

**INTERNATIONAL CONVENTIONS CONCLUDED  
BY THE EUROPEAN UNION AFTER  
THE ECJ “LUGANO II OPINION” OF 2006.  
AN ALTERNATIVE OR COMPLEMENTARY TO EU REGULATIONS  
PATH TO UNIFICATION OF PRIVATE INTERNATIONAL LAW?**

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**1. Unification of private international law:  
from international agreements between Member States  
to regulations adopted by the European Union**

Common rules of private international law *sensu largo* (i.e., rules not only on conflict-of-laws but also on jurisdiction, the peculiarities of international civil proceedings and the recognition and enforcement of foreign judgments) were for decades introduced in the Member States of the EEC/EU *via* the traditional method of international conventions<sup>1</sup>.

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<sup>1</sup> Concluded pursuant to Article 220 of the Rome Treaty of 1957. Under Article 220 (then Article 293) of the Treaty establishing the European Economic Community, 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 simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The icons of such agreements, accessible only for members of the “EEC Club”, were the 1968 Brussels Convention on jurisdiction and recognition of judgments in civil matters<sup>2</sup> and the 1980 Rome Convention on the law applicable to contractual obligations<sup>3</sup>. Each Member State was generally free to conclude conventions with other Member States in matters not governed by these legal instruments<sup>4</sup>, and to accede to multilateral conventions (especially prepared under the auspices of the Hague Conference on Private International Law<sup>5</sup>) and to sign bilateral international agreements with third countries<sup>6</sup>. The example of the Lugano I Convention of 1988<sup>7</sup> concluded the EFTA countries (and subsequently with Poland in 1999) shows that the EEC institutions could be *de facto* engaged in supporting such actions.

The entry into force of the Amsterdam amendment to the Rome Treaty on 1.5.1999 constituted *inter alia* the delegation of new competences to the European Union (except for Denmark, and optionally for Great Britain and Ireland) and commenced a new era of private international law

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<sup>2</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27.9.1968 (consolidated version), O.J. 26.1.1998, C-27, at pp. 1–27. It was supplemented by accession conventions with the new Member States concluded in 1978, 1982, 1989 and 1997.

<sup>3</sup> Rome Convention on the law applicable to contractual obligations of 19.6.1980 (consolidated version), O.J. 30.12.2005, C-334, at pp. 1–15. It was supplemented by accession conventions with the new Member States concluded in 1992, 1996 and 2005.

<sup>4</sup> Many examples can be seen in a list of about a hundred international agreements between Member States in Article 69 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 16.01.2001, L-012, (“Brussels I”), at pp. 1–23 with amendments.

<sup>5</sup> See “status of conventions” section at [www.hcch.net](http://www.hcch.net).

<sup>6</sup> Examples of such conventions concluded with third states are listed in notifications published under Article 26(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I) O.J. 4.7.2008 C-343, at p. 4 and under Article 29(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11.7.2007 on the law applicable to non-contractual obligations (Rome II), O.J. 31.7.2007, C-343, at p. 5.

<sup>7</sup> Convention of 16.9.1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, O.J. 28.7.1990, C-189, (“Lugano I”), at p. 9.

in Member States<sup>8</sup>. The European Community acquired the possibility to adopt regulations, *i.e.*, instruments binding directly and replacing national laws and bilateral agreements between Member States. This fact triggered an unnecessary continuance of actions aimed at concluding international conventions to unify subsequent matters between Member States<sup>9</sup> and to amend existing ones<sup>10</sup>, because the adoption of EU regulations became a more efficient method for achieving similar results.

The Lisbon amendment to the Rome Treaty<sup>11</sup> of 1.12.2009 did not amend the competences of the EU institutions significantly<sup>12</sup>. According to the current version of the Treaty on the Functioning of the European Union (TFEU), the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments. Institutions shall adopt measures aimed at ensuring not only the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases (Article 81(2)(a)), the compatibility of the jurisdiction rules (Article 81(2)(c) *in*

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<sup>8</sup> This branch of law has been inaccurately described in the Treaty as “measures of judicial cooperation in civil matters”. The term “judicial cooperation in civil matters” may suggest only a cooperation between courts of Member States, *e.g.*, in taking evidence or serving documents. It should not have replaced the traditional term of “private international law” (preferably with the extension of “*sensu largo*”, which emphasises that it refers not only to the rules determining applicable law, but also to the issues of international civil procedure), that has acquired widespread historical usage in every European country. Furthermore, there is no need to rename an area of law which is already well recognised.

<sup>9</sup> Drawn up on the basis of Article K.3 of the Treaty on European Union drafts of: Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, (O.J. 27.8.1997, C-261, at p. 2) and Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, (O.J. 16.7.1998, C-221, at p. 2).

<sup>10</sup> Proposal for a Council Act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union (O.J. 31.1.1998, C-33, at p. 20).

<sup>11</sup> Treaty on the Functioning of the European Union, O.J. 30.3.2010, C-83, (“TFEU”), at p. 47.

<sup>12</sup> However, it is worth noting that the “freedom of movement of judgment’s effects” is now described in the general part of the Treaty (Article 67(4) TFEU) and that the adoption of EU regulations is not necessarily, but “in particular” confined to the proper functioning of the internal market (Article 81(2) TFEU).

*fine*) and the cross-border service of documents and cooperation in the taking of evidence (Article 81(2)(b) and (d)), but also compatibility of the rules concerning conflict of laws, *i.e.*, private international law *sensu stricto* (Art. 81(2)(c) *in initio*).

Both of the abovementioned EEC conventions were adopted in the first decade of the XXI century and were replaced with regulations adopted by the EU institutions, who benefitted from their “new powers”, *i.e.*, the 2000 Brussels I Regulation on jurisdiction and recognition of judgments in civil matters and the 2008 Rome I Regulation on the law applicable to contractual obligations. It was also envisaged that subsequent aspects of civil matters would be regulated at an EU level. The most important unified rules on jurisdiction and recognition of foreign judgments are: the 2000/2003 Regulations on matrimonial and parental responsibility matters (Brussels II/IIa)<sup>13</sup>, the 2009 Regulation on maintenance matters<sup>14</sup> (Brussels III, which has modified the “European” rules deriving from the Brussels

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<sup>13</sup> Council Regulation (EC) No 2201/2003 of 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, O.J. 23.12.2003, L-338, at pp. 1–29). See P. McElevay, *The Brussels II Regulation: How the European Community has moved into Family Law*, “The International and Comparative Law Quarterly” 2002, Vol. 51, No. 4, at pp. 883–908.

<sup>14</sup> Council Regulation (EC) No 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (O.J. 10.1.2009, L-7, at pp. 1–77). It can be called a “Brussels” one, because its final version in fact doesn’t contain conflict-of-law rules. It can be noted that, under Article 5 of this decision, the rules of the Protocol shall also determine the law applicable to maintenance relating to a period prior to its entry into force (or the provisional application) in situations where court proceedings are instituted as from 18.6.2011. The part of the decision which is manifestly contradictory to Article 22 of the Protocol (its non-application to maintenance relating to a period prior to entry into force) should be criticized. Firstly since it infringes the fundamental principle of *lex retro non agit*. It is unfair to apply new conflict of law rules to proceedings established from 18.6.2011, but dealing with the former situations, that can be even prior to official publication of this decision and Protocol (*i.e.*, the first moment at which it became possible to become aware of them). Secondly, it seems that the decision assumes the application of conflict of law rules only after the initiation of court proceedings, while those rules also operate in non-court cases both before and from 18.6.2011 (*e.g.*, a creditor checks which law is applicable, examines the substantive provisions and renders maintenance under it voluntarily, without the court’s involvement).

I Regulation), and chapters of the “Brussels-Rome” proposals regarding future EU regulations superseding – from an EU law perspective – the following matters: succession and wills (Proposal of 2009<sup>15</sup>), matrimonial property regimes (Matrimonial proposal of 2011<sup>16</sup>) and the financial consequences of registered partnerships (Partnership proposal of 2011<sup>17</sup>).

As far as conflict-of-laws rules are concerned, it should be noticed that fewer civil matters have been governed by EU regulations thus far when compared with the scope of the “Brussels system”. Apart from the Rome I Regulation, the 2007 Rome II Regulation on the law applicable to non-contractual obligations was also adopted<sup>18</sup>. In December 2010, the Rome III Regulation on the law applicable to divorce and separation<sup>19</sup> was adopted, by virtue of the procedure for enhanced cooperation and involving only about a half of the Member States. This legal instrument is an example of the partial success in unification of law, because it will enter into force in 2012 only in respect of a restricted EU territory, unless the remainder of the Member States choose to join. Conflict-of-laws rules are also found in sections of all three of the recent proposals for EU regulations concerning succession and wills, matrimonial property regimes and the financial consequences of registered partnerships. Adoption of these rules would improve the scope of civil matters currently regulated in a self-contradictory manner by the European Union<sup>20</sup>.

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<sup>15</sup> Proposal of 14.10.2009 for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM(2009)154 final.

<sup>16</sup> Proposal of 16.3.2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM(2011)126 final.

<sup>17</sup> Proposal of 16.3.2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships COM(2011)127 final.

<sup>18</sup> This *de facto* finalized the actions undertaken in the 1970’s when the future Rome convention of 1980 was being drafted. See Rome II, *supra* note 6.

<sup>19</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 29.12.2010, L-343 at pp. 10–16.

<sup>20</sup> Judicial cooperation between courts of Member States in civil disputes is additionally governed by EU regulations concerning taking evidence abroad and – even

The Stockholm Programme, agreed by the European Council for years 2010–2014<sup>21</sup>, and the Commission Action Plan for Implementation thereof<sup>22</sup> confirm that the EU institutions will propose further “measures of judicial cooperation in civil matters”, *i.e.*, the next “Brussels”, “Rome” or comprehensive regulations that will either regulate outstanding civil matters or amend the existing EU instruments.

## **2. The European Union as a contracting party to international conventions in the field of private international law**

The Amsterdam amendment to the Rome Treaty introduced a basis for the Community’s internal actions in the field of “judicial co-operation in civil matters”. However, it failed to provide provisions concerning international agreements. This fact gave rise to certain questions concerning the existence of parallel external competence, *i.e.*, the possibility for the Community itself to accede to international agreements<sup>23</sup>. For example, while considering whether to join the 1996 Hague Convention on parental responsibility and child protection matters, it was argued that the scope of this international agreement fell partly

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twice – the service of documents – see: Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13.11.2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, O.J. 10.12.2007, L-324, at pp. 79–120; Council Regulation (EC) No 1206/2001 of 28.5.2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, O.J. 27.6.2001, L-174, at pp. 1–24; Council regulation (EC) No 1348/2000 of 29.5.2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, O.J. 30.6.2000, L-160, at pp. 37–52.

<sup>21</sup> The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, O.J. 4.5.2010, C-115, at pp. 1–38, at points 3.1.2, 3.3.2.

<sup>22</sup> Communication of 20.4.2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Delivering an area of freedom, security and justice for Europe’s citizens. Action Plan Implementing the Stockholm Programme, COM(2010)171 final, at pp. 19–28.

<sup>23</sup> See F. Pocar, *The “Communitarization” of Private International Law and its Impact on the external relations of the European Union* [in:] A. Malatesta, S. Bariatti, F. Pocar (ed.), ‘The external dimension of EC private international law in family and succession matters’, CEDAM 2008, at pp. 8–11.

within the scope of EU competences (given the prior adoption of the Brussels II Regulation), and partly within the domain of the Member States. A common conclusion had been drawn that this agreement should have been signed in a “mixed” way, both by the Community and by each of the Member States<sup>24</sup>. Finally because of, *inter alia*, the complicated situation resulting from the fact that some of the Member States had already signed this convention and a kind of “interim period”, the remainder of the Member States acceded to this international agreement both in their own name and as authorized by the European Community on its behalf<sup>25</sup>.

The situation was significantly altered by the ECJ’s Opinion No. 1/03, delivered on 7.2.2006 (“Lugano II Opinion”)<sup>26</sup>. While considering the method for concluding the Lugano II Convention, none of Member States

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<sup>24</sup> Similarly in an explanatory memorandum to the proposal of 15.12.2003 for a Council Decision concerning the signing of the 2002 Hague Convention on the Law applicable to certain rights in respect of securities held with an intermediary, COM (2003) 783 final, it was said that the EU was to be understood as one regional economic integration organization on behalf of which the Commission negotiated that convention. It seems that this convention was treated as a “mixed” one (with shared competences between EU and Member States to sign it), because it was also explained, that “signature by the Community and its Member States, but also as many as possible of the relevant third countries [...] will ensure the success of the agreement” (at point 13). Finally the Commission’s proposal to sign that convention was withdrawn; See J.P.Hix, *Mixed agreements in the field of judicial cooperation in civil matters: treaty-making and legal effects* [in:] B. Martenczuk (ed.) ‘Justice, Liberty, Security. New challenges for EU external relations’, Brussels 2008, at pp. 254–255.

<sup>25</sup> See Council Decision of 19.12.2002 No. 2003/93/EC authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, O.J. 21.2.2003, L-48, at p. 1; Council Decision of 5 June 2008 No. 2008/431/EC authorizing certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, O.J. 11.6.2008, L-151, at p. 36.

<sup>26</sup> Opinion of the Court of Justice of 7.2.2006 on the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition



opposed the need to introduce unified rules in relation to third (*i.e.*, EFTA) countries, but there were divergent opinions as to who should do this. The Court held that the conclusion of the new Lugano Convention fell entirely within the sphere of exclusive competence of the European Community. Referring to the ERTA doctrine, it held that the competence of the Community to conclude international agreements may arise not only from an expressed conferral by the Treaty but may equally flow implicitly from its other provisions and from measures adopted by the Community institutions<sup>27</sup>. The Court judged that competence arose on the basis of the doctrine of implied powers. The essence of this doctrine is that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, the Member States no longer have the right to undertake obligations with third countries which could affect such rules or alter the scope thereof<sup>28</sup>.

The Lugano II Opinion itself was widely commented upon<sup>29</sup> and, especially as regards its reasoning, was the subject of critical remarks.

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and enforcement of judgments in civil and commercial matters, Opinion No. 1/03, Opinion of 7.02.2006, E.C.R. 2006 at p. I-1145.

<sup>27</sup> Case 22/70 Commission v. Council, E.C.R. 1971, (“ERTA”), at p. 263, at paras. 16–22.

<sup>28</sup> ERTA, at para. 16, Lugano II Opinion, at para. 114.

<sup>29</sup> See F. Pocar (ed.), ‘The External Competence of the European Union and Private International Law. The EC Court’s Opinion on the Lugano Convention’, *Studi e Pubblicazioni della Rivista di Dritto Internazionale Privato e Processuale*, 2007; A. Borrás, *Competence of the Community to conclude the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Opinion 1/03 of 7 February 2006: comments and immediate consequences*, ‘Yearbook of Private International Law’ 2006, Vol. VIII, at p. 37; U.G. Schroeter, *Alleinige Außenzuständigkeit der EG im Bereich des Internationalen Zivilverfahrensrechts: Anmerkung zu EuGH, Gutachten 1/03 vom 6. Februar 2006*, ‘Zeitschrift für Gemeinschaftsprivatrecht’ 2006, No. 4, at p. 203–205; T. Baume, *Competence of the Community to conclude the new Lugano Convention on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters: Opinion 1/03 of 7 February 2006*, ‘German Law Journal’ 2006, Vol. 7, No. 8, at p. 681; N. Lavranos, *Opinion 1/03, Lugano Convention (Full Court) of 7 February 2006*, ‘Common Market Law Review’ 2006, Vol. 43, at p. 1097; P. Mostowik, M. Niedzwiedz, *Implications of the ECJ ‘Lugano II Opinion’ for European Union’s External Actions concerning Private International Law*, ‘Yearbook of Polish European Studies’ 2010, Vol. 13, at pp. 129–148.



Many questions were raised as regards the consequences of the Court's opinion for further developments in private international law. It was questioned to what extent the flexible reading of the ERTA doctrine given in the Lugano II Opinion would have immediate consequences for the EU competence in other areas of private international law and other civil matters. Such concerns were also expressed as regards the potential restriction of Member States' freedom to maintain or establish bilateral relations with third states in the area of private international law<sup>30</sup>.

The Lisbon amendment to the Rome Treaty introduced no specific provisions concerning the EU external competence in the field of private international law. However, it codified the doctrine of implied powers. According to Article 216 TFUE, the Union may conclude an agreement with one or more third countries or international organisations *inter alia* where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding EU act, or is likely to affect common rules or alter their scope. Pursuant to Article 3(2) TFEU, the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or in so far "as its conclusion may affect common rules or alter their scope"<sup>31</sup>. The broad approach to the ERTA doctrine adopted by the ECJ in the Lugano II Opinion will undoubtedly influence the interpretation of this provision as regards the competence to conclude agreements concerning "judicial cooperation in civil matters".

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<sup>30</sup> Lugano II Opinion was *inter alia* the subject of an interesting academic debate held at the Milan University on 16.9.2006, when the European Court of Justice was criticised for its imprecise language and weak – from the perspective of private international law – grounds of its reasoning. See contributions of Ch. Kohler (at p. 7) and A. Malatesta (at p. 46) [in:] F. Pocar (ed.) 'The External Competence of the European Union and Private International Law. The EC Court's Opinion on the Lugano Convention', 'Studi e Pubblicazioni della Rivista di Dritto Internazionale Privato e Processuale' 2007; P.J. Kuijper, *The opinion on the Lugano Convention and the implied external relations powers of the Community* [in:] B. Martenczuk (ed.) 'Justice, Liberty, Security. New challenges for EU external relations', Brussels 2008, at pp. 208–209.

<sup>31</sup> See J. Wouters, D. Coppens and B. De Meester, *The European Union's External Relations after the Lisbon Treaty*, „Schriftenreihe der Österreichischen Gesellschaft für Europaforschung' (ECSA-Austria) 2008, Vol. 11, at pp. 168–186.

It should be added that, since the Lisbon Amendment, the European Union has been endowed with legal personality and is accordingly better prepared to be an actor on the international arena<sup>32</sup>.

There are two aspects of the ECJ's Lugano II Opinion which give rise to consequences beyond the particular issue raised by the Council in that case. Firstly, the Court noted that the rules on the recognition and enforcement of judgments are indissociable from those concerning jurisdiction (at paras. 162–172). The result thereof is that EU regulations on jurisdiction, recognition and the enforcement of judgments in any matter could be affected by an international agreement concluded by a Member State. Secondly, the Court also gave the ERTA doctrine a more flexible meaning. It focused on the uniform and consistent application of EU rules and the proper functioning of the system they establish, in order to preserve the full effectiveness of EU law (at paras. 126–128). It was also held that, in determining the application of the ERTA doctrine, “it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully” and that “it is also necessary to take into account not only the current state of the EU law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis” (at para. 126). This extensive interpretation of the ERTA doctrine and the exclusive character of the EU competence may be justified by the political underpinnings of the Court's opinion, namely development of the European Union's area of civil justice<sup>33</sup> which constitutes an important aspect of the EU's general objective to create, for the benefit of its citizens, an area of freedom, security and justice (Article 2 TUE.).

Creating the area of freedom, security and justice in the European Union was set as a goal of the EU during the European Council meeting in Tampere in December 1999, soon after the entry into force of the Amsterdam Amendment<sup>34</sup>. The European Council stressed in its Tampere conclusions that all competences and instruments at the disposal of

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<sup>32</sup> See Article 47 of the Treaty on the European Union, as amended by the Treaty of Lisbon, *supra* note 11, at p. 13.

<sup>33</sup> See contribution of Ch. Kohler, *op. cit.*, at p. 129.

<sup>34</sup> See Presidency Conclusions – Tampere European Council, 15 and 16.10.1999, Document of the European Council 200/1/99.

the Union, and in particular in external relations, must be used in an integrated and consistent manner to build the area of freedom, security and justice. The Hague Programme<sup>35</sup>, which was agreed prior to the Lugano II Opinion, expressed the need for further enhancement of the work on the creation of “Europe for citizens”. Setting up the European Area for Justice was to play an essential role in this respect<sup>36</sup>. The development of a coherent external dimension of the Union policy of freedom, security and justice was identified as a growing priority. In order to achieve that goal, all of the powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice. The existence of internal policies was indicated as the major parameter justifying external action.

The determination of the Court of Justice as regards the EU exclusive competence in this matter seems to be understandable. The Court expressed that “international provisions containing rules to resolve conflicts between different rules of jurisdiction drawn up by various legal systems using different linking factors may be a particularly complex system which, to be consistent, must be as comprehensive as possible”. The exclusive external competence of the European Union, analysed from that perspective, seems to serve the goal of creating a European Area for Justice for the benefit of those to whom the private international rules ultimately concern. This direction of the development of the EU private international law is upheld in the Stockholm Programme<sup>37</sup>. The European Council considered that “clearly defining Union external interests and priorities in the area of judicial cooperation in civil matters is very important with a view to interacting with third countries in a secure legal environment” (at para. 3.5.1). It also recommended that international agreements, in particular, as regards judicial cooperation as well as in the field of civil law, should be used more frequently, while taking account of multilateral mechanisms (at para. 7.4).

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<sup>35</sup> Document No. 16054/04 of the Council of the European Union of 13.12.2004, The Hague Programme: strengthening freedom, security and justice in the European Union.

<sup>36</sup> *Ibidem*, at p. 26.

<sup>37</sup> The Stockholm Programme: An open and secure Europe serving and protecting citizens. Document of the European Council, O.J. 4.5.2010, C-115, at p. 1.

Summarizing, the Lugano II Opinion analysed in the context of the 1999 Tampere conclusions and the 2004 Hague Programme, may be perceived as the Court's contribution to the development of the European judicial area by way of (characteristic for the ECJ) a functional approach to integration taken in particular in areas where it is difficult to distinguish between law and policy<sup>38</sup>. Accordingly, it may be difficult to reconcile the Court's arguments in the Opinion exclusively from a private international law perspective. The abovementioned policy seems to be confirmed by legal developments in EU private international law *sensu largo* after 2006 and the future actions planned in the Stockholm Programme of 2009.

By confirming the exclusive competence of the European Community to conclude the second Lugano Convention, the Opinion made the European Union an important player on the international arena in the field of private international law *sensu largo*. This may be an important feature of the process of "Europeanization" of the sources of law *via* not only adopting regulations, but also the conclusion of international agreements by the European Union instead of the Member States.

### **3. The Practical consequences of the ECJ "Lugano II Opinion" after 2006**

Since the Lugano II Opinion was delivered, the European Community (Union) has exercised its external competences in the field of private international law. On 5.10.2006, the Council adopted a decision on the accession of the Community to the Hague Conference on Private International Law ("HCPIL")<sup>39</sup>. Although the Lugano II Opinion itself was

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<sup>38</sup> See contribution of Ch. Kohler, *supra* note 30, at p. 129.

<sup>39</sup> Council Decision No. 2006/719/EC of 5.10.2006 on the accession of the Community to the Hague Conference on Private International Law, O.J. 26.10.2006, L-297, at p.1; As regards the Hague Conference of Private International Law as "a meeting place between the EU and third states", see T. Kruger, *Civil Jurisdiction Rules of the UE and their Impact on Third States*, Oxford 2008, at pp. 41-56. On welcoming the EU as a member of HCPIL, see H. van Loon, A. Schulz, *The European Community and the Hague Conference of Private International Law*, [in:] B. Martenczuk, S. van Thiel (eds), 'Justice, Liberty, Security. New challenges for EU External Relations', Institute for European Studies, Vol. 11, Brussels 2008, at pp. 257-299.

not mentioned directly in this decision, the ERTA doctrine to which the Opinion gave a more flexible reading, was mentioned in Annex II on the declaration of the European Community (now European Union) specifying the matters in respect of which competence was transferred to it. It seems therefore that the opinion helped to accelerate accession to the HCPIIL in order to grant a status corresponding to the new international role and enabling the exercise of external competence<sup>40</sup>. Such a statement was confirmed by subsequent developments in EU external relations<sup>41</sup>. On 26.2.2009, the Council adopted a decision on the signing of the 2005 Convention on Choice of Court Agreements finding that this convention falls entirely within the exclusive external competence of the Community<sup>42</sup>. In the explanatory memorandum to the Commission's proposal of 5.9.2008, in justifying the EC competence, reference was made to the Court of Justice's jurisprudence, in particular to the Lugano II Opinion<sup>43</sup>. Reference to this opinion did not raise concerns in this case, because the sub-areas of private international law regulated in Lugano II and the 2005 Hague conventions, as well as the civil matters covered therein, were similar.

The next action was the adoption by the Council on 30.10.2009 of the decision on the conclusion by the European Community of the 2007 Protocol on the Law Applicable to Maintenance Obligations<sup>44</sup>. According to

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<sup>40</sup> See K. Boele-Woelki, *Unification of private international law in Europe* [in:] J. Basedow (ed.), 'Private international law in the international arena – Liber Amicorum Kurt Siehr', The Hague 2000, at pp. 75–76; P. Mostowik, M. Niedźwiedz, *op. cit.*, at pp. 129–148.

<sup>41</sup> See J.A. Bischoff, *Die Europäische Gemeinschaft und die Haager Konferenz für Internationales Privatrecht*, 'Zeitschrift für Europäisches Privatrecht' 2008, Vol. 3, at pp. 334–339; R. Wagner, *Die Haager Konferenz für Internationales Privatrecht zehn Jahre nach der Vergemeinschaftung der Gesetzgebungskompetenz in der justiziellen Zusammenarbeit in Zivilsachen- mit einem Rückblick auf die Verhandlungen zum Haager Gerichtsstandsübereinkommen*, 'Rebels Zeitschrift für ausländisches und internationales Privatrecht' 2009, Vol. 2, at pp. 215–240.

<sup>42</sup> Council Decision 2009/397/EC of 26.2.2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, O.J. 29.5.2009, L-133, at p. 1.

<sup>43</sup> *Ibidem*, at p. 3.

<sup>44</sup> Council Decision 2009/941/EC of 26.2.2009 on the conclusion by the European Community of the 2007 Protocol on the Law Applicable to Maintenance Obligations,

the preamble, the European Community (Union) has exclusive competence over all matters governed by this international convention<sup>45</sup>. In the draft of this decision it was said that, in accordance with the Lugano II Opinion, the Community had exclusive external competence in the fields covered by Regulation 4/2009<sup>46</sup>. However, such a simple explanation may give rise to concerns. Firstly, the “Brussels III” Regulation – contrary to its proposal – contains no conflict-of-laws rules *per se*, but rather refers to the 2007 Hague Protocol. Given the choice of such a legislative method, it is not easy to argue that the regulation’s rules could be affected. Secondly, the regulation refers to the Protocol, which was not signed by the European Union prior to adoption of the Regulation. This fact was known at the time of the Commission’s decision of 2009 on the conclusion of the Protocol. One could agree that the Member States had no competence to sign this Protocol *e.g.*, a year before (in 2008), because such signature could affect any future EU regulation being drafted at that time and also containing conflict-of-laws rules. Another viewpoint, however, would be to agree with the statement that the European Union enjoyed exclusive competence.

These doubts concerning the main arguments presented for the European Union’s accession to the 2007 Hague Protocol do not mean that its exclusive competence is contested, since other convincing arguments in favour of this conclusion exist. One such argument is that the regulation was intended to unify conflict-of-law rules in a universal way. In particular, the rationale could be the existence of common rules on the recognition and enforcement of foreign judgments in maintenance matters (pursuant to the “Brussels I” Regulation), which are in practice strictly connected with the application of conflict-of-laws rules<sup>47</sup>. If the European Court

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O.J. 16.12.2009, L-331, at p. 17; See P. Beaumont, *International Family Law in Europe- the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity*, ‘*Rabels Zeitschrift für ausländisches und internationales Privatrecht*’ 2009, Vol. 3, at pp. 509–513.

<sup>45</sup> *Ibidem*, at point 5.

<sup>46</sup> Proposal of 23.2.2009, COM(2009)81 final, at point 4.

<sup>47</sup> Such argumentation could be partly found in point 2 of the Proposal: “Application of the Protocol in the Community will guarantee the application within the Member States of uniform and harmonized rules on applicable law in maintenance matters. In addition, harmonized rules on applicable law are a precondition for abolishing *exequatur* for decisions concerning maintenance obligations”.



of Justice had held that the EU was exclusively competent to conclude a Convention on Jurisdiction and Mutual Recognition and Enforcement of Judgments in Civil Matters, the same conclusion should apply *a fortiori* to conflict-of-laws rules. Determining the applicable substantive law has a direct impact on judgments, which affects “free movement” within the European Union (*i.e.*, *ipso iure* recognition of judgments). Conflict-of-laws rules resulting from international agreements would certainly affect those provided in *e.g.*, the “Rome” regulations (given the universal effect of their application) and could give rise to differences among judgments in factually similar cases originating from different Member States.

The last example of the Lugano II Opinion’s impact is in the adoption of the decision on signing on behalf of the European Union the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance by the Council on 31.3.2011<sup>48</sup>. In the explanatory memorandum<sup>49</sup> the Commission – arguing in favor of the EU’s exclusive competence – refers directly to the Lugano II Opinion and also derives competence from Regulation 4/2009 (at pp. 4–5). The exclusive character of such competence is, however, also extended to administrative cooperation and rules on legal aid. According to the Commission, this is justified by the possibility for conflicts between the “Brussels III” Regulation and the 2007 Hague Convention. This reasoning refers directly to the reasoning of the Court in Lugano II Opinion as regards the role of the disconnection clause. The Commission pointed out that “such a clause does not exclude the potential impact of the Convention on Community law. On the contrary, inclusion of a disconnection clause in the agreement may indicate that the Community rules are affected” (at p. 5)<sup>50</sup>.

Further developments of EU law in the area of private international law are envisaged in the Stockholm Programme and the Commission Action Plan for Implementation thereof<sup>51</sup>. The European Union is eager to strengthen its presence on the international arena in the field of

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<sup>48</sup> Council Decision 2011/220/EU of 31.3.2011 on signing on behalf of the European Union of the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance, O.J. 7.4.2011, L-93, at p. 9.

<sup>49</sup> COM (2009)373 final.

<sup>50</sup> See also Lugano II Opinion, at paras. 129–130.

<sup>51</sup> Communication of 20.4.2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the



private international law. The following priorities of EU external actions are identified: (1) clear definition of the Union's external interests and priorities in the area of judicial cooperation in civil matters (with a view to interact with third countries in a secure legal environment); (2) encouraging third states to join the Lugano Convention; (3) active promotion of the widest possible accession to the most relevant Hague Conventions; and (4) offering as much assistance as possible to other states so as to secure proper implementation of these instruments. The option of bilateral agreements should be explored, on a case-by-case basis, with regard to bilateral agreements in cases where no legal framework is in place for relations between the Union and partner countries, and where the development of new multilateral cooperation is not possible from the Union's standpoint<sup>52</sup>.

Detailed initiatives have been scheduled in the Commission's Action Plan, including recommendations for authorizing Member States to negotiate an agreement between the European Union and Norway, Iceland and Switzerland on Judicial Cooperation Concerning the Service of Documents and Taking of Evidence (in 2012), and for an authorization to negotiate an agreement between the EU and those countries regarding an Additional Protocol on Maintenance Issues concerning the 2007 Lugano Convention (in 2010). The second planned action may be understood as being influenced by the Lugano II Opinion, but the first extends beyond the areas of jurisdiction and recognition and the enforcement of foreign judgments. It should be read together with planned proposals for the authorization, in the EU interest, of certain Member States to accede to the Hague Convention on service of documents and on the taking of evidence (in 2011)<sup>53</sup>. Both of the actions involve an inherent assumption that the European Union has exclusive external competence, which is not easily obvious from the provisions of regulations on the taking of evidence and service of documents

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Regions. Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme, COM(2010)171 final.

<sup>52</sup> See Stockholm Programme, at point 3.5.1.

<sup>53</sup> Apart from those actions a communication defining strategy for the EU's international presence in the field of civil law (2011), an assessment of the participation of the third countries to the Lugano II Convention (2012), and proposal for the accession of the EU to UNIDROIT (2014) are planned. The latter refers rather to substantive law.

between Member States, nor from the terms of the Lugano II Opinion. However, the transfer of competences to the European Union in this area of external relations could result in certain advantages, which will be discussed in the next part of this paper.

It seems that beyond the territory “taken over” by existing and planned EU Regulations, there remains a place for an “old-fashioned” way of acceding to international conventions separately by Member States (individually or alongside the European Union). An example of matters in respect of which the European Union does not regard itself as exclusively competent (probably given the absence of existing or planned Regulation in these areas), is the 2000 Hague Convention on the International Protection of Adults. Nevertheless, a common political strategy has been drafted, *i.e.*, Member States are being encouraged to join this convention in the Stockholm Programme<sup>54</sup>. Another question is whether such individual actions should be supported. Of course, if they are common for all Member States, they would give rise to similar effects as the harmonization of laws.

The Lugano II Opinion also underpins the adoption of the following two EU regulations: Council Regulation 664/2009 of 7.7.2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, as well as the law applicable to matters relating to maintenance obligations<sup>55</sup>, and Regulation 662/2009 of the European Parliament and of the Council of 13.7.2009 establishing such a procedure on particular matters concerning the law applicable to contractual and non-contractual obligations<sup>56</sup>.

These legal instruments represent a response to the question whether, and to what extent, Member States may negotiate bilateral

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<sup>54</sup> According to point 2.3.3 *in fine* of the Stockholm Programme: “The need for additional proposals as regards vulnerable adults should be assessed in the light of the experience acquired from the application of the 2000 Hague Convention which are parties or which will become parties in the future. The Member States are encouraged to join the Convention as soon as possible”.

<sup>55</sup> O.J. 31.7.2009, L-200, at p. 46.

<sup>56</sup> O.J. 31.7.2009, L-200, at p. 25.

agreements with non-member countries following the Lugano II Opinion<sup>57</sup>. Their preambles refer to this opinion directly<sup>58</sup>. However, they go beyond the Court's findings on jurisdiction, recognition and enforcement of judgements in civil and commercial matters. The explanatory memoranda to the Commission's proposals read as follows:

“the Court confirmed that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out ‘*inter alia*’ in Regulation 44/2001, ‘in particular’ on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”<sup>59</sup>.

It follows that the areas of jurisdiction and enforcement of judgments, as well as civil and commercial matters, are merely examples thereof. Given the existence of the Brussels and Rome regulations<sup>60</sup>, the European Union has acquired exclusive competence for the conclusion of international agreements on the law applicable to contractual and non-

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<sup>57</sup> It is worth noting that the question was raised by the Spanish government at the hearing in the Lugano II Opinion proceedings. In particular the Spanish government drew the Court's attention to the fact that certain Member States may have a particular interest in negotiating with a non-member country on those areas, either because of geographical proximity or because of historical links between the two States concerned; See Lugano II Opinion, at para. 102. The Court of Justice did not answer that question directly and unequivocally.

<sup>58</sup> See *supra* note 56, at point 5 and *supra* note 55, at point 5.

<sup>59</sup> Proposal of the Council regulation establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, COM(2008)894 final, at p. 3; proposal of the regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, COM (2008)893 final, at p. 3.

<sup>60</sup> The Regulation 664/2009 shall apply to agreements concerning matters falling entirely or partly within the scope of the “Brussels II-bis” and the Regulation 4/2009, while the Regulation 664/2009 shall apply to agreements concerning matters covered by “Rome I” and “Rome II” Regulations. The procedures established by the two Regulations are identical, therefore they can be discussed together.

contractual obligations, and jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters and matters of parental responsibility, as well as the law applicable to maintenance obligations. Accordingly, the EU exclusive competence is *a priori* extended to rules concerning not only international civil procedure but also conflict-of-law rules determining the applicability of substantive law<sup>61</sup>.

Both of the abovementioned regulations refer to pre-existing bilateral agreements and to future agreements yet to be negotiated and concluded. It should be stressed that pursuant to Article 351 TFUE, if a pre-existing international agreement contains provisions that are incompatible with the Treaties, Member States must take all steps to eliminate such incompatibilities by renegotiating or, if necessary, by denouncing the agreements. These steps shall be taken in accordance with the procedure provided for in the relevant regulation, accordingly to the subject matter of the agreement. A Member State shall also follow the said procedure if it intends to negotiate and conclude a new agreement with a third country.

Prior to engaging in formal negotiations, in order to amend an existing agreement or to conclude a new agreement, a Member State shall notify the Commission of its intention to do so<sup>62</sup>. The Commission shall assess the notification – taking into account whether it involves any negotiating mandate with a view to the Union concluding an agreement with a third country – within 24 months. Failing this, it shall also assess whether the following conditions are met: provision by a Member State of information showing that it has a specific interest (due to economic, geographic, cultural, historical, social or political ties with the third country concerned), the envisaged agreement does not render EU law ineffective and does not undermine the proper functioning of the system established by EU law, and that it should not undermine the object and purpose of the EU external relations policy<sup>63</sup>. If such conditions are met, the Commission shall authorise a Member State to begin negotiations, but

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<sup>61</sup> See D. McClean, *Bilateral agreements with non-member states after Lugano opinion*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), 'The external dimension of EC private international law in family and succession matters', CEDAM 2008, at pp. 55–76, S. Bariatti, *Bilateral agreements with non-member states after Lugano opinion: some procedural issues* [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at pp. 77–86.

<sup>62</sup> Article 3 of the Regulation 664/2009 and Article 3 of the Regulation 662/2009.

<sup>63</sup> Article 4 of the Regulation 664/2009 and Article 4 of the Regulation 662/2009.

it may propose negotiating guidelines and participate in the negotiations as an observer<sup>64</sup>. The content of the international agreement may also be influenced by the EU, since the Commission may request the inclusion of particular clauses in the envisaged agreement<sup>65</sup>. Moreover, the regulations require that the envisaged agreement should contain a clause providing for either denunciation of the agreement or direct replacement of the relevant provisions in the event that a subsequent agreement is concluded by the Union with the third state<sup>66</sup>.

Prior to signing a negotiated agreement, the Member State shall notify the outcome of the negotiations to the Commission and shall transmit the text of the agreement<sup>67</sup>. The Commission shall assess whether the conclusion of the envisaged agreement is in the interests of the Community and, if so, shall adopt a reasoned decision authorising the Member State to conclude the agreement<sup>68</sup>.

If such conditions are not met and the Commission intends to refuse the authorization, it shall give an opinion within 90 days from receipt of the notification. The Member State concerned may then – within 30 days – request that the Commission enters into discussions with it to find an appropriate solution. If no such request is submitted, or following the closure of discussions, a reasoned decision should be given upon the application of the Member State and the European Parliament and Council should also be notified<sup>69</sup>.

The aforementioned Regulations may be *de facto* described as “the exception confirming the rule”, namely the exclusive competence of the European Union. The autonomy of the Member States to amend, negotiate and conclude bilateral agreements is *de facto* restrictively limited by the two Regulations<sup>70</sup>. It is worth mentioning that the approach

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<sup>64</sup> Article 5(1) of the Regulation 664/2009 and Article 5(1) of the Regulation 662/2009.

<sup>65</sup> *Ibidem*.

<sup>66</sup> See Article 5(2) of the Regulation 664/2009 and Article 5(2) of the Regulation 662/2009.

<sup>67</sup> Article 8 of the Regulation 664/2009 and Article 8 of the Regulation 662/2009.

<sup>68</sup> Article 8(3) of the Regulation 664/2009 and Article 8(3) of the Regulation 662/2009.

<sup>69</sup> Article 6 of the Regulation 664/2009 and Article 6 of the Regulation 662/2009.

<sup>70</sup> On the will of Member States to get back the “lost territory” during preparing the regulations, what *de facto* not happened – see R. van Wagener, *op. cit.*, at pp. 233–235.

taken in the area of private international law with regard to bilateral agreements of the Member States is similar to that taken with regard to negotiation and implementation of air service agreement between the Member States and third countries<sup>71</sup> following the ECJ's "open skies" judgments<sup>72</sup>. This approach may be described as a procedural approach to the competence issue. What the Lugano II Opinion and the "open skies" judgments have in common is that they both illustrate the contribution of ECJ jurisprudence to the development of EU policy goals. Placed in that context, both judgments and their consequences seem understandable. Quite another issue is whether they will prove acceptable.

Application of the two regulations may give rise to certain practical problems. Firstly, the question arises whether the Member State concerned may challenge the Commission's decision to refuse authorization of the opening of formal negotiations or conclusion of an agreement. Reasoned decisions are legal instruments adopted by the Commission and addressed to the Member State concerned and are intended to produce legal effects *vis-à-vis* third parties as they influence the rights and obligations of third countries seeking to enter into international relations with the Member State. Accordingly, it should be possible to challenge such decisions under Article 263 TFEU<sup>73</sup>. Secondly, a question arises as to the consequences

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<sup>71</sup> See Regulation (EC) 847/2004 of the European Parliament and of the Council of 29.4.2004 on the negotiation and implementation of air services agreements between Member States and third countries, O.J. 30.04.2004, L-157, at p. 7.

<sup>72</sup> *Commission v. United Kingdom*, Case No. C-466/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9427; *Commission v. Denmark*, Case No. C-467/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9519; *Commission v. Sweden*, Case No. C-468/98, Judgment of 5.11.2002, E.C.R. 2002, at p. 9575; *Commission v. Finland*, Case No. C-469/98, Judgment of 5.11.2002, E.C.R. 2002, at p. 9627; *Commission v. Belgium*, Case No. C-471/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9681; *Commission v. Luxembourg*, Case No. C-472/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9741; *Commission v. Austria*, Case No. C-475/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9797; *Commission v. Germany*, Case No. C-476/98, Judgment of 5.11.2002, E.C.R. 2002, at p. I-9855.

<sup>73</sup> Pursuant to Article 263 TFEU, the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.



for the Member States of the conclusion of an agreement in breach of the Commission's refusal to authorize the conclusion of the agreement. It seems that the Member State concerned may be challenged by the Commission before the Court of Justice on the basis of Article 258 TFEU<sup>74</sup> for a breach of EU law if it indeed encroached upon the exclusive competence of the EU in concluding the agreement. However it must be noted that, in the light of public international law, the agreement concluded by the Member State with a third country would remain valid.

Thirdly, the question arises as to the consequences of the expiry of the two Regulations, as they are of limited temporal application. According to Article 14 of Regulation 664/2009 and Article 14 of Regulation 662/2009, these Regulations will expire three years after the submission by the Commission of the report on their application. The Commission is to submit such a report not earlier than July 2017<sup>75</sup>. The report may either confirm their expiration or may recommend replacing them with new Regulations. In the latter case, it seems that the current situation regarding bilateral agreements will be maintained. In the event of their expiration, it seems that Member States would no longer be competent to conclude bilateral agreements with third states, which would result in further impoverishment of their competences in the area of private international law<sup>76</sup>. In light of the advantages of the uniformity of private international law in Member States, this would have desirable effects<sup>77</sup>.

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<sup>74</sup> According to Article 258 TFEU if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

<sup>75</sup> See Article 13 of the Regulation 664/2009 and Article 13 of the Regulation 662/2009.

<sup>76</sup> However, the Stockholm Programme seems to suggest the continuation of the current solution; *supra* note 22, at point 3.5.1.

<sup>77</sup> T. Kruger, *Civil Jurisdiction Rules of the UE and their Impact on Third States*, Oxford 2008, at pp. 382–384, 386–387. As advantages of individually concluded conventions by Member States with third states he regards reasons to conclude such an agreement with neighbours or states in which live many nationals, as well as situations when certain third states might not be interested in concluding a convention with the entire EU. The authors of this article see more advantages of unified rules in all EU countries, especially



#### 4. The colourful mosaic *vel* complicated labyrinth of private international law's sources in the European Union

Private international law *sensu largo* includes legal provisions that are different in character. Conflict-of-laws rules indicate the substantive law applicable in international matters. Norms concerning jurisdiction determine which courts have competence to hear such cases. Accordingly, it applies specific solutions on, *e.g.*, service of documents or the taking evidence abroad. Determining the effect of judgments issued abroad is the role of rules governing the recognition and enforcement of foreign judgments. All of these areas are strictly connected in the practice of international civil and family disputes<sup>78</sup>. Given the existence of a plethora of sources of private international law and the coexistence of legal provisions of different origins (internal, international and EU), and the frequent amendments thereof<sup>79</sup>, these are far from peaceful times for lawyers dealing with this branch of law.

Despite its name, private international law is in fact not international in origin, since each State has created its own system of conflict-of-laws rules, alongside provisions on international civil procedure. The Polish codification of 1926 may be highlighted as an example of the first systemic conflict-of-laws rules in Europe<sup>80</sup>. Domestic legislation on

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because of the existing “free movement of judgments” effects and the phenomenon of one economic territory. On the need of an EU policy on recognition of judgements form third states, but exercising a number of competences by Member States regarding bilateral level – see M. Pertegás, *Recognition and enforcement of judgements in family and successions matters*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at pp. 184–186.

<sup>78</sup> See H.-P. Mansel, *Anerkennung als Grundprinzip des Europäischen Rechtsraums, Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?*, ‘*Rebels Zeitschrift für ausländisches und internationales Privatrecht*’ 2006, Vol. 2, at pp. 651–731.

<sup>79</sup> Potential conflicts between rules on jurisdiction coming from different legal systems, as well as the fact that domestic rules and international rules may be “a particularly complex system” was stressed by the ECJ in Lugano II Opinion, *supra* note 26, at paras. 140–141.

<sup>80</sup> See A. Mączyński, *Polish Private International Law*, ‘*Yearbook of Private International Law*’ 2004, Vol. VI, at p. 220.

private international law (often separate legal acts or parts of civil codes and codes of civil procedure) are binding in matters not covered by international conventions or EU regulations. In the XXth century, certain areas of private international law were regulated at an international level by way of bilateral or multilateral agreements. Each country decided on whether or not to join a specific multilateral convention, which resulted in further differentiation of the legal situations prevailing in each Member State<sup>81</sup>. International conventions concluded by Member States remain applicable, with their specific problems of delimitation between multilateral and bilateral conventions (which must be resolved in relation to particular conventions)<sup>82</sup>. EU regulations are of growing importance, because – especially in the area of conflict-of-laws and jurisdiction – they are effective means for the unification of law. The process of “communitarization/unionalization” of private international law is intensifying but has not yet resulted in the complete replacement of domestic laws. To complicate things further, the influence of the Lugano II Opinion has meant that the European Union is nowadays often a party to international conventions instead of the Member States directly.

As regards the frequency of changes within the legal order in last decade, it may be noted that the sharpest “wind of change” in Member States is blowing from Brussels, but this is not the only

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<sup>81</sup> For example, research conducting for the purposes of writing a paper for a conference organised in Trnava in 2008 showed that Hungary was a party to 11 Hague conventions (and used to be a party to other 3), there were 15 Hague conventions in force both in the Czech Republic and Slovakia and these countries have signed one more convention, which has not yet entered into force, in Poland 17 conventions were in force (and Poland used to be a party to 3 more and signed one more convention, which had not yet come into force). Taking into account all those countries, they were or used to be parties to 23 Hague conventions, but interestingly there are only 7 Hague conventions to which all countries have acceded. See P. Mostowik, *Beginning of the XXIst century – the Age of Common European Private International Law has commenced? Some remarks from V4 countries' point of view*, [in:] “The role of international law and European law in the 21st century in V4 countries”, Trnava 13.10.2008, Trnava 2009, at pp. 32/1-32/17.

<sup>82</sup> See E. Jayme, *Das europäische gerichtsstands- und vollstreckungsübereinkommen und die drittländer – das beispiel Österreich*, [in:] F. Schwind (ed.), ‘Europarecht – Internationales Privatrecht – Rechtsvergleichung’, Österreichische Akademie der Wissenschaften, Philosophisch-Historische Klasse. Sitzungsberichte, 500. Band, Wien 1988, at p. 121.

one and amendments are also made to legislation that is national or international in origin. Examples of such changes adopted directly by national legislators may be, *e.g.*, in Poland – the implementation of EC directives prior to 2004, the entry into force of the re-codification of international civil procedure in 2009<sup>83</sup>, and the adoption of a new act on private international law in 2011. These developments were also caused “indirectly” by acceding to international conventions, such as the 1980 Rome Convention in 2007 and the 1996 Hague Convention on parental responsibility and measures for the protection of children in 2010. As described above, in the last decade the EU institutions have not only adopted or proposed subsequent regulations concerning new civil matters, but also amended existing regulations.

The co-existence of legal sources of different origins creates the need for über-norms governing the inter-relationship (between EU regulations, multilateral conventions and bilateral conventions, as well as rules of domestic origin, also including provisions harmonized with EU directives). In general, EU regulations, as “super-instruments”, prevail over other sources of law (but shall not prejudice the application of other EU instruments that are *lex specialis* in character)<sup>84</sup>. EU regulations shall prejudice national legislation (except for provisions harmonized pursuant to EU directives<sup>85</sup>) and international agreements concluded only between the Member States<sup>86</sup> (with a few exceptions for conventions between Scandinavian countries<sup>87</sup>).

<sup>83</sup> See T. Ereciński, K. Weitz, *Das neue autonome internationale Zivilverfahrensrecht in Polen*, ‘Zeitschrift für Zivilprozeß International’ 2008, Vol. 13, at p. 57.

<sup>84</sup> See Article 67 of “Brussels I” regulation.

<sup>85</sup> See Article 67 of “Brussels I”, Article 68(3)-(4) of “Brussels III” regulation.

<sup>86</sup> See Article 69 of “Brussels I”, Article 59(1) of “Brussels IIa” regulation, Article 45 of Succession Proposal, Article 36 of Matrimonial Proposal, Article 32 of Partnerships Proposal and – literally only as far as “conventions concluded exclusively between two or more of Member States” – Article 25(2) of “Rome I”, Article 28(2) of “Rome II”, Article 19 of “Rome III” regulation. Article 21(1) and (2) of Evidence regulation and Article 20(1)(2) of Service of documents Regulation provide in general their prevailing over bilateral agreements between Member States or multilateral conventions, but not preclude from agreements aiming to further facilitating or simplifying the taking of evidence or servicing the documents between Member States.

<sup>87</sup> See Article 59(2) of “Brussels IIa”, Article 69(3) of “Brussels III” regulation.

No clear-cut answer exists as to the relationship between EU regulations and multilateral conventions involving the participation of third countries. In general, such regulations shall not affect the application of such bilateral or multilateral conventions, but – as it is usually stipulated – “without prejudice to the obligations of Member States under Article 307 TEC (Art. 351 TFEU) and not in cases between Member States (where regulations take precedence over such conventions)”<sup>88</sup>. Such regulations *ex proprio vigore* shall not generally affect the application of bilateral conventions with third countries, but there are situations in which the provisions of bilateral conventions state otherwise (compatibility clauses). Such provisions concerning relations to international agreements refer to participation in conventions existing at the moment regulations are adopted, which may be interpreted as referring to the past (and introducing a kind of *status quo*), but not to the future (precluding Member Countries from concluding further conventions).

When applying international agreements in a Member State, the question of supremacy within different international agreements on the same matters may arise. Most commonly, a bilateral convention takes precedence over a multilateral convention, but this is not a general principle<sup>89</sup>. Furthermore, while applying conflict-of-laws rules from bilateral convention, because of their non-universal application, the practical issue arises of delimitating situations governed by such a convention and domestic law<sup>90</sup>.

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<sup>88</sup> See Articles 60 and 61 of “Brussels IIa”, Article 69 of “Brussels III”, Article 45 of Succession Proposal, Article 36 of Matrimonial Proposal, Article 32 of Partnerships Proposal. The situation is more complex under Articles 71 and 72 of “Brussels I”.

<sup>89</sup> *E.g.*, according to Article 19(1) of 2007 Hague Maintenance Protocol: “this Protocol does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Protocol, unless a contrary declaration is made by the States Parties to such instrument”.

<sup>90</sup> The situation concerning the sources of applicable law in Denmark may also be described as a mosaic made of colourful pieces of different origin or a labyrinth with many twisting and blind alleys, but moreover enveloped in fog. In accordance with the Protocol on the position of Denmark annexed to the Treaties, Denmark generally does not participate in measures adopted under Title IV of the Treaty establishing the European Community, including judicial cooperation in civil matters. Paradoxically Denmark is, indirectly via international conventions with EU, bound by the Brussels I

All such problems, combined with a growing number of oft-amended legal instruments, do not help to simplify the life of judges and lawyers. There should also be no illusions that this process will halt, because the next round of EU regulations (including amendments) have already been announced in the Stockholm Programme. Apart from experts on private international law, it is not easy for lawyers to master and update their knowledge of provisions of different origin. One could even joke that we are surely not living in times in which the law was created on the basis of pre-existing and accepted customs (*per consuetudinem*) but rather in times where legal provisions sometimes have no chance to become a practical custom that people have time to understand and comply with. Excessively frequent changes in the legal order and the growing complexity thereof are deadly enemies of the law itself, since they *de facto* lead to non-compliance with the law.

There is a saying “May you live in interesting times”, most often reported as being of ancient Chinese origin. Certainly, from the perspective of private international law, we are living in interesting times, perhaps too interesting. For some professionals and academic scholars, living in times of the European private international law *in statu nascendi* and the possibility to co-create this process may represent a blessing. However, for other lawyers and non-professionals such times of strong “winds of change can” be a curse<sup>91</sup>.

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and Brussels III regulations and by those concerning the service of documents in civil matters (with some modifications and exceptions); See Council Decision of 20.9.2005 on the signing on behalf of the Community 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, O.J. 16.11.2005 L-299, at p. 61; Council Decision of 27.4.2006 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, O.J. 5.5.2006, L-120, at p. 23 and Danish notification of decision to implement the contents of Regulation 4/2009 to the extent that it amends Regulation 44/2001, O.J. 12.6.2009, L-149, at p. 80.

<sup>91</sup> A. Bonomi, *The Opportunity and the modalities of the Introduction of erga omnes Rules on Jurisdiction*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at p. 154 (“simplicity is very important value, in particular in a field such as that of conflict-of-laws, which is perceived as highly complex by legal profession”).

## **5. External relations in the scope of EU regulations and internal relations regulated by international conventions**

While discussing “judicial cooperation between Member States in civil matters” and “external action of the European Union” the impression may be created that the former (regulations adopted by EU institutions) is focused on internal cases while the latter (international agreements concluded by the European Union) is concentrated on relations with third countries. In fact, the situation here is more complicated and quite different from typical conventions between states concerning, *e.g.*, mutual obligations between countries within public international law, models of substantive law to be implemented in domestic laws, or mere political arrangements between states. Firstly, such a statement is only partly true. Secondly, it has different intensity as regards the various areas of private international law *sensu largo*.

Delimitation between EU internal and external relations, and between different types of legal instruments associated with each of these relations, seems relatively unproblematic (and quite typical from the perspective of public international law) with reference to existing mutual rules on recognition and enforcement of foreign judgments, and rules on cooperation in taking evidence or service of judicial documents. They apply only to EU internal relations (*e.g.*, pursuant to Regulation 1206/2001 when both the State requesting and the State taking evidence are EU members) or are restricted to relations with third countries (*e.g.*, under the Lugano II Convention when the state of origin of the judgment and the third country in which recognition is sought are bound by this convention, and *vice versa*).

Nevertheless, it is possible to imagine the creation – by way of adopting EU regulations – of common EU rules on recognition or enforcement of judgments coming from third parties, as well as common rules concerning foreign requests for taking evidence or service of a document. Such regulations would govern “one-way traffic” from third countries, just as national provisions currently do as regards matters outside the scope of the “Brussels” Regulations. They would not of course be mutual (*i.e.*, they would not bind third countries), and so would not



result in mutual treatment of judgments issued by EU courts in third countries, because EU regulations – contrary to international conventions – may not be enforced in third states. The creation of such common EU rules on the recognition of judgments originating in third countries was even contemplated during discussions on the planned amendment to the “Brussels I” Regulation, but was finally omitted from consideration<sup>92</sup>.

Conversely, there is no delimitation between EU internal and external relations when we consider EU regulations including conflict-of-laws rules and multilateral conventions prepared in recent decades under the auspices of the HCPIIL. Based on the principle of universal application, both of them are applied in countries bound by such a regulation (e.g., the Rome I, II and III Regulations<sup>93</sup>) or a convention (e.g., 2007 Maintenance Protocol<sup>94</sup>) in every international case, with no differentiation between “intra-EU” or “extra-EU” cases. Any law specified by such a regulation or a convention shall be applied whether or not it is the law of a Member State or a contracting party. This amounts to the complete replacement of domestic conflict-of-laws rules in each country bound by such a regulation or multilateral convention. This principle is worth supporting, because it eliminates the potential need to pre-define each situation as “European”, “conventional” or “other” at the initial moment of “choosing” the instrument to be applied in a concrete situation, which would give rise to serious practical problems. Conversely, this may cause a kind of “rivalry” between the two methods of unification of conflict-of-law rules<sup>95</sup>.

Such problems are not uncommon, however, when applying bilateral conventions with third states, because they usually provide for non-

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<sup>92</sup> The absence of common rules on the effect of third State judgments in the Community may in certain Member States lead to situations where third State judgments are recognized and enforced even where such judgments are in breach of mandatory Community law or Community law provides for exclusive jurisdiction of Member States’ courts.

<sup>93</sup> Under Article 2 of “Rome I”, Article 3 of “Rome II”, Article 4 of “Rome III” regulation, Article 25 of Succession Proposal, Article 21 of Matrimonial Proposal and Article 16 of Partnerships proposal (“any law specified by this Regulations shall be applied whether or not it is the law of a Member State”).

<sup>94</sup> Under Article 2 of 2007 Hague maintenance Protocol: “this Protocol applies even if the applicable law is that of a non-Contracting State”.

<sup>95</sup> See A. Malatesta, *The Lugano Opinion and its consequences in Family and Succession Matters* [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at p. 25.



universal conflict-of-laws rules and create the need for interpretation of their concrete scope of application. This should be done by analysing the particular case and verifying whether or not the connecting factors described in bilateral conventions are to be found in one of the two contracting states. If not, other conflict-of-law rules are applied, such as EU regulations or domestic laws. In fact, such bilateral agreements affect both EU regulations and multilateral conventions (regardless of whether they were concluded by a Member State or by the European Union). In this sense, they may be treated as referring to external relations, as opposed to “intra-EU” matters<sup>96</sup>.

As regards the rules on jurisdiction, it is not easy to generally delimitate the scope of application of EU regulations and multilateral conventions in external relations. Moreover, we are currently witness some changes in the solutions adopted in EU regulations some years ago.

### **5.1. Restricted external application of EU jurisdiction rules**

While constructing the “Brussels I” (which itself refers back to the 1968 Convention), “Brussels II” and “Brussels IIa” Regulations, the European institutions sought to define the scope of their application as an “intra EU” issue. It should firstly be noted that the “Brussels I” rules on jurisdiction apply whenever the defendant – or sometimes a branch of the defendant’s business – is domiciled in a Member State (Article 2, Article 15(2)). Secondly, the rules on exclusive jurisdiction may apply regardless of the parties’ domicile, by virtue of the object of the case, e.g., the location of immovable property in an EU country, the maintenance of a public register or validity of a patent in an EU country (Article 4(1), Article 22). Similarly, the Brussels II Regulations on jurisdiction in matrimonial cases apply whenever one of the spouses is habitually resident in the territory of a Member State or is a national of such a state (Article 6). It governs parental responsibility cases when a child is habitually resident in the EU or – exceptionally – is merely present in the EU territory (Articles 8 and 13).

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<sup>96</sup> See L. Tomasi, *The application of EC Law to non purely intra-Community situations*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at pp. 87–95; E. Pataut, *International Jurisdiction and Third States: a view from the EC in family matters*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at pp. 130–133.

Such legal approaches and restrictions to factors connected with Member States can be seen as an attempt to mark out “intra-UE” situations for the purpose of applying EU rules. Some free space remains in other cases to apply domestic provisions (also resulting from international agreements concluded by the Member State). But even internal EU situations specified in this way include, for example, cases where the claimant is a national or a habitual resident of a third country or – in “exclusive jurisdiction” situations – where both parties are resident outside the EU. The latter situations could be perceived as having certain external elements and not being purely internal.

## **5.2. Entire external application of EU jurisdiction rules**

When considering EU regulations adopted or proposed over the last two years, one can witness a phenomenon of extending the applicability of existing and planned EU rules on jurisdiction, aimed at governing cases more intensively connected with third countries. Since the new or planned instruments can – similarly to the universally applied conflict-of-laws rules contained in the “Rome” regulations – regulate cases connected with the whole world, they create a kind of “rivalry” between EU regulations and international conventions concluded by the EU. Such a view is to be found exclusively from a Member States’ perspective, however, since EU regulations create rules common in the European Union, but inapplicable outside the organisation itself.

For example, the ‘Brussels III’ Regulation is “wide open” for cases connected with third countries. Its provisions do not provide any restriction for its application, for example, to defendants domiciled in the European Union. Jurisdiction is granted to the court proper for the place where the defendant or the creditor is habitually resident, with no restrictions as to the circumstances regarding the claimant (Article 3). Moreover, jurisdiction can be based on the appearance of the defendant, unless he appears only to contest the jurisdiction (Article 5). Member States’ courts also have subsidiary jurisdiction based on the common nationality of the parties when no court of a Member State nor any court of a “non-EU” State Party to the Lugano II Convention (Article 6) has jurisdiction pursuant to Articles 3 to 5 of the Regulation. This Regulation also provides for the necessary jurisdiction (*forum necessitates*) enabling a court of

a Member State to exceptionally hear a case if no EU court has jurisdiction and if proceedings cannot be reasonably conducted in a third state (with which the dispute is closely connected) and the dispute has a sufficient connection with the Member State of the court seized.

The same idea of “widening” the scope of EU legal instruments’ application can be seen in proposals amending the “Brussels I” and “Brussels IIa” Regulations. According to the 2006 proposal for amending the “Brussels IIa” Regulation<sup>97</sup> its provisions on jurisdiction were not intended to be restricted to the spouse’s nationality or habitual residence in the EU. The proposed Article 7 was to provide that where none of the spouses is habitually resident in the territory of a Member State and the spouses do not have a common nationality of a Member State, the courts are competent by virtue of the fact that the spouses previously had their common habitual residence in the territory of a Member State for at least three years or where one of the spouses holds the nationality of that state. This proposal meant that the remaining domestic rules on jurisdiction would be superseded<sup>98</sup>.

Another example of the tendency described here – and of great importance given its wide scope of application – is the 2010 proposal for amending the Brussels I Regulation<sup>99</sup>. It abolishes the requirement for the defendant to have his habitual residence in the EU and extends the regulation’s jurisdiction rules to defendants from third countries. According to the proposed Article 4, persons not domiciled in any of the

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<sup>97</sup> Proposal of 17.7.2006 for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters COM(2006)399 final.

<sup>98</sup> The written explanation concerning this amendment states as follows: “the lack of widened rules of jurisdiction were noted as leading to practical difficulties to have the divorce recognised in a Member State since a decision issued in a third State is not recognised in a Member State pursuant to Council Regulations, but only pursuant to national rules or applicable international treaties. The Proposal introduces a uniform and exhaustive rule on residual jurisdiction which replaces the national rules on residual jurisdiction and which ensures access to court for spouses who live in a third States but retain strong links with a certain Member State of which they are nationals or in which they have resided for a certain period”.

<sup>99</sup> Proposal of 14.12.2010 for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast). COM(2010)748 final.

Member States may be sued in courts of a Member State only by virtue of the rules set out in Sections 2 to 8. That means, for example, that a person not domiciled in a Member State may be sued in the European Union in matters relating to a contract – in the courts proper for the place of performance of the obligation in question – and in matters relating to torts – in the courts proper for the place where the harmful event occurred (Article 5 of Section 2). This proposal introduces additional jurisdiction for disputes involving defendants domiciled outside the EU. It is also proposed that, when no court of a Member State has jurisdiction in accordance with Articles 2 to 24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located (Article 25)<sup>100</sup>. Furthermore, the courts of a Member State will be able to exercise jurisdiction if no other foreign forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned, which would allow proceedings to be brought when there would otherwise be no access to justice abroad (*forum necessitates*, Article 26).

The report on application of the Brussels I Regulation states that:

“the absence of harmonized rules on subsidiary jurisdiction causes an unequal access to justice for citizens, in particularly in situations where a party would not get a fair hearing or adequate protection before the courts of third States. The absence of common rules determining jurisdiction against third State defendants may also jeopardize the application of mandatory legislation, for example on consumer protection, commercial agents, data protection or product liability. In Member States where no additional jurisdictional protection exists, consumers cannot bring proceedings against third State defendants”<sup>101</sup>.

The 2010 proposal also explains that:

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<sup>100</sup> Provided that the value of the property is not disproportionate to the value of the claim and the dispute has a sufficient connection with the Member State of the court seized.

<sup>101</sup> Report of 21.4.2009 from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009)174 final, at point 3.2.

“The harmonization of subsidiary jurisdiction ensures that citizens and companies have equal access to a court in the Union, and that there is a level playing field for companies in the internal market in this respect. The harmonised rules compensate the removal of the existing national rules. First, the *forum* of the location of assets balances the absence of the defendant in the Union. Such a rule currently exists in a sizeable group of Member States and has the advantage of ensuring that a judgment can be enforced in the State where it was issued. Second, the forum of necessity guarantees the right to a fair trial of EU claimants, which is of particular relevance for EU companies investing in countries with immature legal systems”<sup>102</sup>.

Similar solutions are drafted for succession matters in the 2009 Proposal, which would fill the gap in the scope of “Brussels I” rules. Accordingly, if the deceased had their residence in a third State, the courts of a Member State may – under certain conditions<sup>103</sup> – nevertheless be competent on the basis of the fact that succession property is located in that Member State (Article 6). This rule is intended to guarantee access to justice for EU heirs and creditors where the location has close links with a Member State on account of the presence of property therein.

The next example is the latest 2011 proposal regarding matters of matrimonial property regimes and property consequences of registered partnerships. The former, borne out of the provisions dependent on succession or divorce proceedings, “opens the door” to EU courts’ jurisdiction on the basis either of the defendant’s habitual residence or previous common habitual residence (if the claimant still resides there), or on the basis of the nationality of both spouses (Article 5). Where no court has jurisdiction on these bases, but the property of one or both spouses is located in the territory of that Member State, the courts of a Member State shall have subsidiary jurisdiction only insofar as concerning the property in question (Article 6).

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<sup>102</sup> Proposal of 14.12.2010 for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010)748 final.

<sup>103</sup> Provided that that the deceased had previous habitual residence in that Member State in last five years, or – failing that – had the nationality of that state, or – failing that – an heir or legatee has their habitual residence in that state or – failing that – the application relates solely to property.

*Forum necessitatis* in matrimonial property cases is regulated in Article 7 of the 2011 Proposal, where it proves impossible or unreasonable to initiate or conduct proceedings in a third State. If no court in the European Union has jurisdiction on these bases, the proposal grants jurisdiction to the Member State whose courts may hear the case by way of exception. This rule should ensure access to justice for spouses and interested third parties where the property of either spouse or of both spouses is located in the territory of a particular Member State, and also where both spouses hold the nationality of a particular Member State<sup>104</sup>.

The abovementioned proposals in matters regarding matrimonial property regimes are duplicated in the 2011 Proposal on the property consequences of registered partnerships.

## **6. The practical coexistence of EU regulations and conventions concluded by the European Union in the area of private international law**

The abovementioned tendencies concerning rules on jurisdiction demonstrate that cases containing external elements may be regulated by EU instruments, although at first glance they may be associated only with EU internal affairs. The same may be said, albeit to a different degree, about other areas of “judicial cooperation in civil matters”, especially universal conflict-of-laws rules. EU regulations should not be considered as legal instruments governing only “intra-EU” cases. In fact, the most important factor that distinguishes measures undertaken by the European Union within “external actions” (in the meaning of Part Five of the Treaty) from “internal” measures (adopted under Article 81 TFEU), is the

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<sup>104</sup> According to this proposal, its provisions, provided independently of any succession or separation proceedings, jurisdiction of EU courts is based on defendant’s habitual residence, last common habitual residence if plaintiff still resides here and the place of partnership’s registration (Article 5). EU courts may also exercise subsidiary jurisdiction (Article 6) in so far as the property of one or both partners is located in the territory of a Member State (in respect of this property) or when both partners are nationals of that Member State. Exceptional “necessary jurisdiction” is also provided under Article 7. This rule is also intended to ensure access to justice for the partners and interested third parties in a case connected with third states.

fact that the rules included in international conventions are binding not only in Member States, but also in third countries, and are thus capable of introducing mutual solutions.

Taking into consideration this conclusion and the peculiarity of jurisdiction rules, the treatment of foreign requests for taking evidence or delivering judicial documents, the recognition and enforcement of foreign judgments, and conflict-of-laws rules, the final remarks on the future coexistence of EU regulations and international agreements shall be presented<sup>105</sup>.

The EU accession to multilateral conflicts-of-laws conventions (providing for the universal application of their provisions, e.g., under Article 2 of 2007 Hague Protocol) has almost identical consequences for EU Member States as would otherwise be achieved if the EU institutions adopt a new “Rome” regulation. In general, the difference between these two methods of unification of law can be seen not from an internal perspective but from the perspective of a third country in which rules identical to those applicable in the EU would be applied. Member States may be interested in achieving such international uniformity when considering the recognition and enforcement of judgments coming from such third countries. Introducing the same conflict-of-laws rules leads to the harmonization of judgments (e.g., judging on the basis of the substantive law indicated by the same connecting factors) given in EU and third countries. As regards the scope of the existing “Rome” regulations, future international agreements would only make sense if the conventional rules were the same as those contained in the “Rome” regulations. Otherwise, a conflict between the application of a convention and EU regulations would arise.

Similarly, the conclusion by the European Union of bilateral conventions, including conflict-of-laws rules, seems unnecessary because it would lead to practical problems of delimitation of the concrete scope of application of such bilateral conventions and EU regulation, unless they

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<sup>105</sup> On the concurrent legislative efforts of the HCPIIL and EU regarding maintenance obligations – see H. van Loon, *Remarks on the needs and methods for governance in the field of private international law – at the global and regional levels*, [in:] F. Cafaggi, H. Muir-Watt (eds.), *Making European Private Law. Governance Design*, Edward Elgar 2008, at p. 204.



provide identical rules to those contained in the “Rome” regulations and are intended to “export” them to a third country.

The rules on jurisdiction should be analysed together with those governing the recognition and enforcement of foreign judgments. Practical problems arise as regards a conflict of jurisdictions (*e.g.*, when two countries regard themselves as competent to resolve a dispute) when incompatible judgments in the same case are delivered in two countries. To eliminate such problems, the rules on jurisdiction are often regulated in international agreements in conjunction with the principles of mutual recognition and enforcement of judgments. Both of those areas of private international law could be potentially governed by EU regulations – not mutually, but merely from the Members States’ point of view. Whereas concluding international convention causes a kind of “mirror reflection” and application of the same rules in third countries (as seen in the Lugano II example). It also leads to equal treatment in third states of persons or bodies coming from Member States, as well as uniform rules on the effects of judgments coming from these states within the European Union’s territory<sup>106</sup>. It also represents an opportunity for the contracting States to agree on the scope of exclusive jurisdiction (*i.e.*, rules acceptable to all parties that do not allow a recognition of judgments given in proceedings conducted in an inappropriate jurisdiction). Especially as regards the jurisdiction and recognition of foreign judgments, the need may arise for special adjustment of common rules to an individual relation with a third state, which may make the conclusion of a bilateral agreement reasonable.

Given the necessity of mutual trust (especially as regards the “quality” of a foreign judicial system), when agreeing common rules on recognition of judgments, it remains desirable to ensure solutions that allow some degree of control as regards future parties (currently unknown at the time of the EU accession) to conventions and to ensure that only trustworthy States are permitted to accede. The question as to

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<sup>106</sup> The ECJ in the Lugano II Opinion, at paras. 131, 141 and 171 stressed the need for the proper functioning of the systems established by the Treaty, as well as stating that “the smallest lacuna” in rules on jurisdiction can cause concurrent jurisdiction of several courts, while rules on jurisdiction are indissociable from the rules on the recognition and enforcement of judgments.

whether such an assessment should be done at the level of EU should be answered positively, not only because of the *de facto* local effect of foreign judgments (especially in commercial matters in the European market)<sup>107</sup>.

Less important grounds to justify exclusive EU external actions may be found in connection with rules on the service of documents and the taking of evidence abroad. The EU Regulations refer to intra-EU relations and do not explicitly exclude individual contracting by Member States. However, it appears sensible to conceive of the European Union acceding to multilateral or bilateral conventions that would establish mutual rules. Unifying these areas with third countries would also ensure the efficiency of international disputes connected with such third countries, but held in Member States, and would eliminate unequal treatment and other indirect factors potentially differentiating the judgments. A single regime applicable between EU Member States and a common system(s) with a third State(s) would additionally make the practice less complicated. In fact, such uniformity takes by virtue of the popularity in Member States and abroad of the 1965 and 1970 Hague conventions<sup>108</sup>, but the EU actions could also relate to future HCPIIL instruments.

Article 81(2) TFEU provides for the elimination of obstacles for the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. This may be achieved within Member States not only by adopting EU regulations but also by concluding a convention to “export” efficient solutions into proceedings held in third countries involving the participation of EU citizens or companies (which would lead to positive results especially where common rules on jurisdiction and recognition of judgments exist simultaneously). EU negotiations with third states, as opposed to individual Member State negotiations, would strengthen the bargaining position and facilitate the achievement of satisfactory results.

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<sup>107</sup> It is difficult to see how judgments from third states could affect intra-EU “Brussels” system (unless the EU courts have non-exclusive jurisdiction in the same case). See A. Malatesta, *op. cit.*, at p. 27.

<sup>108</sup> Convention of 15.11.1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and Convention of 18.3.1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

In conclusion, there is no single answer to the question whether it is possible for EU regulations and international agreements concluded by the European Union in the area of private international law *sensu largo* to coexist harmoniously. Accession to international conventions may represent an alternative method of unifying private international law in the EU, instead of adopting regulations, in particular as regards universally applicable conflict-of-laws rules. Such conventions would represent complementary measures as far as mutual rules on recognition and enforcement of judgments are concerned, as well as the rules on mutual provisions governing the taking of evidence and service of documents<sup>109</sup>. The total unification of the bases for jurisdiction of Member States' courts in cases connected with third countries is possible both on the basis of the EU external competence to act "in the name of" all Member States (if such a convention existed), but also – in respect of all third countries in the world, but not mutually – through adoption of EU Regulations. The latter option seems to be the appropriate contemporary solution given the existence of the principle of "free movement of judgments" between Member States and the absence of a systemic international convention capable of achieving the former solution<sup>110</sup>. This does not exclude the conclusion of international agreements with third states in the future, especially as regards rules governing the mutual recognition of judgments.

The conclusion by the European Union of international conventions governing all of the above mentioned areas of private international law results – similarly to the adoption of EU regulations – in the uniform application of common rules in every Member State. Such uniformity is ensured by the competence of the Court of Justice to interpret both EU regulations and such conventions. A difference of less practical importance may be found in the number of authentic texts (*e.g.*, only the official languages of the HCPIIL), although every international agreement is translated into the Member States' respective languages and is published in the EU Official Journal. In practice, external actions could be undertaken by the EU *via* signing conventions prepared under the auspices of the HCPIIL (whose activity is now *de facto* a model for EU

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<sup>109</sup> See *R. v. Wagner, op. cit.*, at pp. 227–233.

<sup>110</sup> The need to protect the proper functioning of internal market can be interpreted from *Lugano II Opinion, supra* note 26, at para 131.

internal legislation), or by the active participation of EU institutions in the preparation of an international agreement, so no problems should arise in practice from incompatibility with the general assumptions and terminology of EU regulations. International conventions could coexist as elements of the system of private international law in the Member States – based on EU regulations – especially in civil and commercial matters.

## 7. Final remarks

In light of the discussions above, it should be noted that the European Union has traversed a long distance from lacking competence, through sharing external competence with the Member States and, finally, to exclusive competence in the field of “judicial cooperation in civil matters”. As a consequence of the Lugano II Opinion, it is generally assumed that the Member States have transferred their external competences to the European Union. The ECJ’s opinion has become a rationale not only of EU competences in the areas of jurisdiction and judgments’ recognition, but also of conflict-of-laws rules *per se*.

The most important practical consequence of this development may not be the fact of the EU acquiring exclusive competence but rather “the other side of the coin”, *i.e.*, the effect on the Member States who have transferred such competence. The “loss” of competences halts activities that could otherwise have led to further complications in the labyrinth of legal sources in this area and deepened the differences between Member States’ laws. It creates the opportunity to create simultaneously efficient activities for the unification of private international law, led by the European Union not only *via* EU regulations but also through international agreements (including bilateral conventions in the area of international civil procedure, especially with countries geographically or economically close to Member States). However, unification of private international law and EU accession to international conventions is not appropriate for every civil matter, nor in every area of “judicial cooperation in civil matters”. Firstly, given the absence of a single, systemic and comprehensive international convention on private international law and international civil procedure to which the European Union could accede, and the absence of any realistic prospects of any such treaty in the foreseeable future. Secondly, certain areas of

private international law are more susceptible to unification by way of adopting EU regulations, not only as regards internal relations but also in cases connected with third states.

Given the ECJ's Lugano II Opinion and the acceptance of the broad interpretation contained therein, there is no longer any perceptible "competition" between legislation originating from the EU and the Hague from the perspective of EU Member States. Nowadays, it is the European Union that decides whether or not to adopt a regulation or to join the Hague Convention *in lieu* of the Member States, and so another kind of "rivalry" may be argued to exist, but a rivalry perceptible only from the perspective of the EU institutions<sup>111</sup>.

Both recent EU regulations and proposals for amendments thereto, and the transfer of external relations powers, evidence the "conquering" of domestic rules on private international law *sensu largo* by EU rules. This phenomenon should in general be assessed positively, especially because it facilitates a more comprehensive version of the current intra-EU mutual system of "automatic" recognition and enforcement of judgments between Member States. This system refers currently not only to judgments delivered in proceedings where jurisdiction derives from EU regulations, but also according to domestic rules and "individual" international agreements, which causes differences in access to courts. The total unification of jurisdiction rules in Member States, currently in preparation, would eliminate these differences entirely.

Unification of the conflict-of-laws rules applicable in outstanding civil matters (especially these falling outside the scope of the existing "Rome" regulations, but being within the scope of the "Brussels" regulations), would make the system of *ipso iure* recognition more sensible. Implementation of this objective would be much easier if only one subject acted as "a player" in the field of private international law on the internal and external arenas, which would counteract potential contradictions between solutions adopted individually by Member States and commonly by the European Union. In authors' opinion, support for such an idea should not be viewed as leading to a loss of national identity, unless

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<sup>111</sup> See G. Vitellino, *European private international law and parallel proceedings in third states in family matters*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at pp. 246–248.

the European Union “measures of judicial cooperation in civil matters” would additionally seek to impose particular results in substantive law, which would be beyond the organisation’s competences. The existence of European Union may lead to the achievement of doctrinal dreams concerning the unification of common conflict of laws rules, presented in the XIX century by S. P. Mancini and others.

Conflict-of-laws rules are in fact technical in character and do not directly regulate civil or family matters. Their role is merely to designate the application of different substantive systems of law present in different countries (including EU Member States which, in general, have not lost their competence to regulate substantive law). The need to retain national identity within Member States is here of much lesser importance than substantive law concerns. In some cases – independently of their domestic, international or European origin – they will indicate as applicable the substantive law of a foreign state. What is important, those conflict of law rules of EU origin and those rules on the recognition and enforcement of foreign judgments provide – and should continue to provide – for *ordre public* clauses that not only justify the non-application of foreign law provisions that are manifestly incompatible with the public policy of the forum but also function as an instrument to limit the effect of a foreign judgment, by preventing the recognition or enforcement thereof. If application of such clauses were restricted or excluded (which has been a subject of concern of EU institutions, e.g., as regards to the “Brussels” regulations<sup>112</sup>), there would be a serious fear of a potential “influx” – *via* foreign law or judgments – of legal institutions manifestly contrary to fundamental principles in a certain Member State.

The uniformity of conflict-of-laws rules in EU Member States may be achieved both after accession to multilateral Hague conventions (if such exist, e.g., on the Form of Testamentary Dispositions<sup>113</sup>) and by the adoption of EU regulations. The former method may additionally lead

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<sup>112</sup> Sometimes, on the basis that the *ordre public* clause is seldom applied by courts. Of course, such a statement does not constitute an argument against the existence of such a clause, but rather argues in favour thereof – e.g., an argument confirming its exceptional character in practice.

<sup>113</sup> Convention of 5.10.1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.



to achieving the more ambitious goal of unification on a global scale. By the time this occurs, there will be disadvantages of the non-uniformity of judgments given in the same case by courts of different Member States (and even in the same case when alternative bases for jurisdiction provided for in EU regulations are located in different Member States).

It is insufficient to appoint a common “centre of administration” in the field of private international law for the future, and to restrict the requirements of concluding new bilateral agreements, because each Member State is “loaded down with historical baggage”. The important task for now is to simplify the current, increasingly complicated, constellation of sources of law of which conventions concluded by Member States represent merely one element. The European Union – quoting Article 351 TFEU – may play an important role and stimulate Member States to re-contract existing bilateral conventions in the scope governed by uniform EU law, as well as encouraging them not to play individually in the future (which is restricted, but still possible). Fulfilling this task would be much easier if the European Union built a systemic codification of private international law (in fields where *consensus* is possible, *i.e.*, outside the scope of personality and family matters), instead of the current “leap frog” tactics of covering certain areas and civil matters by subsequent regulations and amending previous ones. Prior to this, denouncing international agreements will only be partially possible (*i.e.*, such denunciation will not cover all areas of private international law nor every civil law matter) and inconvenient, as well as proving difficult for third states to understand<sup>114</sup>.

The conclusions resulting from the European Council meetings in Tampere (1999), the Hague (2004) and Stockholm (2009), as well as the Amsterdam and Lisbon amendments to the Treaty show that, in last decade, a political *consensus* exists among the Member States to develop private international law *sensu largo* and adopt EU regulations. The EU exclusive competence to conclude international conventions seems logically to complement that phenomenon. In the absence of the latter, achieving

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<sup>114</sup> On the absence of clarity as regards the general idea of the EU institutions as to how to progress, see A. Borrás, *Lights and Shadows of Communitarization of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to relations with third states*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds.), *op. cit.*, at p. 121.

the goal of unification of this branch of law in Member States and future simplification of sources of law will not be fully possible. The current European situation could be even compared to the situation prevailing in countries that were territorially united but were simultaneously regionally different as regards their substantive civil laws – e.g., Italy and Germany in the XIXth century, Poland after regaining independence at the beginning of the XXth century, or the situation in contemporary Spain<sup>115</sup>. Such a situation of territorially diversified substantive laws makes unification of private international law a first priority. The second issue may be the question about unification of substantive law, which is much more complex, long-lasting and perhaps not possible in all aspects of civil and family law. However it must be added that, even if such uniform substantive law would be created in the future, the need will remain to rely on conflict-of-laws rules to determine which substantive law will be applicable in a given international case.

Bearing in mind the EU motto: “United in diversity”, we could say that the diversity found in the civil codes of the Member States creates the need for unification of conflict-of-laws rules. Without such unification, the courts in each Member State will give conflicting judgments (based on the substantive laws from different jurisdictions) in the same cases. A general acceptance of the current trend does not, of course, mean an *in blanco* consent to every detail of the proposed solutions, but this is outside the scope of this paper. Moreover, the existence of common internal and external rules of international procedure is worth supporting, especially given the absence of commercial borders in the EU territory.

Finally, it should be said that the EU institutions’ acquisition of competences also brings with it the responsibility for the practical effects of such activities and the future shape of private international law in Member States. The main goal of unification is commendable, and the authors hope that citizens of Member States will in the future – looking at the systemic<sup>116</sup> and solid uniform rules – share the opinion that it was

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<sup>115</sup> It was pointed out that modern private international law emerged in Germany in a similar way – it was developed on the basis of intra-national conflict of laws cases and later extended to international disputes. See contribution of Prof. K. Siehr, in: *Ibidem*, at p. 57.

<sup>116</sup> Reading the reasoning of the Lugano II Opinion (See *supra* note 26, at paras. 141, 151 and 172) one could be forgiven for thinking that such a “system” already exists. This

worthwhile coping with the contemporary, “interesting times” of over-complexity and instability of private international law.

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is partly true as far as concerns international civil procedure in civil matters, because of the application of some domestic rules. Looking at private international law *sensu largo* and all civil and family matters, it should be *de facto* said that the system is “under construction”. See K. Siehr, *Internationales Privatrecht in der Europäischen Union*, [in:] L. Ogiegło, W. Popiołek, M. Szpunar (eds.), ‘Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana’, Kraków 2005, at pp. 294–297, J. Basedow, *The Communitarisation of Private International Law – Introduction*, ‘*Rabels Zeitschrift*’ 2009, Vol. 3, at pp. 455–460, M. Czepelak, *Would we like to have a European Code of Private International Law?*, ‘*European Review of Private Law*’ 2010, Vol. 4, at pp. 705–714.