74]

The Brussels I Regulation incorporates the Brussels Convention into a directly applicable Community instrument and reduces the national differences that affected the operation of the intra-Community Treaty. Hence, the previous 'autonomous and complete system' established by the Brussels Convention is retained by Community rules that are independent of national rules on jurisdiction and the recognition and enforcement of foreign judgments.[75] The scope of the Brussels I Regulation covers 'all main civil and commercial matters apart from certain well-defined matters.'[76] It advocates the complete harmonization of the fields of jurisdiction, recognition and enforcement of judgments within the Community, leaving only minor issues to be determined by national laws of the Member States and providing for the jurisdiction of the ECJ for preliminary rulings on the application and interpretation of the Regulation under Article 68(1) EC.[77]

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72 For the comprehensive analysis of EC Regulations see T. C. Kotuby, *External Competence of the European Community*, at p. 7.

73 COM (99) 220 final, section 2.2. See also J. Basedow, *EC Regulation in European Private Law*, at p. 21.

74 Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal 2001 L 12, pp. 1-23. For analysis of the Brussels Regulation see Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, at pp. 67-68.

75 T. C. Kotuby, *External Competence of the European Community*, at p. 22. The Preamble of the Regulation expressly states this fact by saying that 'continuity ... should be ensured' under para. 5.

76 Brussels Regulation, preamble para. 7.

77 However, not all the members of the EC are contracting States to the Regulation. According to Articles 1 and 2 of the Protocol on the position of Denmark, the Regulation is neither applicable nor binding for this Member State. Hence, the Brussels Convention of 1968 will continue to be applicable between Denmark and each of the Member States.

b. *Other Regulations*

There are also other regulations that have been adopted under Article 65 EC that transformed conventions to Community regulations. Council Regulation (EC) 1348/ 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters[78] came into force on 31 May 2001 and transformed the European Service of Documents Convention. The Brussels II Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters has been converted to Council Regulation (EC) 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses.[79] Finally, Council Regulation (EC) 1346/2000 on Insolvency Proceedings[80] converted the respective 1995 Convention. The last-mentioned piece of legislation is not based on the Action Plan but was proposed in May 1999 in the Justice and Home Affairs Council.

3. Other EC Measures on Private International Law in Progress

Apart from the new instruments that have already been adopted pursuant to the ToA, there is important ongoing progress within the Community with respect to the drawing up of new Community measures as well as the revision of existing ones on different aspects of private international law. All these attempts are based on the Action Plan of 1998 and the Scoreboard.

The Action Plan does not mention the type of instrument that should be adopted; it only mentions the term 'legal instruments.' Clearly, Article 65 EC can be the basis for any type of Community measure, including non-binding measures, such as recommendations and resolutions, as well as binding legislation in the form of regulations and directives.

Other work-in-progress includes drawing up of a legal instrument on the law applicable to non-contractual obligations (Rome II), as a part of the two-year priority plan,[81] as well as an instrument on the laws applicable to Brussels III and Rome IV[82] within the time-frame of five years. The latter encompass international jurisdiction, the applicable law and enforcement of decisions concerning the law of matrimonial property, and the law of succession.

The Action plan also refers to the possibility of approximating certain areas of civil law, such as creating uniform private international law applicable to the acquisition in good faith of corporal movables,[83] examining the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family

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78 Official Journal 2000 L 160, pp. 37-52.
79 Official Journal 2000 L 160, pp. 19-36.
80 Official Journal 2000 L 160, pp. 1-18.
81 Action Plan, para. 40 (b)
82 Action Plan 41 (b). See also Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, at p. 74.
83 No. 41 (f) of the Action Plan.

conflicts,[84] identifying the rules on civil procedure having cross-border implications and needing urgent approximation so as to facilitate access to justice for the citizens of Europe, examining the elaboration of additional measures to improve compatibility of civil procedures, and improving and simplifying cooperation between courts in taking evidence.[85]

III. Communitarization Through Directives and Regulations on Various Issues

Apart from the conventions and Community legislation mentioned in the previous subsection, directives and regulations on different other issues are also contributing to the growing body of legislation on private international law in the Community. Although these measures vary in subject, they provide jurisdiction and choice of law clauses regarding the subjects concerned. Such an inclusion of private international law in different Community secondary legislation has led to discussions about the interaction between these measures and the Rome Convention on the Law applicable to Contractual Obligations as well as the Brussels Convention on Jurisdiction and Judgments, the latter having been converted to a Council Regulation. Although areas of choice of law and jurisdiction have been covered by those long-standing Conventions, the creation of different instruments that partly regulate the same subject matter have created certain difficulties. The differences in the implementation of the directives in different Member States' legal systems, the difficulties of interpretation as well as of procedure for transposing the directives into national legal systems have further increased the scepticism towards these provisions.[86] Accordingly, the Action Plan mentions the problem in the context of the revision of Rome I and provides that the conflicts provisions in other Community instruments should be eliminated.

Directives on insurance contracts, consumer protection, the insider trading directive of 1989,[87] the television directive,[88] the directive on the return of cultural objects,[89] and amended proposals for a directive concerning the posting of workers in

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84 No. 41 (b) of the Action Plan.

85 No. 41 (e) of the Action Plan.

86 For discussion of the directives including conflict provisions and the Rome Convention see Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, at p. 69; *European Group on Private International Law*, 'Introductory Note,' 41 NILR1994, at p. 410.

87 Council Directive 89/592 Coordinating Regulations on Insider Dealing, Official Journal 1989 L 334, p. 30.

88 Council Directive 89/552 on Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, Official Journal 1989 L 298, p. 23.

89 Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, Official Journal 1993 L 74.

the framework of the provision of services,[90] are such measures providing for choice of law rules.

The insurance directives include some provisions aimed at the harmonization of insurance contract conflict of laws[91] and are based on Article 47 (ex Article 57) and 55 (ex Article 66) EC to allow for the free establishment and free movement of services within the Community.[92]

The directives on return of cultural objects, unfair terms in consumer contracts, time sharing, distance contracts, and consumer sale are based on the establishment and functioning of the internal market under Article 95 (ex Article 100a) of the EC Treaty. Articles 2 and 6(2) of Directive on Unfair Terms in Consumer Contracts,[93] Article 9 of the Timesharing Directive, Article 12(2) of the Distance Contracts Directive, Article 7(2) of the Consumer Sales Directive,[94] and Articles 5, 12 and 15 of the Directive on the Return of Cultural Objects include rules on conflict of laws.

The Insider Trading Directive of 1989 provides for the applicable law of the market (Art. 5(2)), the Television Directive attributes the counter claims to the law of the emission (Art 2,para. 1) and the Directive on the Return of Cultural Objects submits the determination of property rights to the *lex originis* (Art. 12).[95]

In addition, there are conflict rules in certain regulations within the framework of the common transport policy under Article 71 or Article 80 EC, or on the basis of subsidiary Community powers under Article 308 EC.[96] The Regulation on the Cabotage Transport of Goods or Passengers by Inland Waterway,[97] the Regulation on Road Haulage Services in Cabotage Transport,[98] the Regulation on the European Economic Interest Grouping,[99] and the Regulation on the Community Trademark[100] are examples for measures that include provisions on conflict legislation and/or international procedure.

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90 European Communities, *Amended Proposals for a Directive Concerning the Posting of Workers in The Framework of the Provision of Services*, Official Journal 1993 C 187.

91 O. Remien, *European Private International Law*, at p. 58; T. C. Kotuby. *External Competence of the European Community*, at p. 3.

92 J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 697.

93 Council Directive 93/13 on Unfair Terms in Consumer Contracts, Official Journal 1993 L 95.

94 O. Remien, *European Private International Law*, at p. 59.

95 On the contrary, the directive on e-commerce underlines that it does not establish any additional rules on private international law nor does it deal with the jurisdiction of the courts.

96 J. Basedow, *The Communitarization of the Conflict of Laws*, at p. 697.

97 Council Regulation (EEC) 3921/91 Laying Down the Conditions Under Which Non-Resident Carriers May Transport Goods or Passengers by Inland Waterway Within a Member State, Official Journal 1991 L 373, p. 1.

98 Council Regulation (EEC) 3118/93 Laying Down the Conditions Under Which Non-Resident Carriers May Operate National Road Haulage Services Within a Member State, Official Journal 1993 L 279, p. 1.

99 Council Regulation (EEC) 2137/85 on the European Economic Interest Grouping, Official Journal 1985 L 199, p. 1.

100 Council Regulation (EEC) 40/94 on the Community Trademark, Official Journal 1994 L 11, p. 1.

D. International Unification of Private International Law

I. General

Although the unification of private international law at the regional level has gained importance due to the enlarged powers of the EU after the ToA, international unification finds its roots in the decades of work by many international organizations, such as the Hague Conference on Private International Law and its Conventions. Various other organizations also have dealt with private international law harmonization within substantive law using different instruments of the developing world.

This section deals with a number of issues regarding harmonization of private international law at the international level. The first part of this section will focus on international organizations that are engaged in private international law harmonization. Since it is not possible to include all the international organizations dealing with harmonization of private international law at the international level, we will limit our analysis to four important organizations: the Hague Conference on Private International Law, UNIDROIT, UNCITRAL and IMO, which have produced significant measures for harmonization. The second part of this section will deal with the measures and instruments used for harmonization at the international level – particularly, conventions as binding instruments and model laws, guidelines and general principles as non-binding instruments.

II. Intergovernmental Organizations Engaged in Private International Law

1. The Hague Conference on Private International Law

The Hague Conference on Private International Law is an intergovernmental organization that traces its origins to an 1893 conference convened by the Government of Netherlands. Its purpose is 'to work for the progressive unification of the rules of private international law.'[101] The organization is active in the development of conventions in various areas of private law; it has developed 41 conventions to date, ranging from traditional topics of private international law including international judicial and administrative cooperation; conflict of laws for contracts, torts, maintenance obligations, recognition of companies, jurisdiction and enforcement of foreign judgments, to

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[101] Statute, Article 1. For a comprehensive history of the Conference see K.H. Nadelmann, *The United States Join the Hague Conference on Private International Law*, in Kurt H. Nadelmann (eds.), *Conflict of Laws: International and Interstate*, The Hague 1972, at pp. 99-139; P.H. Pfund, *Contributing to Progressive Development of Private International Law*, at pp. 24-30. On the multilateral unification of private international law see D. McClean, *Perspectives on Private International Law*, at pp. 174-177.

contemporary issues such as inter-country adoption and child abduction.[102] The Hague Conference now enjoys a membership in excess of sixty-one States and its conventions are open to accession by other States, which have not yet become members of the Conference. It is also noteworthy that the countries that have ratified the highest number of Hague Conventions are mostly the European nations that composed the original nucleus of the membership of the organization.[103]

Current work of the Hague Conference includes a future convention on international jurisdiction and foreign judgments in civil and commercial matters; attempts on indirectly held securities, electronic commerce; general affairs and policy of the Conference; revision of the 1980 Hague Child Abduction Convention, the 1993 Hague Inter-country Adoption Convention, and the 1956/58 and 1973 Hague Maintenance Obligations Conventions.[104] Later in this section, I will deal in more detail with the Draft Hague Convention on International Jurisdiction and Foreign Judgments, and the competition between its provisions and the Brussels I Regulation.

2. The International Institute for the Unification of Private Law (UNIDROIT)

Although the International Institute for the Unification of Private Law (UNIDROIT) was established in 1926 as an organ of the League of Nations, it is now an independent intergovernmental organization with the aim of examining ways of harmonizing and coordinating the private law of States and of groups of States, and preparing for the adoption by States of uniform rules of private law.[105] The organization mainly works on the

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102 Hague Conference on Private International law, available at http://www.jus.uio.no/lm/hague.conference/doc.html; D.A.Levy, *Private International Law*, available at http://www.asil.org/resource/pil1.htm#International Organizations, 2002.

103 I. Fletcher, *Conflict of Laws and European Community With Special Reference To The Community Conventions On Private International Law*, Amsterdam, Oxford 1982, p. 6. The Hague Conference keeps contacts with different bodies such as the United Nations, particularly its Commission on International Trade Law (UNIDROIT), UNICEF and the High Commissioner for Refugees (UNHCR); the Council of Europe, the European Union, the Organization of American States, the Commonwealth Secretariat, the Asian-African Legal Consultative Committee, the International Institute for the Unification of Private Law and other international organizations with the aim of promoting international cooperation and ensuring coordination of work undertaken. Additionally, the representatives of certain non-governmental organizations, such as the International Chamber of Commerce, the International Bar Association, International Social Service and the International Union of Latin Notaries also follow the work of the Conference. For such relations see http://www.jus.uio.no/lm/hague.conference/doc.html.

104 Hague Conference on Private International Law, http://www.hcch.net/e/workprog/index.html

105 The International Institute for the Unification of Private Law, http://www.jus.uio.no/lm/unidroit/doc.html. UNIDROIT has 58 member States: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Holy

substantive aspects of private law unification. Private international law harmonization, dealing with conflict of law rules, happens incidentally.[106]

The uniform rules drawn up by UNIDROIT have traditionally taken the form of international conventions, which come into force following the completion of all the formal requirements of the national legal laws of the participating States. However, over the years, where a binding instrument is not felt to be essential, alternative forms of unification have been developed by the organization, including model laws, general principles and legal guides.

One of the best-known accomplishments of UNIDROIT in recent years is the creation of the UNIDROIT Principles of International Commercial Contracts, which represent general rules of commercial contract law derived from various legal systems. 'The Principles can also be used by private parties as the law governing their contract, as a supplementary source to be used in conjunction with the CISG, and as a codification of *lex mercatoria* for arbitration, *inter alia.* '[107] The Principles have been the subject of a great deal of comment since they were released in 1994.[108]

3. The United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL was established in 1966 as an organ of the United Nations General Assembly, with the aim of unification and harmonization of international trade law. The organization deals with harmonization of both jurisdiction and choice of law rules through conventions concerning international trade. The organization has issued conventions on international commercial arbitration and conciliation,[109] international sale

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See, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia (former Federal Socialist Republic of).

106 The International Institute for the Unification of Private Law, http://www.unidroit.org/english/presentation/pres.htm.

107 D.A.Levy, *Private International Law*, available at http://www.asil.org/resource/pil1.htm, International Organizations, 2002.

108 See, e.g., the special issue of the European Journal of Law Reform, Vol. I, No. 3.

109 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the 'New York Convention.'

of goods and related transactions,[110] international payments[111] and international transport of goods.[112]

In addition to traditional conventions, UNCITRAL performs harmonization of private international law for international trade law through the creation of model laws, such as the UNCITRAL Model Law on the Procurement of Goods, Construction and Services of 1994 or the UNCITRAL Model Law on electronic signatures, as well as legal guides to inform domestic legislative drafters, such as the UNCITRAL Legal Guide on drawing up international contracts for the construction of industrial work. Some other UNCITRAL efforts are directed at private commercial parties, such as the well-known UNCITRAL Arbitration Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings.[113]

4. The International Maritime Organization (IMO)

IMO, one of the smallest UN agencies, was established in 1948 at an international conference under the name of the Inter-Governmental Maritime Consultative Organization (IMCO) aiming for 'safer shipping and cleaner oceans.' The IMO Convention entered into force in 1958 and the organization started to work the following year.

IMO mainly deals with maritime safety and the prevention of marine pollution. However, it has also developed conventions on liability and compensation for damage, such as pollution caused by ships.[114] The Torrey Canyon disaster of 1967, which led to an intensification of IMO's technical work in preventing pollution, was the catalyst for work on liability and compensation.[115] At that time, an ad hoc Legal Committee was established within the organization to deal with the world's first major disaster and the Committee soon became a permanent subsidiary organ of the IMO Council, meeting twice a year to deal with any legal issues raised at IMO.[116]

The IMO, while dealing with various issues within its area of interest, has also attempted a certain harmonization of private international law. Within the IMO instruments, some related areas of private international law have been dealt with. Some very recent examples will be given later.

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110 UN Convention on Contracts for the International Sale of Goods of 1980 and Convention on the Limitation Period in the International Sale of Goods of 1974.

111 UN Convention on International Bills of Exchange and International Promissory Notes (New York, 1988), UN Convention on Independent Guarantees and Stand-by Letters of Credit of 1995, UN Convention on the Assignment of Receivables in International Trade of 2001.

112 UN Convention on the Carriage of Goods by Sea of 1978 and the UN Convention on the Liability of Operators of Transport Terminals in International Trade of 1991.

113 D.A.Levy, *Private International Law* available at http://www.asil.org/resource/pil1.htm.

114 For the text of the conventions mentioned here see http://www.imo.org/home.asp.

115 Available at http://www.imo.org/home.asp.

116 Ibid.

III. Forms of Harmonization of Private International Law Rules at the International Level

As mentioned above and elsewhere, international harmonization of private international law has been done through different instruments. The traditional way has been via the drafting of international conventions, which become binding on the States that ratify them. In addition to or instead of conventions, some international organizations have chosen various non-binding methods because of their flexibility and convenience in light of ongoing developments in our changing world.

1. Binding Instruments: International Conventions

Efforts towards the international unification of private international law have usually taken the form of international conventions.[117] By signing an international convention, the contracting States undertake an international obligation to implement and respect the agreed principles of the convention by all necessary means.

International conventions may be distinguished based on different aspects. The first separation can be made depending on the formation of the convention.[118] While some of them are self-executing and therefore enter into force as soon as they are ratified by the required number of Member States, some others need to be incorporated into the internal legal system of the contracting States via additional legislative and/or other measures. A convention may be an open convention or it may be restricted to the relations between certain States as it is the case for the Hague Convention on Private International Law. Under different conditions, reservations may or may not be allowed.

Another separation may be made according to the rules governed by the conventions. Other than those that unify substantive law,[119] international conventions on private international law can be on procedure,[120] choice of law or a combination of

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[117] For Conventions as important instruments of harmonization of private international law see G. Parra-Aranguren, *General Course of Private International Law*, at p. 50; M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 The American Journal of Comparative Law 1992, at p. 619.

[118] R..H. Graveson, *The International Unification of Law*, 16 The American Journal of Comperative Law 1968, at p. 8; R. David, *The Methods of Unification*, 16 The American Journal of Comparative Law 1968, at p. 22.

[119] An example for the conventions' unifying substantive law can be the 1980 United Nations Convention on Contracts for the International Sale of Good, known as the CISG. This convention has been accepted as one of the most successful conventions in this field.

[120] The procedural international conventions deal with different aspects of international procedural law. For instance, while the 1975 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, and the 1979 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters set out internationally agreed procedures 'for the service of process upon a defendant located in another party country, and for the making of requests for the taking or

both.[121] Two very important points concerning harmonization through conventions are: firstly, conventions are very much questioned since they become stumbling-blocks for new developments. This is not only caused by the slowness of the ratification or modification procedures of conventions, but also by the difficulty to obtain agreement on the new rules by all the members of an organization. Secondly and more importantly, it is very difficult to obtain not only unification in law but also in practice. However, uniform application requires uniform interpretation of the conventions. It has been emphasized by many authors that even if uniformity is achieved following the adoption of a single text, uniform application is by no means guaranteed, since in practice many countries interpret the same words differently. Unification of application is considered a very important task since all the efforts of the contracting States are useless if each State interprets the rules according to different criteria.[122] Many proposals have been made for uniform interpretation of international conventions, ranging from the establishment of an international court to annual conferences of experts. Whether any of the proposals are carried out or not, they underline the necessity for uniformity of application in addition to uniformity of text.

2. Non-Binding Instruments: Rules, Model Laws, Legal Guides, General Principles

Apart from the efforts of unification at the international level through international conventions, there are also non-binding ways used by different international organizations. These measures take the form of rules or principles, model laws and legal guides. It is usually argued that harmonization through non-binding instruments is more feasible than international conventions in terms of their negotiation and preparation. Besides, the

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production of evidence when witnesses or documentary evidence are located in a different country than the one in which the proceedings are taking place or are to take place,' the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents deals with the replacement of the legalization of documents by the diplomatic or consular officials by a certificate issued by designated competent officials in the country of the document's origin. Furthermore, the 1973 UNIDROIT Convention Providing a Uniform Law on the Form of an International Will deals with certain requirements for the execution of international wills.

121 The 1980 Hague Convention on the Civil Aspects of International Child Abduction is an example for such Conventions, which combine procedural issues with substantive ones. Another example for this kind is the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption that governs the movement of children from one country to another in connection with their adoption.

122 For the importance of interpretation of the Conventions, see G. Parra-Aranguren, *General Course of Private International Law*, at p. 54; P.H. Pfund, *Contributing to Progressive Development of Private International Law*, at p. 49; R. H. Graveson, *The International Unification of Law*, at p. 12.

non-binding instruments facilitate international trade and are appropriate for the needs of the international marketplace.[123]

Non-binding rules or principles are drafted to establish a balanced set of rules designed for use throughout the world, irrespective of the legal traditions and economic and political conditions of the countries in which they are to be applied. The principles are composed of articles divided into chapters depending on different aspects of the issue concerned. Each article is usually accompanied by a commentary intended to form an integral part of the rule, also explaining the reasons for the rule and different ways in which it may operate in practice.[124] If necessary, the commentary also contains illustrations with bibliographical references. The UNIDROIT Principles of International Commercial Contracts of 1994[125] and the UNCITRAL Arbitration Rules of 1998[126] are the best known among such rules. While the UNIDROIT Principles set forth general rules for international commercial contracts, UNCITRAL Arbitration Rules deal with the establishment and operation of arbitral tribunals when the parties of a dispute decide to submit their differences to arbitration.[127] Both rules are applied when the parties agree that their contract be governed by them.

The UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works and the UNCITRAL Legal Guide on International Countertrade Transactions are examples of legal guides. These guides are prepared to help the parties of the transaction or the contract on issues common to the same types of documents. The main features of the negotiation of the contracts, as well as the various types of provisions, are included in the legal guides. Furthermore, the legal guides direct the use of professionals' application of the laws in countries in which the languages are different from those in which the laws are written.

Model laws are produced to show how countries may modernize their existing laws or enact new laws that would have compatibility with the laws of other countries, dealing with the same international transaction.[128] Under this system, States incorporate model laws prepared by the international organizations into their legal systems. Model laws are non-binding rules; however they still establish a superior legal standard in the shape of supranationally drafted uniform rules. They differ from the conventions on an important point, namely that the States are allowed to make modifications deemed necessary to attend to their peculiarities and particular circumstances without violating any international obligation.[129] UNCITRAL has been active in the enactment of model laws on various aspects of international transactions or relationships. The UNCITRAL Model Law on International Credit Transfers of 1992, the UNCITRAL Model Law on Procure-

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[123] P.H. Pfund, *Contributing to Progressive Development of Private International Law*, at p. 50.

[124] M.J. Bonell, *Unification of Law by Non- Legislative Means*, at p. 620.

[125] Available at http://www.unidroit.org/english/principles/pr-main.htm.

[126] UNCITRAL Arbitration Rules, General Assembly Resolution, 31/98, available at http://www.uncitral.org/english/texts/arbitration/arb-rules.htm.

[127] P.H. Pfund, *Contributing to Progressive Development of Private International Law*, at p. 46.

[128] Ibid., at p. 47.

[129] G. Parra-Aranguren, *General Course of Private International Law*, at p. 50; R.H. Graveson, *The International Unification of Law*, at p. 9.

ment of Goods, Construction and Services of 1994, and the UNCITRAL Model Law on International Commercial Arbitration are some examples. Although the model laws are more flexible and convenient for the national legal systems, it is also true that the more the States deviate from the model laws according to their particular needs, the less uniformity will be achieved.

Last but not least, general principles may be used by parties to govern their contracts, to fill gaps in applicable laws or to be referred to by arbitrators in the settlement of disputes. They can also be used as sources or means of inspiration to other international organizations in the preparation of new instruments or to national legislators in the modernization of the domestic law to make it compatible with the current requirements of private international law. General principles may also be used as tools to interpret or supplement existing international law texts.

E. Conflicts in Harmonization of Private International Law: Comparison Between the Brussels I Regulation and the International Conventions that Include Provisions on Jurisdiction, Enforcement and Recognition of Judgments

As has been demonstrated, work on harmonization of private international law is presently ongoing in many regional and international organizations. These organizations deal with different aspects of harmonization of private international law and adopt different measures for this purpose. The various organizations and the variety of work can lead to duplication of efforts and contradictory results.[130] Some recent measures of harmonization at the international and regional levels reflect this fact.

This section provides examples of such problems. Three very important international conventions that contradict their European counterparts will be analyzed. The Draft Hague Convention on Jurisdiction, Enforcement and Recognition of Foreign Judgments, the Bunkers Convention of 2001, and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) will be compared with recent European Community legislation, namely the Brussels I Regulation. The section will discuss the main problems and deficiencies arising from these contradictions and duplications.

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130 P. Hay, *The International Unification of Law: A Symposium*, 16 The American Journal of Comparative Law 1968, at p. 1.

I. The Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters v. the Brussels I Regulation

As mentioned above, since 1992, and in a more concrete setting since 1997, the Hague Conference has been working on an international convention on jurisdiction to improve the international movement of judgments in civil and commercial matters, as well as their enforcement and recognition. While the preparations and negotiations of the convention were ongoing, the EU adopted a Community measure on these issues in the year 2000. This development raises important questions both at the European and the international level on the relationship between the two organizations and on the compatibility of their instruments.

It is not considered likely that the Hague Conference will succeed in convincing its EU members to adopt a different instrument on a topic already covered by a new Community instrument.[131] Therefore, there seems to be a realistic threat from the supranational European side that the preparation and adoption of a global instrument will be frustrated because of the differing national or regional interests.[132] Likewise, the position of the EU Member States in the Hague Conference has attracted attention. On the one hand, the EU has expressed its viewpoints through Commission recommendations as well as in organized hearings.[133] On the other hand, many different solutions have been proposed by Member State representatives at the Hague Conference.[134] The possible conflicts between the two European levels have repercussions not only for the two organizations, but also for the governments, the academic world, the legal profession and the judiciary.

The current attempt at the international level inevitably deserves a comparison with its counterpart at the European level, namely the Brussels I Regulation.

II. Comparison of the Two Documents in Terms of Their Scope and Applicability

The Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is seen as potentially the most important convention on the rules of private international law ever undertaken by the Hague Conference.[135] Interestingly, the old Brussels Convention, which has been updated by the Brussels I Regulation, has been used as a model for the present Draft Convention.[136]

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131 M. De Boer, *Prospects for European Conflicts Law*, at p. 203.

132 Ibid.

133 For the Commission recommendation on the preparations of the Hague Convention on International Jurisdiction and for the hearing on the same issue see http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/compterendu_en.htm.

134 T.C. Kotuby, *External Competence of the European Community*, at p. 9.

135 J. Sedlmeier, *International and European Procedural Law*, at p. 44; T. C. Kotuby, *External Competence of the European Community*, at p. 9 and p. 21.

136 For an overview of the Brussels Regulation see Section C of the article.

The system established by the Draft Hague Convention intends to encourage transactions at the global level through harmonized rules of jurisdiction and through uniform recognition and enforcement procedures.[137] More specifically, it aims at increasing legal foreseeability and reliability of judgments at the international level for the benefit of all economic operators and private individuals. Although the implementation of the draft of 30 October 1999 was initially envisaged for October 2000, because of conflicting opinions of the member States, the 19th Diplomatic Session was first rescheduled to 6-22 June 2001 and then to 2002.[138]

On the other hand, the Brussels I Regulation, as mentioned above in Section C, is a Community instrument that incorporates the 1968 Brussels Convention into Community legislation. Thus, it reduces the national differences on 'all main civil and commercial matters apart from certain well-defined matters'[139] that affect the operation of the Community Treaty. Only minor issues are left to the national legislations of the Member States since the Regulation introduces complete harmonization of the fields that are covered.

As far as the substantive scope of the two measures are concerned, both of them are applied in civil and commercial matters whatever the nature of the court or tribunal might be, excluding revenue, customs or administrative matters.[140] However, the Draft Convention is slightly less limited than the Brussels I Regulation since the latter does not cover maintenance obligations.[141] In parallel with the Brussels I Regulation, the Draft Convention is based on the principle that claims are raised before the courts of the State where the defendant is domiciled, unless another court has exclusive jurisdiction. The Draft Convention, like its European counterpart, provides for the rule that parties to an agreement may choose a court which has jurisdiction over any disputes arising in connection with the particular relationship.[142]

The two instruments provide parallel provisions on jurisdiction with regard to special types of contracts, such as consumer and employment contracts, as well as

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137 T. C. Kotuby, *External Competence of the European Community*, at p. 21.

138 The meeting in 2002 took place in February. However, very important questions still have not been finalized. For the subjects discussed in this meeting see Hague Conference on Private International Law: 'Some reflections on the present state of negotiations on the judgments project in the context of the future work program of the conference,' Prel. Doc. No 16, 2002.

139 Brussels Regulation, preamble para. 7. The Regulation does not affect rules governing jurisdiction and recognition of judgments contained in specific Community instruments and the rules contained in conventions relating to specific matters to which Member States are party.

140 Art. 1 of the Convention and the Regulation. P. Nygh, *The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, in Patrick J. Borchers and Joachim Zekoll (eds.), *International Conflict of Laws for the Third Millennium- Essays in Honor of Friedrich K. Juenger*, New York 2000, at p. 270.

141 Art. 5(2) of the Regulation.

142 Art. 3 of the Convention. Also see P. Nygh, *The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, at p. 272.

claims arising from torts or delicts and trusts.[143] However, the Brussels I Regulation goes one step further and includes jurisdiction for insurance contracts, which is not covered by the Hague Draft Convention.

The Draft Convention provides for a 'white list' under Articles 3-16, for a number of competent forums where claims concerning civil and commercial matters may be raised, and a 'black list' of excluded areas of jurisdiction under Article 18.[144] The Draft Convention also includes a 'grey zone' where the national courts can apply their own rules on jurisdiction. Although the first two 'zones' are also included in the Regulation, the 'grey zone' has not been mentioned.

Regarding recognition and enforcement, the Draft Convention mentions that decisions rendered by foreign courts whose competence is based on a rule contained on the 'white list' must be recognized by the authorities in a contracting State, unless the decisions have serious defects, which are enumerated in Article 28.[145] Decisions where jurisdiction was founded on a rule contained on the 'black list' may not be recognized and enforced in another contracting State, whereas contracting States are free to recognize and enforce decisions from the 'grey zone.'[146] In parallel, the Draft Convention and the Regulation do not require a special procedure for the recognition or the enforcement of a judgment given in a Member State; thus 'a judgment given in a Member State shall be recognized in the other Member States' and 'a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on application of any interested party, it has been declared enforceable there.[147]

An important difference can be found with regard to judicial oversight. While the Draft Convention does not benefit from uniform interpretation by a common court, such uniform interpretation is provided via the jurisprudence of the ECJ for the Regulation. Although the Regulation contains provisions encouraging uniform application by all Member State courts, a duty to make references to the ECJ is given only to the highest national courts. In the context of the Draft Convention, the jurisprudence of the European Court of Justice on parallel provisions may be found useful but it may also prove irrelevant, even where the provisions are identical.

III. Possible Conflicts Between the Two Initiatives

Although the two instruments are very similar in scope and applicability, conflicts may occur because they are not identical and still cover the same subject. Although these documents are prepared at different levels by different organizations, problems seem unavoidable because the EU Member States are also the core members of the Hague

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[143] P. Nygh, *The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* at pp. 273-279.

[144] A. Kur, *International Hague Convention on Jurisdiction and Foreign Judgments: A way forward for intellectual property*, European Intellectual Property Review, Vol. 24, No. 4, 2002, p. 1.

[145] A. Kur, *International Hague Convention on Jurisdiction*, at p. 1.

[146] Ibid., at p. 2.

[147] Articles 32 and 38 of the Brussels I Regulation respectively.

Conference on Private International Law. Furthermore, similar problems might occur in the future because of the ToA's effects on the Community's ability to harmonize private international law. Such deficiencies will be summarized under the following headings: external competence of the EU Member States, the relationship between the European and the global instruments and the position of the EU Member States in the Hague Conference.

1. The Member States' External Competence

As mentioned above and elsewhere, the autonomous and complete system established by the Brussels Convention is transformed to a supreme body of conflict of laws, independent of the national legislations. With regard to issues of jurisdiction, recognition and enforcement of judgments, the Brussels I Regulation of 2001 has transformed the Convention into a directly applicable Community instrument.[148] As a result of this development, the ability of the Member States to enter into international agreements with third countries or organizations regarding issues of jurisdiction, recognition and enforcement of judgments has become debatable.

In reality, the answer to the question depends on a number of different issues. First of all, it depends on the interpretation of the Community regulation, 'as regards the scope in which the Community replaces the Member States in the negotiations of the international instrument and the extent to which the replacement occurs.'[149] As mentioned previously, the scope of the Regulation is very large, including all civil and commercial matters. It is also certain that 'matters excluded from the scope of the Regulation will be as limited as possible.' By including this language, the Member States have openly declared that harmonization of the area of jurisdiction, recognition and enforcement of foreign judgments by way of the Brussels I Regulation should be complete. Furthermore, as we have seen previously in our comparison of the scope of the Draft Hague Convention and the Brussels I Regulation, these instruments are mostly identical concerning the issues they cover, even if the latter includes some issues, such as jurisdiction over insurance contracts, which do not find their comparison in the former. This conclusion may raise the presumption that an exclusive external competence of the EU was created together with the new Regulation.

Moreover, the possibility of the Member States to enter into negotiations regarding international agreements with third States is directly addressed by the Brussels I Regulation. The issue is treated in Chapter VII of the new Regulation in a rather different way than it used to be in the Brussels Convention. While the latter precluded in Article 57 an effect on 'any conventions to which the Contracting States *are or will be parties* [emphasis added] and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgements', the Regulation has limited the conventions mentioned under this Article. The new Article 71 of the Regulation pre-

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[148] T.C. Kotuby, *External Competence of the European Community*, at p. 9.

[149] T.C. Kotuby, *External Competence of the European Community*, at p. 9; J. Sedlmeier, *International and European Procedural Law*, at p. 38.

cludes an effect of the Regulation on 'conventions to which the Member States *are parties* [emphasis added] and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.'

Clearly, the wording of the Regulation, and therefore, the interpretation of the relationship of the instrument to other instruments, has changed. Hence, the Regulation does allow Member States to apply other conventions to which they are and have been parties. It is important to make a distinction at this point. Unlike the Brussels Convention, the Regulation, by only preventing an effect of the Regulation on conventions to which the Member States *are* parties, no longer allows the Member States to enter into *new* conventions covering the issues of jurisdiction, recognition and enforcement. In other words, Article 71 of the Regulation precludes the ability of the Member States to enter into future international agreements with third States. Otherwise, it would certainly have included the same phrase as the Brussels Convention.

The issue of EU Member State competence has several implications. First of all, the Draft Hague Convention is not finalised although it has been in preparation for the last ten years. When the Draft Hague Convention started to be debated at the Conference, there was obviously no Community competence regarding issues of private international law. The system was that of the Brussels Convention, which allowed the coexistence of both existing and future international agreements covering the same issues.

Secondly, another very important point about Articles 57 and 71 is that both the Brussels Convention and the Brussels I Regulation contain a provision about 'conventions...in relation to particular matters (that) govern jurisdiction or the recognition or enforcement of judgments.' From the wording of both articles it is obvious that the other conventions should be on 'particular' issues related to jurisdiction or recognition or enforcement of judgments. However, the Draft Hague Convention is not this kind of a convention; on the contrary, it deals generally with issues of jurisdiction, recognition and enforcement of judgments, without contributing to any one particular issue.

2. The Relationship Between the European and the Global Instruments

The series of problems mentioned above, particularly those of Article 71 of the Brussels Regulation, have led to interesting discussions at the Hague Conference.[150] The European Union Council's Legal Service has ventilated the idea of taking action at the Conference to preserve the Member States' competence to conclude the Hague Convention. The Legal Service suggested that 'if a disconnection clause was inserted into the Hague

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150 It is the same problem in Rome II, which governs the applicable law on non-contractual obligations and the Hague Conventions as regards traffic accidents and product liability with our concern about the draft Hague Convention and the Brussels regulation. This problem will need even further emphasis, since its importance will increase to a certain extent when the EU adopts various instruments based on the Article 65 EC. Thus, after the ToA, since the Community is empowered to adopt Community instruments that are directly applicable, any contradiction between a European instrument and a global one will open the same debate.

Convention which would safeguard the priority of Community law under all circumstances and would result in a situation where the rules of the convention would not affect in any way the Community measure or its possible future evolution, the Member States would remain competent to conclude the convention.' In such a case, the application of the Convention would be excluded from the territorial units of the Community. Thus, the Community would reserve its autonomous instruments regarding cases involving intra-Community parties. However, it would apply the Convention in cases that involve disputes outside of its borders. In this regard, three different proposals for a disconnection clause were drafted to be included in the interim text that was issued by the Permanent Bureau after the diplomatic conference of 6-20 June 2001.[151]

The first proposal[152] is based on the principle that the Convention does not affect the other international instruments, unless the States parties to these instruments declare an intention to the contrary. Nevertheless, the Convention will take priority over the other international instruments where the latter provide for exceptional forums not authorized by Article 18. The concept of international instruments in the proposal would of course include instruments that are not international conventions in the true sense, namely uniform laws adopted for the purposes of regional integration, or instruments adopted within a community of States.

The second proposal[153] governs relations with the European instruments in detail, a term which includes the Brussels Convention, the European Community Brussels I Regulation and the Lugano Convention. An EU Member State (called 'European instrument State' in the proposal) would have to give priority to that instrument, and apply it in the applicable field. In the cases when the defendant is not domiciled in a European instrument State, this priority for the European instruments would be given only to the provisions on exclusive jurisdiction, prorogation of jurisdiction, *lis pendens* and related actions, and protective jurisdiction. In all other instances, Articles 3, 5 to 11, 14 to 16 and 18 of the Hague Convention would apply. Finally, even when the defendant is domiciled in a European instrument State, the courts of that State would in any event have to apply: a) Article 4 of the Convention whenever the court chosen is a third State; b) Article 12 of the Convention if the court with exclusive jurisdiction under that provision is situated in a third State; and c) Articles 21 and 22 of the Convention if the court in whose favour the proceedings are stayed or jurisdiction is declined is situated in a third State.

The third proposal provides for relationships between the Convention and other international instruments regarding the recognition and enforcement of judgments. It includes the principle that judgments rendered by courts in a contracting State to the Convention which are based on jurisdiction granted under a different international Convention are to be recognized in the other Contracting States to the Convention which are

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151 Hague Conference on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, at http://www.hcch.net/e/workprog/jdgm.html.

152 Ibid.

153 In the annex to regulate this problem, two provisions are needed. One of these, the text of which is not yet available but will perhaps be drafted in Conventional terms, would govern all relations with the other international Conventions, in a general sense.

also parties to the other instrument. This rule would not apply to States which make a reservation against the provision or against being governed by the provision as to certain designated other conventions.

It is important to mention that any decisions on the different proposals are going to be made by the Diplomatic Conference. The result, therefore, remains to be seen. At this time, different opinions exist on the issues mentioned. It is certainly important to keep the system established by the EU Member States unaffected, as some of the scholars argue.[154] In this regard, directly applicable European instruments would need attention. However, to accept the idea that 'all future European conventions and regulations on jurisdiction and enforcement should therefore prevail whenever they are directly applicable'[155] would endanger the harmonization at the international level and universal unification would be hampered by the EU. Thus, a balance should be found by the Member States of the EU and the Hague Conference, including the question of interpretation by the ECJ.

3. Position of the EU Member States in the Hague Conference

The position of the EU Member States during the negotiations in the Hague Conference is also controversial.[156] Until the ToA, despite all diversity, the EU Member States were the hardcore promotors of the Hague Conferences. They were very active in the preparations and the negotiations of all international instruments developed in The Hague. However, after the ToA and the transfer of judicial cooperation in civil matters from the third pillar to the Community pillar, the EU itself has become a new treaty making power, which has raised doubts about the quality of future Hague legislation.[157] A question that has arisen as a consequence is whether the EU itself can become a member of the Hague Conference. It is obvious that this question would have to be answered negatively, since the negotiations of the Hague Conference are carried out by the contracting States on the basis of national sovereignty.[158] The acceptance of Community involvement as a single legal entity would require amendments in the Statute of the Hague Conference, which so far only allows States to negotiate conventions. Such an amendment would not be a simple matter, since it would need acceptance by all members of the Hague Convention.

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154 A. Kur, *International Hague Convention on Jurisdiction*, at p. 9.

155 Ibid.

156 J.J. Forner, *Special Jurisdiction in Commercial Contracts*, at p. 2.

157 K. Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, at p. 74.

158 According to Article 2 of the Statute of the Hague Conference, 'Members of the Hague Conference on Private International Law are the States which have already participated in one or more Sessions of the Conference and which accept the present Charter.'

IV. The IMO Conventions v. the Brussels I Regulation

A second potential conflict regarding the jurisdiction, recognition and enforcement of judgments between instruments at different levels concerns two international conventions of the International Maritime Organization and the Brussels I Regulation. Since adoption of the Brussels I Regulation, the Community has acquired an exclusive competence in the area of jurisdiction, recognition and enforcement. Therefore, certain IMO conventions providing for rules on similar issues have attracted attention. More importantly, the European Commission has made attempts and prepared two proposals for Council decisions to address the potential conflicts by authorizing the Member States to sign and ratify these IMO conventions.

Under the following sub-headings, two international conventions, namely the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 (hereinafter the 'HNS Convention') and the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001 (hereinafter the 'Bunkers Convention') will be analyzed. First of all, a summary of the scope and application of the Conventions will be given and then the potential conflicts between the instruments will be mentioned. Moreover, the abovementioned Commission proposal and its potential effects on the Conventions and third States will be examined.

1. Scope and Applicability of the Conventions

a. The HNS Convention

The HNS Convention was adopted under the auspices of the IMO in 1996.[159] The regime established by the HNS Convention is largely modelled on the existing regime for oil pollution from tankers set up under the International Convention on Civil Liability for Oil Pollution Damage of 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992, which covers pollution damage caused by spills of persistent oil from tankers. The HNS Convention establishes a liability and compensation regime for pollution damage caused by a great variety of substances, including gases and chemicals. This Convention covers any damage caused by HNS in the territory or territorial sea of a State Party to the Convention. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a State Party and damage (other than pollution damage) caused by HNS carried on board ships registered in, or entitled to fly the flag of a State Party outside the territory or territorial sea of any State. Costs of preventive measures, i.e. measures to prevent or minimize damage, are also covered, wherever taken.[160]

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159 For an overview of the convention see: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D5025/HNSOverview.pdf.

160 IMO, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D5025/HNSOverview.pdf.

b. The Bunkers Convention

The International Convention on Civil Liability for Bunker Oil Pollution Damage, commonly known as the 'Bunkers Convention' was adopted by a Diplomatic Conference at the IMO in 2001. The Bunkers Convention establishes a regime for compensation for persons suffering from oil spills when carried as fuel in a ship's bunkers and introduces strict liability for damage and loss arising from actual and threatened pollution from a ship's bunker oils. The Convention is applicable to pollution damage caused in the territory, including the territorial sea of a State Party, and in the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured, and to preventive measures, wherever taken, to prevent or minimize such damage.[161]

2. Comparison of the Conventions With the Regulation in Terms of Provisions on Jurisdiction, Recognition and Enforcement of Judgments

So far, there are no particular Community rules regulating liability for pollution damage caused by the HNS substances or civil liability of marine pollution incidents. Both areas are regulated by international conventions of the IMO and by national law.[162]

However, since both the HNS and the Bunker Conventions provide for rules on jurisdiction, recognition and enforcement of judgments relating to the application of the Conventions, they may affect the Brussels I Regulation in areas where the Community has exclusive competence. The main problems between these two Conventions and the Brussels I Regulation concern different rules regarding jurisdiction, recognition and enforcement of judgments.

Although the Regulation establishes multiple grounds of jurisdiction, both of the Conventions provide for exclusive jurisdiction. Article 38 of the HNS Convention provides for the exclusive jurisdiction of the State Party where pollution damage has occurred, as a main rule.[163] Article 38 (5) of the Convention provides that the courts of the State, where the owner or the insurer or any other person has constituted a fund in

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161 Article 2 of the Convention.

162 European Commission, *Proposal for a Council Decision authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage*, COM (2001) 675 final, p. 2.

163 Article 38(1) of the Convention provides that 'Where an incident has caused damage in the territory, including the territorial sea or in an area referred to in article 3(b), of one or more States Parties, or preventive measures have been taken to prevent or minimize damage in such territory including the territorial sea or in such area, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of any such States Parties.'

order to benefit from the right to limit the liability, shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund. A similar restrictive jurisdiction is provided under Article 39 concerning actions involving the HNS Fund.

As far as jurisdiction and enforcement of judgments under the HNS Convention provisions are concerned, under Article 40 (1) of the Convention, judgments shall be recognized if they were given by a Court with jurisdiction under Article 38, if they are enforceable in the State of origin and no longer subject to ordinary forms of review, except where the judgment was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present his case. Judgments recognized under the mentioned rule will be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened (Article 40(2)).

The Bunkers Convention includes very similar provisions regarding jurisdiction, recognition and enforcement of judgments. Articles 9 and 10 of the Convention deal with these issues. Unlike the multiple jurisdiction regime provided by the Brussels I Regulation, the Bunkers Convention, like the HNS Convention of 1996, provides for exclusive jurisdiction of the State Party where pollution damage has occurred.[164] According to Article 10 (1), judgments shall be recognized if they were given by a court with jurisdiction and if they are enforceable in the State of origin and no longer subject to ordinary forms of review, except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his or her case. A judgment recognized under Article 10 (1) will be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened (Article 10 (2)).

By contrast, the system of the Brussels I Regulation applies when the defendant is domiciled in one of the Member States bound by the Regulation, while a defendant not domiciled in a Member State may be brought before the courts of each Member State in accordance with its national rules of jurisdiction. Jurisdiction of the courts is based on the domicile of the defendant. As regards tort, *delict* or *quasi delict*, a person domiciled in a Member State may be sued in the Member State where the harmful event occurred or may occur (Article 5(3)). In matters relating to insurance, an insurer domiciled in a Member State may be sued in the courts of the Member State where he is domiciled, or, in the Member State where the plaintiff is domiciled, in the case of actions brought by the policyholder, the insured or the beneficiary; a co-insurer may be sued in the courts of a Member State in which proceedings are brought against the leading insurer (Article 9). As regards liability insurance, the insurer may also be sued in the courts of the place where the harmful event occurred (Article 10). Furthermore, if the law of the court permits it, a case against a liability insurer may be joined in proceedings brought by the injured party against the insured (Article 11).

The Regulation does provide additional conditions for the recognition and enforcement of judgments. A judgment given in a Member State shall be recognized and enforced without any special procedure being required (Article 33 and Article 38).

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164 Article 9 of the Convention.

Moreover, some exceptions have been provided for non-recognition of judgments such as public policy considerations, respect for the rights of defence and the existence of certain irreconcilable judgments.[165]

3. The Solution Found by the European Community Regarding the Conflicts

The abovementioned provisions represent inconsistencies between the instruments in substance, and raise the problem of Community competence, as mentioned under the previous heading. Since the Community declares its exclusive competence in this field, the existence of incompatible rules in new or future international conventions is not accepted by the Community institutions. In the case of the 1996 HNS Convention, it was impossible to adapt it to the Brussels I Regulation, since it was negotiated under the old regime of the Brussels Convention. In the case of the Bunkers Convention, although the Brussels I Regulation had already been adopted, the potential conflict was brought to the attention of the negotiators of the Convention at a very late stage. Thus, in neither of the cases, co-ordinated law-making in the field was really possible in practice. Consequently, the Commission has issued proposals for Council decisions to authorize ratification of the conventions subject to similar reservations.

a. The HNS Convention and the Proposal of the Commission of 2001/0272

In the proposal regarding the HNS Convention, a differentiated approach is accepted for jurisdiction and recognition and enforcement. As far as the recognition and enforcement of judgments given by a court of a Member State in another Member State is concerned, continued application of Chapter III of the Regulation is found essential with the idea of 'ensuring unity in the Community judicial area and the free movement of court rulings within the Community.'[166] Regarding provisions on jurisdiction, since Articles 38 and 39 of the Convention regulate specific jurisdiction regime for disputes arising from pollution incidents involving hazardous and noxious substances and since the Convention was signed several years before the Regulation came into force, an exception to the general application of the Brussels I Regulation is accepted. As far as the provisions of the HNS Convention are concerned, these provisions are accepted as *lex specialis* in relation to the Brussels I Regulation.[167] Hence, it will be accepted that

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[165] European Commission, 'Proposal for a Council Decision authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage,' p.2.

[166] European Commission, *Proposal for a Council Decision authorizing the Member States to ratify in the interest of the European Community the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the 'HNS Convention')*, COM (2001) 674 final, p. 4, also published in the Official Journal, 2002 C 51, p. 370.

[167] Ibid., at p. 5.

Articles 38 and 39 of the Convention will take precedence over the related Articles of the Regulation.

In sum, the proposal openly declares that 'Judgments referred to in Article 40 of the Convention shall, when given by a Court of a Member State of the European Community subject to Community rules in this area, be recognised and enforced in another Member State of the European Community according to such Community rules.'

b. The Bunkers Convention and the Proposal of the Commission of 2001/0271

The Commission has made a very similar proposal for resolution of the inconsistency problem between the Bunkers Convention and the Brussels I Regulation. For the problem of recognition and enforcement of judgments, the proposal is identical. With the same reasons of ensuring unity in the Community judicial area and free movement of court rulings within the Community, it proposes that there be a limit on the application of Article 10 of the Bunkers Convention and that the courts continue to apply Chapter III of the Brussels I Regulation on the issue.

On the problem of jurisdiction, a differentiat approach is suggested. Although the same reasons are given for the proposal as for the one dealing with the HNS Convention, namely the need 'to avoid forum shopping, ensuring equal treatment of claimants, a link between the court involved and the action, as well as considerations relating to the sound administration of justice aimed at avoiding difficulties involved in settling the same issues, involving the same experts, the same witnesses, the same defendants etc. in different courts in several jurisdictions,'[168] the Commission does not want to treat the Bunkers Convention as *lex specialis*. Instead, the Commission proposes that the application of the rules of jurisdiction in the Regulation is limited to cases where the defendant or co-defendant is domiciled within the Community and the pollution damage has occurred in the geographical area of one or more Member States. In such cases the situation is thought to have sufficiently strong Community dimension that there is no sufficient ground to depart from the regime established by Community law for other types of civil and commercial judgments.[169] The proposals also calls upon the Member States to seek a future revision of the Convention on the issues concerned.

With the conditions outlined above, the Commission proposed to the Council to exceptionally authorize the Member States to sign and ratify the HNS and Bunkers Conventions in the interest of the Community, subject to making a reservation whereby Member States undertake to apply Regulation 44/2001 in their mutual relations.[170]

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168 European Commission, *Proposal for a Council Decision authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage*, p. 5.

169 Ibid., at p. 5.

170 Ibid., at p. 4.

4. Effect of the Solutions

The kind of problems related to different legislation on the same issues, and the discussion about the EU Member States' external competence, have been mentioned above in relation to the Draft Hague Convention. Similar problems appear in the context of the HNS and Bunkers Conventions in the maritime sector. In light of our discussions about Article 71 of the Brussels I Regulation, some clarifications need to be made. First of all, neither of the IMO Conventions has come into force. Thus, although preparations have been made for a while, these Conventions are not applicable at the moment. They are considered to be 'future' conventions instead of 'existing' conventions under Article 71. Under Article 71 of the Brussels Regulation, these conventions are included under 'conventions ... which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.' Since the Conventions have not yet been ratified by the EU Member States, the Regulation can have a direct impact on them. By contrast, the Regulation should have no effect on conventions to which the Member States are already parties. The Commission proposals have to be understood in light of Article 71. As far as Community law is concerned, the Commission proposals have positive effects on its unity and uniform application.

However, from a more general and international perspective, such attempts by the Community institutions, in particular, if a Council decision should indeed be adopted to restrict the impact of certain articles of the international conventions, the international unification of the law may be negatively affected. Since the EU Member States form a majority in the IMO, they would act as a single block and might hamper productive discussions at the international level. This would also create differences of application of the international instruments, depending on the parties of the dispute concerned, since the EU Members would always insist on the application of their Community instruments.

The debate on membership of the Community as a whole in the IMO is another aspect. The statute of the IMO, like the Hague Conference on Private International Law, does not foresee membership of international organizations. An amendment of the Statute would be required before the EU or EC could become a member.

At the bottom line, there is not doubt that the above-mentioned proposals of the European Commission serve for one primary goal only, namely the communitarization of private international law. As the Community enters the realm of private international law, disputes between the instruments and organizations of the EU and the international level are expected. While on the one hand, there is the European side arguing for the unity and supranationality of EC Law, on the other hand there are the international legislative instruments with numerous contracting States from all over the world. As mentioned previously about the Draft Hague Convention on private international law, a balance should be found for such conflicts. While doing that, it is important to keep in mind the significance of international unification of private international law while trying to ensure the uniform application of the Community law.

F. Conclusion

Harmonization of private international law is usually considered an alternative to harmonization of substantive law. Since a complete harmonization of substantive law is utopian, harmonization of conflict rules is a very good way of solving legal divergences and bringing decisional harmony. With this aim, many organizations at the regional and international levels have adopted different measures to harmonize conflict rules in various areas.

At the regional level, organizations such as the Council of Europe, the Organization of American States and the EU have been active in such harmonization. The EU has been particularly active in recent years. There have been two different ways of harmonizing the conflict rules within the Community: adherence to international conventions and adoption of domestic legislation in the form of Council regulations that specifically target the harmonization of private international law, and in the form of harmonizing directives that address issues of private international law in specific other contexts.

As pointed out in some detail in the third section, the Community measures and their legal bases have changed depending on the phase in which they were adopted. Significantly, the Community was not exclusively competent in the area under the Treaty of Rome, which concentrated on the internal market. At that time, harmonization of conflict rules was not a real Community policy and the issue was left to negotiations by the Member States. Only some limited aspects of private international law were implemented through international conventions and directives on various issues. The Brussels Convention on Jurisdiction and Foreign Judgments of 1968 and the Rome Convention on the Law Applicable to Civil and Commercial Matters of 1980 were the most important conventions that were adopted by the Community under the founding treaty. The Treaty on European Union increased the role of the Community in the harmonization of private international law but, for the most part, kept the issue 'intergovernmental.' In 1997, the Treaty of Amsterdam introduced a legal basis for Community harmonization and transferred the issue to the Community pillar. As a consequence, the topic became part of the aims of the Community and the Community obtained an exclusive competence. For the first time in EC history, private international law was accepted as one of the aims of the Community. The competence of the EC was provided under Article 65 EC, which provides authority for measures having cross-border implications so far as the proper functioning of the internal market is concerned. Article 65 EC has been accepted as *lex specialis* in enacting private international law measures relating to free movement of persons. The shortcomings of Title IV were noted, namely its new legislative procedures, which require unanimity in the Council at least for a while, the limited role of the European Parliament in the legislative procedures, the limitation placed on national courts to request preliminary ruling from the ECJ, as well as three opt-outs by the UK, Ireland and Denmark.

In response to the reforms introduced by the Treaty of Amsterdam, the Community institutions have become active in the harmonization of conflict rules in recent years. The European Commission and the Council have developed an Action Plan on how to implement the provisions of the ToA with a Scoreboard. Accordingly, in some areas existing measures have already been revised and in others new Community measures have been adopted. The Brussels Convention of 1968 has been transposed into

a Community instrument, namely the Brussels I Regulation. The European Service of Documents Convention was transformed into Council Regulation (EC) 1348/2000. The Brussels II Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters has been converted into Council Regulation (EC) 1347/2000. The Council Regulation (EC) 1346/2000 on Insolvency Proceedings replaced the 1995 Convention on Insolvency Proceedings.

While the EC has been working on private law harmonization, a number of international organizations have also been active in the field, as analyzed in Section D. The Hague Conference on Private International Law, in particular, has developed numerous international conventions on different aspects of conflict legislation. Others, such as UNCITRAL, UNIDROIT and the IMO, have also produced conflict rules, mostly harmonizing rules of private international law on particular issues. The measures at the international level have taken different forms. Besides international conventions, which are binding instruments, there are also legal guides, model laws and guidelines issued with different purposes.

While attempts at different levels continue, since entry into force of the Treaty of Amsterdam of the EC, a number of very important conflicts started break out between the organizations and instruments in this field. As was exemplified under Section E, at least three international conventions are incompatible with a Community regulation issued in an area where the Community now has exclusive competence. The Draft Convention on Jurisdiction and Foreign Judgments raises a potential conflict with the Brussels I Regulation. Despite the fact that the two instruments are very similar in terms of scope and applicability, there are important areas of potential conflict related to the external competence of the EU Member States, the relationship between the two instruments and the position of the EU Member States in the Hague Conference. Since the Convention has not been finalized yet, a resolution of the problem may be possible. In this context, neither the importance of international harmonization nor the attempts of the EC should be undermined. The Member States of the EU have been at the core of the negotiations in the Hague Conference. The introduction of an exclusive competence of the EC in issues of private international law should not hamper the functioning of the Hague Conference, which used to be the preeminent international organization for harmonization of private law for many years. For the time being, and in spite of the provisions of the Brussels I Regulation, the EU as a whole cannot become a member of the Hague Conference, membership being reserved to sovereign States. The issues have to be resolved in other ways.

As for the two international conventions of the IMO, namely the Bunkers and HNS Conventions providing for liability and compensation regimes, there are similar issues of incompatibility with the Brussels I Regulation concerning provisions on jurisdiction, recognition and enforcement of judgments. Since the Brussels I Regulation prevents the Member States from adopting other instruments on similar subjects after its entry into force, the Member States cannot easily ratify the IMO Conventions. In this regard, the European Commission has issued two recommendations for Council decisions to provide for the adoption of the Conventions by the Member States with certain reservations. This solution was chosen because, again, the EU as a whole cannot become a member of the IMO and its interests will have to be represented, at least for the time being, by its Member States.

In conclusion, it can be said that the harmonization of private international law raises important issues with regard to the relationship between the European and the international level. At each level, different organizations will continue to achieve the harmonization of different aspects of the subject. The most important conflicts will occur when similar subjects are covered at different levels. This will not only lead to duplication of work but also create disharmony and uncertainty. It will be a continuous and difficult task to resolve these problems. However, common ground should be found in the mutual interest to preserve the quality and the benefits of the international instruments on private international law and the advantages of European integration. Progress at one level should not be at the expense of progress on the other.