CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

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I. THE EVOLUTION OF EUROPEAN PRIVATE INTERNATIONAL LAW

A. Introduction

The European founding treaties and their subsequent amending instruments have fundamentally changed the European conflict of laws landscape over the past fifty years, with the last ten years in particular witnessing a surge in legislative activity.

The Treaty of Amsterdam not only introduced notable institutional and material modifications to both the Community and the European Union, it radically reformed the position and status of private international law, bringing it within the ambit of first pillar competence. In contrast, the adopted though as yet unratified[1] Lisbon Treaty[2], will treat conflict of laws matters with a comparatively light touch.

This article traces the historical development of European conflict of laws, analysing the issues of material internal and external competence, as well as of geographical scope.

B. Overview of the Development of European Private International Law until the Reform Treaty

European private international law[3] long predates the invention of concepts such as the areas of 'Justice and Home Affairs' and 'Freedom, Security and Justice'. As soon as

[1] The ratification of the Lisbon Treaty has been rejected by referendum in Ireland in June 2008 and is raising difficulties in three more Member States, see PM Kaczyński, S Kurpas & P Ó Broin, 'Ratification of the Lisbon Treaty—Ireland is not the only problem', (2008) European Policy Institute Network Working Paper No 18/2008 <http://shop.ceps.eu/BookDetail.php?item_id=1716>

[2] [2007] OJ C 306, 17 December 2007. Under the Reform Treaty, the EU remains essentially founded on the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), the latter being renamed 'Treaty on the Functioning of the European Union' (TFEU). All references to the '(European) Community' are replaced with references to the Union: Art 1 (3) of the TEU as amended by the Lisbon Treaty. For a general overview of the changes introduced by the Reform Treaty, see P Craig, 'The Treaty of Lisbon, architecture and substance', European Law Review 2008, 137–166.

[3] See in particular K Kreuzer, 'Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts—Wie europäisch soll das Europäische Internationale Privatrecht sein?', *Rabels Zeitschrift* 2006 (70) 1–88. H Gaudemet-Tallon, 'Quel droit international privé pour l'Union

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the founding treaties were concluded, the question arose as to the extent to which the objectives and requirements of the European Communities could impact on the conflict of laws.[4] The fact that the European institutions had no specific competence to enact private international law rules until the Amsterdam Treaty did not prevent the development of European conflict of laws provisions either within directives and regulations (2), or in the form of conventions (1).

1. Intergovernmental Cooperation

a) 1957–1993

Private international law issues did not occupy a substantial place in the Treaties of the European Communities. The only relevant provision in the 1957 Rome Treaty was Article 220[5]. Several agreements were negotiated on this basis (the 1968 Recognition of Companies Convention[6] and the 1995 Insolvency Convention),[7] but only one, the 1968 Brussels Convention,[8] entered into force.

Member States also cooperated in the field of private international law in the context of the so-called European Political Cooperation (EPC) from the 1970s onwards (long before the EPC was formalised by the Single European Act). Consultations between Member States took place with a view to taking common positions in international organizations, which led to the ratification by all Member States of the Luxembourg and Hague Conventions of 1980 (both of which are open to non EU Member States). However, the (only) two intra-European instruments adopted through the EPC (the 1987 European Legalisation Convention[9] and the 1990 European Maintenance Convention)[10] have achieved little.

européenne?' in P Borchers & J Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers, Ardley, 2001) 317–338.

[4] These issues did not receive much doctrinal attention. See, however, R Savatier, 'Le marché commun au regard du DIP', *Revue critique de droit international privé* 1959, 237–258; U Drobnig; 'Conflict of Laws and the European Economic Community' 15 American Journal of Comparative Law [1966–67] 204–229.

[5] Art 220 (renumbered Art 293 by the Treaty of Amsterdam and repealed by the Treaty of Lisbon) provided: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: . . . —the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,— the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'

[6] Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69, 7–18.

[7] Convention on Insolvency Proceedings of 23 November 1995, 35 ILM 1996, 1223.

[8] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), [1998] OJ C 27, 26.1.1998, 1–24.

[9] The 1987 Brussels Convention Abolishing the Legalisation of Documents in the Member States of the European Community, Dalloz 1992 L 278, has only entered into force between a few Member States.

[10] The 1990 Convention on the simplification of procedures for the recovery of maintenance claims never came into force. On this, see B Brückner, *Unterhaltsregreß im internationalen Privat- und Verfahrensrecht* (J C B Mohr (Paul Siebeck) Tübingen, 1994) 154 & 180 et seq.

There has though been success for an important instrument negotiated during this period: the 1980 Rome Convention,[11] although it was neither based on a European Treaty provision, nor dependent on the involvement of European institutions.

b) 1993–1999

The Maastricht Treaty complemented the EC Treaty with two additional 'pillars' (Common Foreign and Security Policy and Justice and Home Affairs).[12] It formally introduced (and expanded) the possibility of 'judicial cooperation in civil matters', although in this area, as any other third pillar matters, the form of action remained essentially inter-governmental. Under Title VI ('Provisions on Cooperation in the fields of Justice and Home Affairs') cooperation in the field of private international law was governed in particular by Article K1[13] and K3.[14]

These provisions had the potential to lead to an acceleration of changes in (European) private international law. First, the Treaty on European Union created legislative structures at the European level in the form of a coordinating Committee[15] and through the involvement of the Council, the European Parliament, and the Commission.[16] In addition, unlike Article 220 EC Treaty (which was maintained), Justice and Home Affairs provisions did not expressly restrict the areas of private international law where international instruments could be adopted, simply referring to 'judicial cooperation in civil matters'.[17] The Maastricht provisions, although pragmatically and symbolically important,[18] have been generally criticised as

[11] Convention on the law applicable to contractual obligations (consolidated version), OJ C 027, 26/01/1998, 34–46.

The Rome Convention was adopted as a classic convention but is a closed instrument to which only Member States may accede. No other such European 'free' convention entered into force. In particular the Luxembourg Agreement relating to Community patents of 15 December 1989 OJ L 401, 30.12.1989, 1–27 was never ratified by the required number of Member States.

[12] The EU Treaty has been compared to a Greek temple built on three pillars—the first one being the EC Treaty (where Community institutions are empowered to exercise legislative, executive and judicial powers as conferred to them), is complemented by the second and third one (where governance remains inter-governmental).

[13] Article K.1: 'For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: . . . 6. judicial cooperation in civil matters; . . . '.

[14] Article K.3: ' . . . 2. The Council may:—on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1(1) to (6); . . . (c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Unless otherwise provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.'

[15] Art K4.

[16] Arts K3 & K6.

[17] This wording was variously interpreted. See U Drobnig, 'European Private International Law after the Treaty of Amsterdam—Perspectives for the next Decade', 11 The King's College Law Journal 2000, 191–192.

[18] HE Hartnell, 'EUstitia: Institutionalizing Justice in the European Union', Northwestern Journal of International Law and Business 2002–2003, 74–75.

ineffective[19] both in terms of the working methods[20] used, and instruments[21] adopted. Only two agreements resulted and neither entered into effect: the 1997 Service Convention and the 1998 Brussels II Convention.[22] However, the pre-Amsterdam period did see private international law norms adopted in other forms.

2. Supranational Measures

a) EC measures before the Amsterdam treaty

Various types of isolated private international law rules[23] are contained in a number of scattered directives and (although on a smaller scale) regulations, based on various sectoral provisions of the Treaty (the most important being Article 95 EC Treaty).[24] These were adopted in the context of measures harmonising substantive law. They generally aimed at extending or restricting the scope of European private international law norms,[25] specifying the territorial scope of the application of directives,[26] or protecting the legal framework of the internal market in certain areas against the choice of law of third States.[27] This fragmented approach not only rendered European private international law particularly opaque, but was detrimental to the coherence of its sources.[28]

[19] U Drobnig (n 17) 192; J Basedow, 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam', Common Market Law Review 2000 at 691; N Walker, 'Current developments: EC Law—Justice and Home Affairs' [1998] 47 ICLQ 231, 235.

[20] Measures had to be adopted unanimously at five, and later, after the abolition of steering groups, four different levels: the working groups, the K4 Committee, the Coreper and the JHA Council. The involvement of the Commission, Parliament and ECJ was deemed in general too modest: the Commission enjoyed only shared initiative; the Parliament, which in practice was generally informed *ex post facto*, had only a marginal role in the law-making process and the ECJ did not have inherent jurisdiction.

[21] In addition to common positions and joint actions seldom used in the field of civil judicial cooperation (as not suited to an area which inherently requires legislative action), two kinds of instruments were available: resolutions (which are non binding) and conventions (which remained in the hands of States both through the Council and at the ratification stage).

[22] Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters [1997] OJ C 261, 27.8.1997, 2–16 & Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C 221, 16.7.1998, 2–18. Both instruments were communitarised after the entry into force of the Treaty of Amsterdam.

[23] See K Kreuzer (n 3) 13–16.

[24] Amsterdam version.

[25] eg Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, [1998] OJ L 172, 1–14.

[26] eg European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281, 31–50.

[27] eg Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95, 29–34.

[28] J Basedow, 'Spécificité et coordination du droit *international privé communautaire*', *Travaux du Comité français de Droit International Privé 2002–2004* (Pedone, Paris 2005) 275 et seq.

b) The communitarization of private international law under the Treaty of Amsterdam, and the Treaty of Nice

The Treaty of Amsterdam,[29] which revised the European Community Treaties as well as the Treaty on European Union, opened new perspectives for European private international law: not only was the Maastricht Union's objective of the development of 'close cooperation on justice and home affairs'[30] replaced by the more precise aim of maintaining and developing 'the Union as an area of freedom, security and justice, in which the free movement of persons is assured'[31] but, unlike its predecessor, the Amsterdam Treaty took concrete steps for the implementation of this redefined goal. Competence in the field of judicial cooperation in civil matters was transferred from the third to the first pillar, thus affording the Community power to legislate in the field of private international law.

Introducing a Title IV on 'Visas, asylum, immigration and other policies related to the free movement of persons', the Treaty of Amsterdam indeed enabled in Article 61 the Council to adopt 'measures in the field of judicial cooperation in civil matters as provided for in Article 65', with this latter provision qualifying and enumerating various domains in which such measures could be taken.[32] As is well known, this new regime which has given rise to very strong reactions in the private international law world,[33] has been fraught with uncertainties.

The new arrangements were designed to increase the efficiency of JHA cooperation as they provided for greater involvement of the EC institutions in the law making process and indeed ended many disadvantages of the previous system—protracted ratification procedures, the necessity to renegotiate accession conventions with each enlargement, the absence of inherent ECJ jurisdiction. Yet, the Community regime of private international law under the Amsterdam Treaty remained attenuated: first for a

[29] For a general overview, see Ph Manin, 'The Treaty of Amsterdam', 4 Columbia Journal of European Law 1998, 1–26; M Petite, 'European Integration and the Amsterdam Treaty', 87 Saint Louis-Warsaw Transatlantic Law Journal 1999, 87–122; J Monar, 'Justice and home affairs in the Treaty of Amsterdam: reform at the price of fragmentation', European Law Review 1998, 320–335.

[30] Art B EU Treaty (Maastricht version).

[31] Art 2 EU Treaty (Amsterdam version).

[32] Article 65 EC Treaty provides: 'Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

— the system for cross-border service of judicial and extrajudicial documents,
— cooperation in the taking of evidence,
— the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) 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'.

[33] See most strikingly V Heuzé et al, 'L'Union européenne, la démocratie et l'Etat de droit: lettre ouverte au Président de la République', JCP G 2006 Act. 586; P Lagarde et al, 'Observations sur la lettre ouverte au président de la République intitulée «L'Union européenne, la démocratie et l'État de droit»' JCP G 2007 Act 18.

transitional period of five years, the Council's decisions were to remain unanimous and the European Parliament only had a consultative function. Second, by exception to Article 234, the ECJ had under Article 68 a reduced power of interpretation in that preliminary rulings in the private international law field could only be requested by national courts of final appeal. In addition, specific protocols provided by Article 69 established derogations in respect of the UK & Ireland as well as Denmark.

Further, the EC Treaty provisions impacting on private international law were complex and technically imperfect: Article 220, by then renumbered Article 293, continued to coexist with Article 65 (as well as the sectoral approximation of laws provisions); the location of Article 65 within Title IV linked judicial cooperation in civil matters and the free movement of persons and the uncertain drafting of this provision led to numerous contentions as to the exact scope of the new competence.[34]

Whilst the Treaty of Nice brought about some changes in this field, these uncertainties remained. However an important amendment was introduced in Article 67, which provided for the immediate transition of Article 65 measures, with the exception of family law, to the Article 251 procedure (co-decision with QMV in Council).

In less than 10 years since the entry into force of the Treaty of Amsterdam, facilitated by the changes in voting requirements brought about by the Nice Treaty, there has been a dramatic increase of European Private international law sources. The scope and pace of these developments can be explained not only as a reaction to the meagre achievements under the third pillar approach, but also as a response to 'negative' and 'positive' 'integration logic':[35] the harmonization of private international law in Europe is seen (notably by the Commission) as responding to the imperious need to remove all barriers to free movement in the internal market, ensuring certainty and efficiency, and as well as preventing discrimination. Article 65 has thus been used to achieve the 'reformatting' of Article 220 and Article K3 conventions which had never entered into force;[36] to communitarize and amend Conventions already in force,[37] as well as to bring new initiatives to fruition, thus responding to every single one of the eight objectives set forth in Article 65.[38]

[34] On the relationship of Art 65 with Arts 95 and 293, see O Remien, 'European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice', 38 Common Market Law Review 2001, 72 et seq; J Basedow, 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam', 37 Common Market Law Review 2000, 697 et seq; A Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?', 1 Journal of Private International Law 2005, 197 et seq.

[35] See HE Hartnell, 'EUstitia: Institutionalizing Justice in the European Union', Northwestern Journal of International Law and Business 2002–2003, 83–84.

[36] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, 1–18; Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L 338, 1–29; Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L 160, 37–52 (now repealed and replaced by Regulation (EC) No 1393/2007).

[37] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12, 1–23; Regulation of the European Parliament and of the Council on the law applicable to contractual obligations.

[38] For an overview of the measures adopted or currently considered in the field of judicial cooperation in civil matters, see http://europa.eu/scadplus/leg/en/s22003.htm.

Some of the questions initially raised by the new regime were in effect answered by the practice which progressively emerged: for instance, although Article 65 did not specify the type of Community action to be used (and instead referred to the notion of 'measures'), and although several subparagraphs of the provision mentioned the 'promotion of compatibility' (which could have been interpreted as not referring to unification but simply *a minima* harmonization realisable through directives), the EC involvement in private international law has so far generally taken the form of precise (and by definition binding in their entirety and directly applicable) regulations.[39] These were systematically based on Article 65. Private international law provisions though did continue to be included in measures aimed at harmonising certain areas of substantive law,[40] with all the problems this entails.

C. Union Competence in Private International Law under the Reform Treaty

1. Internal Competence in Judicial Cooperation in Civil matters

Under the Reform Treaty Arts 61 and 65 EC Treaty are replaced by Arts 67[41] and 81[42] which are inserted in a Title V TFEU renamed 'Area of freedom, security and justice'. Arts 67 and 81 are to be read in conjunction with new provisions on competence.

[39] See however the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136, 3.

[40] See for example Art 32 of the Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L 345, 1–51. This directive is based on Arts 47 & 55.

[41] According to Art 67(4), the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. The principle of mutual recognition, cornerstone of judicial cooperation in civil matters since the Tampere conclusions, thus acquires a Treaty basis.

[42] Art 81: 1. 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff. 3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision'.

According to these, Union competence is limited by the principle of conferral[43]—which is in no way affected by the fact that the Union has a legal personality[44]—and Union competence in the area of freedom, security and justice is expressly shared between the Union and Member States.[45] Measures on judicial cooperation in civil matters can therefore be taken by the latter only to the extent that the Union has not exercised its competence or has decided to 'cease exercising'[46] its competence,[47] bearing in mind that 'when the Union has taken action in an area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[48]

The use of competence by the Union further continues to be subject to the (now better defined) principles of subsidiarity and proportionality.[49]

From a procedural point of view, Article 81 largely maintains the status quo: the ordinary legislative procedure (ie codecision & QMV) applies, except in the field of family law, where a *passerelle* remains available. The latter allows the Council to decide to transfer some aspects of family law to the ordinary procedure, but for this to happen the European Parliament must be consulted and there must be unanimity within the Council.[50] Additionally, the Treaty of Lisbon, in accordance with its objective to enhance the 'democratic legitimacy of the Union', now gives national parliaments[51] the power to veto the use of the family law *passerelle*,[52] thus introducing a better safeguard for States' interests in this sensitive field.

From a substantive point of view, the changes introduced by the Reform Treaty appear limited. Aside from the fact that judicial cooperation in civil matters is now detached from the goal of free movement, the most obvious change is the ending of the requirement that measures to be adopted are necessary for the proper functioning of the internal market. Once the Treaty of Lisbon enters into force, the latter will simply be an illustration of the type of measures that the Union may take. Through a substitution of words ('particularly when' instead of 'in so far as'), the legal basis of Union action in judicial cooperation in civil matters is thus formally expanded. However, given the broad interpretation so far given to Article 65, this terminological amendment is

[43] Art 4(1) & Art 5(1) TEU. For the first time the Treaty confirms that competence not conferred upon the Union remain with the Member States.

[44] Declaration (No 24) underlines that the fact that the EU has a legal personality 'will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States of the Treaties'.

[45] Art 4 TFEU.

[46] This situation arises when EU institutions decide to repeal a legislative act, see Declaration 18 in relation to the delimitation of competences. The Council may request the Commission to submit proposals to this end. In addition the Declaration stresses that the Member States (meeting in an IGC) could decide to modify the competences conferred on the Union.

[47] Art 81 in conjunction with Art 2 TFEU.

[48] Sole Article, Protocol 25 on the exercise of shared competence.

[49] Art 5 (2)–(4) TEU; See also the largely redrafted Protocol 2 on the application of the principles of proportionality and subsidiarity. It is to be noted in this context that one of the changes introduced by the Treaty of Lisbon is the role to be played by national Parliaments in the monitoring of compliance with the subsidarity principle.

[50] In a Communication of 15 December 2005 (COM(2005)648), the Commission attempted to resort to the *passerelle* in the context of the maintenance proposal, but this initiative was met with the opposition from a majority of Member States.

[51] See also Protocol No 1 on the role of national Parliaments in the European Union.

[52] Art 81(3): if a national Parliament, duly notified, opposes the use of the *passerelle* within 6 months of the date of the notification, the *passerelle* shall not be used.

unlikely to add much impetus to any further expansion in practice. The removal of the necessity of a link with the internal market in turn has the advantage of clarifying the existence of legal basis for the Union competence, notably as regards to the adoption of measures in the field of family law.[53] In contrast with Article 65, Article 81 also contains a longer but fixed list of areas for potential action. Again, this particular amendment will not in practice lead to a great extension of the scope of Union action: some of these measures (such as measures for the development of ADR or effective access to justice), had already been taken under Article 65.[54]

Article 81 maintains the requirement of cross-border implications, and as such, an important limitation to the legal basis of Union competence in private international law.[55] This is particularly significant given the recent (failed) attempts made by the Commission to legislate on the basis of Article 65 in domestic as well as cross-border cases.[56] Nevertheless, the TFEU does not elaborate on what constitutes 'cross border implications'; definitional difficulties will therefore remain: while it may seem logical that the understanding of the cross-border requirement may vary depending on the particular aim of the measure considered, the lack of uniform definition may raise important difficulties in the practical application of related instruments.

2. *Role of the European Court of Justice*

As indicated above, the Treaty of Amsterdam, in Title IV, curtailed the broad preliminary reference jurisdiction afforded to the ECJ by Article 234 EC Treaty.[57] From the perspective of private international law this change could be seen as particularly retrograde given that the uniform interpretation of the Brussels I Regulation risked being less extensive than that of its 'predecessor', the 1968 Convention. Under the protocol to the Convention appellate courts had the possibility to request a preliminary ruling.[58] By contrast only courts of final appeal can currently avail themselves of this possibility in relation to the Brussels I Regulation.[59] Such a restriction could appear particularly inappropriate as experience shows that references from lower courts have led to very important ECJ rulings on the Brussels regime.[60] Interestingly, although

[53] See M Fallon, 'Constraints of Internal Market Law on Family Law' in J Meeusen, M Petergás, G Straetmans, F Swennen (eds), *International Family Law for the European Union* (Intersentia, Antwerp/Oxford, 2007) 149–181.

[54] See for example: Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L 26, 41–47. Directive 2008/52/EC of the European Parliament and of the Council of May 21st 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136, 3.

[55] This is particularly the case in view of the added powers of national Parliaments in the monitoring of the subsidiary character of Union action.

[56] See A Fiorini, 'Facilitating Cross-Border Debt Recovery—The European Payment Order and Small Claims Regulations' [2008] 57 ICLQ 2008 449, 460 et seq.

[57] See B Nascimbene, 'Community courts in the area of judicial cooperation' [2005] 54 ICLQ 489.

[58] Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version) [1998] OJ C 27, 24–30.

[59] Art 68.

[60] See for example (early cases): Case 21/76 *Bier v Mines de Potasse d' Alsace* [1976] ECR 1735, Case 12/76 *Tessili v Dunlop* [1976] ECR 1473, or (more recently): Case C-412/98 *UGIC* v *Group Josi* [2000] ECR I 5925 and Case C-281/02 *Andrew Owusu v Nugent B. Jackson*, [2005] ECR I 1383.

Article 67(2) EC Treaty requires the Council, after May 2004, to take a decision with a view to adapting the jurisdiction of the Court, no initiative was taken on this basis by the Council.[61]

Once it enters into force, the Treaty of Lisbon will end this situation: Article 68 is repealed and the whole area of Freedom, Security and Justice will fall within the scope of general jurisdiction of the ECJ under Article 267 TFEU[62] (which replaces Article 234 EC Treaty): preliminary references may be requested by any national court, even one of first instance,[63] if a ruling is necessary to enable judgment to be given, with courts of final appeal being under a duty to bring the matter before the Court. This is a significant change, which will improve the consistency of application and interpretation of European private international law rules without forcing litigants to 'exhaust' domestic remedies thereby wasting time and resources. The court's enhanced jurisdiction nevertheless has practical implications which will require action,[64] most notably the risk of overload.[65] The impact of these changes on the duration of the procedure may however be limited: As per Article 23a[66] of Protocol 3 on the Statute of the Court of Justice of the European Union recognises, the rules of procedure now provide for an urgent procedure for references for a preliminary ruling relating to the area of freedom, security and justice.[67]

D. Geographical scope of the measures adopted—special position of the UK, Ireland and Denmark

The realisation by the Treaty of Amsterdam of the area of Freedom, Security and Justice has come at the price of a 'protocolisation'. With respect to judicial cooperation

[61] As a result the Commission enacted a Communication on Adaptation of the provisions of Title IV of the Treaty establishing the EC relating to the jurisdiction of the ECJ with a view to ensuring more effective judicial protection, COM (2006) 346 final. It is to be noted however that, on this issue, the Treaty of Lisbon actually borrows its provisions from the project of Constitution.

[62] Art 267 TFEU: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: . . . (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. . . . '

[63] In C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstell*e [1974] ECR 33 the ECJ recognised that a lower court may make a reference under Art 234 even if domestic rules bind it on points of law by rulings of a superior court.

[64] As pointed out by the House of Lords, the expansion of the ECJ's jurisdiction will lead to an expansion of the range of legal issues coming before it, which obviously raises the issue of expertise of ECJ judges, which in turns should notably lead to a reappraisal of the conditions of their appointment: HL Paper 62 I, The Treaty of Lisbon: an impact assessment, Vol I, 129–130, para 6.96 et seq.

[65] This is particularly so given that the Treaty of Lisbon extends EU competence to *all* JHA matters, thereby greatly increasing the scope of inherent jurisdiction of the ECJ.

[66] Art 23a has not been inserted in the protocol on the ECJ Statute by the Lisbon Treaty but results from Decision 2008/79/EC ([2008] OJ L 24, 42).

[67] Amendments to the Rules of procedure of the Court of Justice [2008] OJ L 24, 39. On this new procedure, see T Millett, 'A Marked improvement', 158 New Law Journal 2008, 694s.

in civil matters, this was in the form of Protocol (No 4) on the position of the United Kingdom and Ireland (1997), as well as Protocol (No 5) on the position of Denmark.[68]

The arrangements negotiated by the UK and Ireland are flexible, allowing both countries to control the level of their involvement in Title IV measures. According to Arts 1 & 2 of the Protocol No 4, the UK and Ireland do not, in principle, take part in the adoption of, and are not bound by, Title IV measures. However, Article 3 allows both countries, within 3 months from the presentation of a specific proposal, to decide to participate,[69] and Article 4 specifies that both countries also have the opportunity to decide to accept Title IV measures after these have been adopted.

In the new protocol 'on the position of the UK and Ireland in respect of the area of freedom, security and justice' (Protocol No 21) the flexible mechanism put in place by the initial agreement is maintained,[70] and clarifications are introduced to facilitate its implementation. However a number of issues remain uncertain, notably in the light of recent UK experience.

What impact should the decision not to opt-in have on the participation in negotiations? Protocol No 4 does not expressly indicate that the decision not to opt-in is to be accompanied by the loss of the ability to be involved in the elaboration of the measure. Practice has shown that refusing to opt-in does not preclude participation in the shaping of a measure.[71] The Treaty of Lisbon does not, however, formalise this possibility. Could the UK or Ireland opt out after initially opting in to a measure? Given that this is not expressly permitted by the protocols (whether in their Amsterdam or Lisbon version), the answer has to be in the negative. Could the UK or Ireland be seen as bound by their initial decision to take part in the event of a dramatic change of substance of the planned measure during the negotiations? Again, the Treaty of Lisbon remains silent on this particular point. But it is to be noted that there is one possible way out in this case: in both versions of the protocol, the Council can, under Article 3(2), decide after a reasonable period of time to exclude the UK or Ireland if either opposes the adoption of a measure (to which they had initially opted in) to the extent that a blocking majority is achieved.

[68] M Hedemann-Robinson, 'The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The 'Opt-In Opt-Outs' under the Treaty of Amsterdam', in *Legal Issues of the Amsterdam Treaty* (D O'Keefe & PM Twoney eds) (Hart, Oxford, 1999) 289 et seq. Both protocols have the same status as any treaty provision. They are complemented by Declaration 26 (on non-participation by a Member State in a FJS measure) which is merely interpretative.

[69] According to the terms of Art 3(1)(1), the UK or Ireland are 'entitled' to do so. In other words, other Member States cannot oppose their participation.

[70] In Declaration 56, annexed to the Treaty of Lisbon, Ireland manifested its firm intention to exercise its rights under Art 3 to take part in the adoption of measures pursuant to Title V of Part Three of the TFEU 'to the maximum extent it deems possible'. It is to be recalled that a similar declaration made in the aftermath of the Treaty of Amsterdam did not prevent Ireland to decide not to opt-in to the negotiation of the Rome III proposal. However, in Declaration 56 Ireland further announced its intention 'to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon' [2008] OJ C 115, 356–357.

[71] In the Rome I dossier, the participation of the UK was a key factor in the elaboration of a measure which could in fine be accepted by the UK. However, Member States had a particular interest in trying to secure a UK involvement and in that particular area, the UK's position was particularly strong (not least because of the weight of its financial markets). See HL Paper 62 II, The Treaty of Lisbon: an impact assessment, Vol II Evidence, Q 519, E118 (J Straw).

The Treaty of Lisbon does remove an important uncertainty concerning the possibility for the UK or Ireland to refuse to opt-in to a measure amending a regulation it had previously accepted. This difficulty had first appeared in the context of the Rome III dossier, where the silence of the Amsterdam version of the protocol proved particularly problematic.[72] Article 4a of the new protocol now clarifies that the UK & Ireland keep the right to decide not to opt-in to a measure amending an existing measure by which they are bound. But, where the non-participation of the UK or Ireland in the amended version of an existing measure makes the application of that measure 'inoperable' for other Member States or the Union, the Council[73] may urge UK or Ireland to make a notification that they wish to take part. If they maintain their position, not only will the existing measure cease to apply to them but they may have to bear the financial consequences incurred as a result of the cessation of their participation in the existing measure.

The introduction of such potent sanctions is obviously likely to change the negotiating dynamics each time 'amending' initiatives are put forward after the entry into force or the Treaty of Lisbon. Further as the mass of the European private international law *acquis* expands so will the likelihood of amending proposals, and so too will the pressure to participate. However the threat of exclusion from the operation of an existing measure is dependent on the existing measure becoming 'inoperable' as a result of the non-participation. This choice of words implies a very high threshold which will probably not often be reached in practice in the field of private international law.[74] In addition, as any other Council decisions, the determination of inoperability by the Council could be challenged before the ECJ.[75]

Unlike the arrangements made under Protocol No 4 on the Position of the UK and Ireland, the position secured by Denmark in Protocol No 5 was inflexible.[76] However, individual agreements were concluded with a view to extending the provisions of two Title IV Regulations to Denmark.[77] Protocol (No 22) maintains the status quo, but an annex is added, which essentially reproduces the terms of Protocol No 21 on the position of the UK and Ireland.[78] Whilst the annex will not be applicable until and unless Denmark decides to substitute it for a part in the original Protocol, it is the State's declared[79] intention to avail itself of the option to participate in the adoption of

[72] See A Fiorini, 'Rome III—A Step Too Far in the Europeanisation of Private International Law?', International Journal of Law, Policy and the Family 2008.

[73] Acting on a proposal from the Commission.

[74] The non-participation of the UK to Rome III does not seem to lead to the inoperability of the Brussels IIa Regulation (see the discussion of the consequences of the non-participation in Fiorini (n 62). However see the example of Baroness Ludford in relation to more technical areas, such as the Schengen information system: HL Paper 62 II, The Treaty of Lisbon: an impact assessment, Vol II Evidence, Q 390, E89.

[75] Art 263 TFEU (formerly Art 230 EC Treaty).

[76] Arts 1 & 2 Protocol No 5. Some exceptions are found in further provisions of the Protocol, although these do not apply to judicial cooperation in civil matters.

[77] Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ L120, 22, and Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters [2006] OJ L120, 23.

[78] The annex also contains further provisions, but these do not affect judicial cooperation in civil matters.

[79] See the Recital of Protocol No 22.

Title V of the TFE. Consequently the blanket opt-out in this area might soon come to an end.[80]

E. External competence[81]

The treaties, until the Lisbon agreement, did not contain a provision empowering the Community to conclude international conventions with third States. In the field of private international law the issue of the external competence started being debated with the Treaty of Amsterdam. Given the well established principle *foro interno-foro externo*,[82] the question raised by the communitarisation of private international law was not whether the Community had external competence in this field, but revolved around the exact material scope of this power and whether this competence was exclusive or shared with Member States.[83] The difficulty was to reconcile potentially antagonistic needs: the importance to strengthen the role of the Community on the international plane—Community action being deemed more efficient than isolated Member States' action—and the special interest Member States may have to enter into agreements with third parties.

The renegotiation of the Lugano Convention gave the ECJ an occasion[84] to clarify how the principles it had developed since the ERTA judgment applied in the particular context of private international law. Although the policy underlying, and the implications of, this complex opinion gave rise to numerous questions, some important points were made by the Court. First a Community competence may implicitly flow from provisions of the Treaty and from measures adopted, within the framework of

[80] According to the Danish Ministry of Foreign Affairs, a referendum on whether to keep the opt-outs should be organized within three years: http://www.denmark.dk/en/servicemenu/News/DomesticPoliticalNews/Archives+2007/PMPromisesEUOptoutVote.htm (last visited 6 June 2008). It is to be noted in this context that this could lead not only to the substitution of the annex to Part I of the protocol but also to full participation in freedom, security and justice matters, as Art 7 provides.

[81] The question of external competence of the Union itself raises 'external external' questions: one problem is that of the acceptance by third States of the transfer of external competence from the States to the Union (which has had historical precedents, See P Manin, *L'Union européenne* (Pedone, Paris, 2005) 149–150). It also raises particular issues when the international agreement in question is not open to non-State entities (to avoid this problem, Art 29 of the 2005 Hague Choice of Court Convention specifically provides that Regional Economic Integration Organizations (REIOs) may sign it), or where full participation in international negotiations is only open to Members of a particular organisation, with membership being solely open to States (for an overview of how this issue led to a modification of the Statute of the Hague Conference on Private international law, see A Schulz, 'The accession of the European Community to the Hague Conference on Private International Law' [2007] 56 ICLQ 939–949).

[82] In the ERTA case 22/70, [1971] ECR, 263, the ECJ considered that an external competence of the EC could arise implicitly where the EC had adopted internal Community legislation in a policy area. In Opinion 1/76, [1977] ECR, 741, the Court importantly indicated that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.

[83] See A Borrás; 'Le droit international privé communautaire: réalités, problèmes et perspectives d'avenir', Hague Academy Collected Courses 2006; Vol 317, 313, 467 et seq.

[84] Opinion 1/03, [2006] ECR I 1145.

those provisions, by the Community institutions. Additionally 'whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect'.[85] This competence is exclusive where 'the conclusion of the international agreement is necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules'[86] and where the instrument would entail obligations which would affect already adopted common rules.[87] A case-by-case assessment is necessary to find out if the Community has competence to conclude an international instrument and if that competence is exclusive. 'In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged,[88] insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining[89] the uniform and consistent application of the Community rules and the proper functioning of the system which they establish'.[90]

The Treaty of Lisbon partly codifies the ECJ rulings and opinions on external competence. Article 216 TFEU[91] provides that the Union has competence to conclude an international agreement where the treaties so provide, where the instrument is necessary in order to achieve an objective (either referred to in the treaties or provided for in a binding Union act), or, is 'likely to affect common rules or alter their scope'. Although framed in terms remarkably similar to those used in the context of exclusive competence by the ECJ, Article 216 does not spell out if the external competence shall be exclusive or shared. This provision however is to be read in conjunction with a new Article inserted by the Treaty of Lisbon in the TFEU, Article 3(2), which specifies that the Union competence for the conclusion of international agreements shall be exclusive when the conclusion of the agreement is 'provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence'. In addition, the Union has exclusive competence for the conclusion of an international agreement 'in so far as its conclusion may affect common rules or alter their scope'. While Article 3 gives a much needed precision that was lacking in Article 216, the similar but not identical wording of the two provisions renders their respective interpretation at times complex. The combined effect of the provisions makes it clear (unsurprisingly) that the Treaties may (expressly) provide for shared external competence in certain areas. It is similarly clear that where the conclusion of the international agreement is provided for in a European legislative act, the Union's competence not only exists but is to be exclusive. The concurrent reading of both provisions further seems to imply that external competence is only shared where the conclusion of an international agreement, although necessary in order to achieve one of the treaty objectives, is not actually necessary to enable the Union to exercise its

[85] para 114. [86] para 115. [87] para 117.

[88] It is 'not necessary for the areas covered by the international agreement and the Community legislation to coincide fully'. Furthermore, it is necessary to take into account 'not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis', ibid para 126.

[89] In this the inclusion of disconnection clauses does not remove the possibility that the instrument affect Community rules, ibid para 129–130. [90] para 133.

[91] Which is identical to Art III-323 of the defunct Constitution.

internal competence. Was this differentiation really intended by the Member States?[92] And while Article 216 provides that external Union competence exists where the conclusion of an agreement 'is likely' to affect common rules and alter their scope, Article 3(2) provides that the external competence of the Union is exclusive 'in so far as its conclusion may' affect common rules and alter their scope. Could the use of the terms 'in so far as' in Article 3 manifest the idea that the exclusivity of the Union competence is restricted to 'concrete' situations where the common rules already exist or are at least foreseeable, the external competence being only shared in situations where the Union has internal competence but where no common rules have yet been adopted or precisely planned?

Further the reference in both provisions to 'common' rules raises difficulty in the context of measures which, as a result of the application of Protocols No 21 & 22, are not binding on certain Member States,[93] or which are adopted under the enhanced cooperation framework.[94] If the Maintenance Regulation were to be adopted with the UK maintaining its decision not to opt-in, would the rules of the Regulation be considered 'common' for the purpose of Arts 3 & 216 TFEU? If so, would an international agreement concluded by the Union and altering the scope of these rules be binding on the UK? Given the rationale of the implied external competence in this case (the importance of preventing an international instrument from undermining the uniform and consistent application of the Community rules), it seems logical to consider that rules binding, say 26 States, are common for the purpose of Arts 216 & 3. None of these 26 States should be allowed to enter into agreements with third States that would affect the common rules: competence in this matter should exclusively belong to the Union. But this does not necessarily mean that the non-participating State itself should be bound by the instrument concluded between the Union and third States. In light of the terms of Article 2 of Protocols No 21 & 22,[95] one is led to conclude that the non participating State would not be bound by the agreement. The same conclusion should *mutatis mutandis* apply in the context of enhanced cooperation.[96]

[92] Compare the terms used by the ECJ according to which Union competence is exclusive where 'the conclusion of the international agreement is necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules' (n 85).

[93] See above Section *D*. Neither Protocol deals expressly with the implication on the Union's external competence of the provisions they entail.

[94] Rome III could soon be the first measure of judicial cooperation in civil matters to be adopted under the enhanced cooperation provisions (cf http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/101000.pdf).

[95] In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and *no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States*; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to the United Kingdom or Ireland (emphasis of the author).

[96] This conclusion appears to correspond to the Commission's current view: See the evidence given by Mrs Durand, HL Paper 62 II, The Treaty of Lisbon: an impact assessment, Vol. II Evidence, QQ 348–349, E78.

F. Conclusions

Closing a review of the impact of the Treaty of Amsterdam on private international law, a strong proponent of European integration in this field wrote in 2000:

> 'A great step forward—private international law recognised as Community task—has been achieved but at a high price on the technical level. Thus on balance it has been a mixed success. One hopes that the next Revision Conference will rectify this major mistake.'[97]

This wish[98] was only partially acted upon by the Lisbon Treaty. Once reformed, the Treaties will provide a slightly wider and more (but not entirely) clearly defined legal basis for Union action in the European internal sphere. However, while Article 293 has been deleted, the specific competence afforded to the Union to legislate in the field of conflict of laws will continue to coexist with provisions allowing it to enact sporadic private international law provisions in a way detrimental to the overall coherence and transparency of the field. More importantly, the elements of variable geometry which have been introduced by the Treaty of Amsterdam will remain, and continue, despite some changes, to raise many questions. Similarly, while the insertion in the reformed Treaties of provisions on categories and areas of competences will in some ways improves the legibility of the definition of external competences relevant to private international law, it will introduce new uncertainties. Technical perfection, it seems, will have to wait for yet another Revision Conference.

AUDE FIORINI*

II. THE NEW HAGUE MAINTENANCE CONVENTION

After four years of negotiations the Hague Convention of 5 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol on Applicable Law was adopted by the Hague Conference on Private International Law at its Twenty-First Session. The intention of the negotiators was to produce a convention designed to respond to the often modest needs of children and other dependents by providing international procedures which are simple, swift, cost-effective, accessible, fair, and build upon features of existing international instruments.

A. History and Background

The history of the Hague Conference with regard to maintenance goes back to the 1950s when the Eighth Session adopted two Conventions relating to maintenance. One dealt with the recognition and enforcement of decisions relating to maintenance obligations towards children while the other dealt with applicable law.[1] It was in the same

[97] U Drobnig, 'European Private International Law after the Treaty of Amsterdam—Perspectives for the next Decade', 11 The King's College Law Journal 2000, 201.

[98] Which had largely been left untouched by the Nice Treaty.

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[1] The Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations Towards Children and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.

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