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Jürgen Basedow*

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CONSISTENCY IN EU CONFLICT OF LAWS**

I. Consistency

In a spring 2014 Communication addressing the European Union's Justice Agenda for the years 2015 to 2020, the European Commission wrote:

"Codification of existing laws and practices can facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and

* Prof. Dr. Dr. h.c. mult. *Jürgen Basedow*, LL.M. (Harvard Univ.), Director emeritus at the Max Planck Institute for Comparative and International Private Law, Professor at the University of Hamburg; *Membre, Institut de droit international*. basedow@mpipriv.de Paper received 13.01. 2018. Accepted 01.02. 2018.

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the cutting of red tape. … The EU should examine whether codification of existing instruments could be useful, notably in the area of conflict of laws."[1]

Thus the guiding theme of future EU legal policy in the area of conflict of laws was announced. Compared to recent years, the Communication strikes a different tone. We no longer find at the foreground a desire to expand the conflict-of-law *acquis communautaire* through additional individual instruments, regarding for instance international property law, international company law or international family law. Similarly absent from the discussion is an articulated need to fill gaps in existing instruments, with efforts addressing, for example, the applicable law of tort for the protection of personality rights or the law of arbitration agreements. Instead, the expressed goal is the achievement of greater consistency in existing legislation, potentially by means of codification.[2] With this development, the topic of my present remarks is set.

As a character of a legal system, consistency represents a goal not only in terms of legal policy but also in the application of law, thus making it an aim concerning legal systematics (or *Rechtsdogmatik* as it is put in some Member States). Yet whether announced in case law or legislation, legal rules generally emerge independent of one another, both chronologically and in respect of content. Consequently, they tend to be products of the immediate problem at hand, reflecting the evolving possibilities for the problem's resolution. It is, as a result, the very nature of legal rules to be uncoordinated.

In turn, it becomes the task of legal commentators and codification projects to allow these rules to assume (once again) an appearance of coherency, as non-contradictory elements of an ordered whole.[3] This is true of all legal systems, the continental civil law regimes as well as those of the common law. And whereas in speaking of the common law *Oliver Wendell Holms* may have written that "[t]he

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility, and Growth within the Union, COM (2014) 144 final, p. 8; although the conclusions of the Council on this point are less explicit, they also identify the goal of consolidating existing instruments, see Extract from the 26-27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues, OJ 2014 C 240/13 no. 3.

[2] See on this point Rolf Wagner, Justizielle Zusammenarbeit in Zivilsachen – quo vadis? *ZEuP* 2014, 1.

[3] See most recently Christian Bumke, Rechtsdogmatik, *JZ* 2014, 641-650 (647).

life of the law has not been logic: It has been experience […]",[4] he did not go so far as to deny the goal of coherency. Indeed the legal principle of binding precedent clearly expresses the goal of consistency in common law countries. We observe merely a different accent: in common law jurisdictions the rule of precedent relates primarily to *vertical* consistency in a historical sense, whereas the European Commission would, in its Communication, seem to be striving for a *horizontal* consistency between various legal instruments.[5] Ultimately, consistency in one and the other sense supports the legitimacy and acceptance of the law.[6]

The European Commission strives for consistency in the conflicts law of the European Union, i.e. with regard to rules relating to jurisdiction, applicable law and the recognition and enforcement of foreign judgments. Accordingly, a first step is to review the existing legislation in this area, considering in the process the comprehensiveness of the present regime and inquiring into the usefulness of a codification (II, below). Uncertainty regarding the consistency of the current *acquis* emerges in many regards: within single regulations which sometimes use diverse connecting factors for related areas (e.g. in the legislation covering insurance contracts, consumer contracts and contracts for the carriage of passengers) and between the actual reference rules found in various conflict-of-law instruments in the strict sense (III, below); and between the rules of private international law and the rules on jurisdiction (IV, below). Yet the spectrum of consistency extends further. As logical and essential as it might be to strive for a cohesive and non-contradictory body of rules in an individual legal area, such limitation is no less problematic, something particularly true in cross-sectional material such as private international law and international civil litigation. A limitation of this nature would discount the significance of the individual areas for the whole. Accordingly, a subsequent section asks whether conflict-of-law legislation is consistent with the remaining legal framework encompassing European integration (V, below).

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[4] Oliver Wendell Holms, *The Common Law*, ed. *Mark DeWolfe Howe*, Boston 1881, quoted here from the Boston edition, 1963, p. 5.

[5] A conceptualization offered by Elizabeth Crawford/Janeen Carruthers, Connection and coherence between and among European instruments in the private international law of obligations, *ICLQ* 63 (2014) 1-29 (2).

[6] See Bumke, Note 3, above, *JZ* 2014, 647.

II. The Conflict-of-Law *Acquis* – Reform through Codification?

1. An overview of the *acquis*

Explicit competence to pass legislation in the areas of conflict of laws and international civil procedure was first conferred to the European Union in the Treaty of Amsterdam.[7] Under the new arrangement of the Founding Treaties, this basic competence is set down in Article 81 of the Treaty on the Functioning of the European Union (TFEU).[8] Pursuant to this provision, EU conflict-of-law rules serve to develop judicial cooperation in civil matters; for its part, such cooperation is, according to Article 67 TFEU, a component of the area of freedom, security and justice, which is in turn one of the primary goals of the European Union, see Article 4(2)(j) TFEU.

As is well known, the European Union has not been shy in exercising this new legislative competence. In part, the lawmakers' efforts have built on earlier public international law conventions. In the area of international civil litigation, a flurry of legislation inside a handful of years saw the enactment of Regulations on the service of documents,[9] evidence,[10] jurisdiction in civil and commercial matters[11] and in matrimonial matters.[12] By contrast, the Rome I Regulation governing

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[7] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam on 2 October 1997, OJ 1997 C 340, entry into force on 1 May 1999.

[8] Consolidated version in OJ 2012 C 326/47.

[9] Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ 2000 L 160/37; replaced by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 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, OJ 2007 L 324/79.

[10] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 L 174/1.

[11] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1 ("Brussels I Regulation"); replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1 ("Brussels I *bis* Regulation").

[12] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19; replaced by Council Regulation (EC) No 2201/2003

contractual obligations,[13] the Rome II Regulation governing non-contractual obligations[14] and the Rome III Regulation – legislatively a so-called enhanced cooperation enacted pursuant to Article 326 TFEU – on the law applicable to divorce and legal separation,[15] are instances of conflict-of-law instruments in the strict sense. To this we can add mixed Regulations that address procedural questions as well as the law applicable to a dispute; here we have the Insolvency Regulation,[16] measures regarding international maintenance obligations,[17] the Succession Regulation[18] and, after years of debate, Regulations on matrimonial property regimes[19] and on property consequences of registered partnerships,[20] both acts again adopted in enhanced cooperation by a majority of Member States

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of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1 ("Brussels II *bis* Regulation").

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

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

[15] 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, OJ 2010 L 343/10, now in force in 16 Member States.

[16] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1, replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings, OJ 2015 L 141/19.

[17] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1; in the European Union, maintenance law is governed by the Hague Maintenance Protocol of 2007 which has not yet taken effect as an instrument of international law but has been declared applicable in the Member States of the EU, see Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ 2009 L 331/17.

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

[19] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183/1.

[20] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ 2016 L 183/30.

under Art. 326 TFEU. Some of these Regulations have already been amended. Additional legal instruments relate to special proceedings, e.g. a European order for payment,[21] a European enforcement order for uncontested claims,[22] a European small claims proceeding,[23] and, recently, a European attachment order for debt recovery;[24] for our purposes these are of minimal significance.

The wide array of secondary EU legal instruments of course raises the question of how well they are coordinated with one another and whether it is possible to assemble them into a coherent whole. For that purpose *Stefan Leible* and *Hannes Unberath* coined the expression of a "Rome - 0 Regulation",[25] and *Paul Lagarde* even pressed ahead with a draft of a European code on private international law and international civil procedure.[26] Reflecting on one hand the aim of establishing consistency between the existing legislation, these efforts also signal a desire to enact rules that by and large can be allocated to a General Part of private international law and international civil procedure. The idea of a General Part of European PIL has also, it should be noted, been received quite favourably in European legal scholarship.[27]

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[21] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ 2006 L 399/1.

[22] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15.

[23] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

[24] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ 2014 L 189/59.

[25] See the comprehensive conference proceedings compiled by Stefan Leible/Hannes Unberath, eds., *Brauchen wir eine Rom 0-Verordnung*? Jena 2013; see also Stefan Leible, Auf dem Weg zu einer Rom 0-Verordnung? Plädoyer für einen Allgemeinen Teil des europäischen IPR, *Festschrift für Dieter Martiny*, Tübingen 2014, 429-448.

[26] Paul Lagarde, Embryon de règlement portant Code européen de droit international privé, *RabelsZ* 75 (2011) 673-676.

[27] See e.g. Karl Kreuzer, Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechts? In: Brigitta Jud/Walter Rechberger/Gerte Reichelt, eds., *Kollisionsrecht in der Europäischen Union, Neue Fragen des internationalen Privat- und Verfahrensrechts*, Wien 2008, 1-62; Christian Heinze, Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts, in: *Festschrift für Jan Kropholler*, Tübingen 2008, 105-128; see also a number of contributions in Leible/Unberath, note 25, above, as well as in Marc Fallon/Paul Lagarde/Sylvaine Poillot-Peruzzetto, eds., *Quelle architecture pour un code européen de droit international privé*? Bruxelles 2011.

2. Consistency, codification, General Part

How should these aims be evaluated? On posing this question, one needs to be clear in drawing three distinctions: First, as to the *goal of consistency*, it can be achieved by coordinating the specific legal instruments and does not necessarily demand a codification. Second, anyone contemplating *codification* should be mindful that in the legal practice of the European Union, the notion of codification should by no means be equated with the highly systematic and comprehensive coverage of a broad legal topic as seen, for instance, in the large civil codes. In accordance with the relevant inter-institutional agreements, codification merely means the repeal of certain legal instruments and their compilation in a new legislative text without any changes in content; it is nothing other than a repackaging of the law improving its accessibility.[28] Third, and last, the wish for a *General Part* is particularly ambitious, whether in the form of a separate Rome-0 or Brussels-0 Regulation presenting the existing Regulations and extracting some general rules from them, or in the form of a comprehensive code linking these Regulations together.

a) Consistency – The quest for consistency deserves support *de lege lata* as well as – in the context of revising existing legal instruments – *de lege ferenda*. Short of there being particular grounds justifying a deviation in the content of individual legal instruments, internal consistency and the absence of contradictory provisions are basic prerequisites of a system meant to ensure justice. As will be shown, the desire for consistency is even expressly stated in a number of the existing instruments.

b) Codification – As a long-term objective, a codification of European private international law and the law governing international civil litigation could indeed facilitate the pursuit for consistency. But is the time ripe for a codification project? Jurists who by codification mean a systematic and comprehensive regime of rules can hardly answer this question in the affirmative. We need only recall the gaps in European PIL: There are, for example, no rules on international property law, particularly as regards the choice of law in financial collateral arrangements, such choice being sometimes allowed in national codes[29] but

[28] See Rut Herten-Koch, *Rechtssetzung und Rechtsbereinigung in Europa*, Frankfurt am Main 2003, 168-174, with further references.

[29] See Article 10: 128 Burgerlijk Wetboek for the Netherlands and Article 2619 of Romania's new Civil Code.

frequently prohibited.[30] European Union rules are equally lacking in international company law. The divergence between Member States in their adoption of either the incorporation or real seat theory has not been diminished by the Court of Justice's *Centros* jurisprudence;[31] illustrative here is Poland's renewed and express adoption of the real seat theory in its 2011 PIL Act.[32] These gaps and the discrepancies which result in national conflict-of-law rules endanger the success of a European PIL codification. Private international law codifications generally tend to be successful when they limit themselves to the arrangement of existing material. Conversely, their success lies in doubt when it also falls upon them to navigate a course through uncharted policy waters. European lawmakers should take heed of this century-old experience and first enact specific instruments to cover presently unaddressed legal areas. Only then will the time for a codification have arrived.

This is doubly true in respect of international family law. Apart from the law on divorce, maintenance and property regimes, conflict-of-law rules are wholly absent. Central areas such as marriage, heterosexual and homosexual partnerships, parentage, adoption and parent-child relationships have in large part never been subjected to focused consideration. The prospect of eastern and western Member States reaching agreement over a topic as controversial as the legal status of same-sex relations would seem a most unlikely occurrence in the coming years if one has account of the fact that some Member States combat any discrimination on grounds of sexual orientation while others try to cement such discrimination by amendments to their constitutions.

c) General Part – Accordingly, the outlook for a comprehensive European codification of private international law does not appear promising. This does not, however, rule out the formulation of a General Part of European PIL in a special Rome-0 or Brussels-0 Regulation. But here as well the Union should take its time. A uniform regime for general questions should be developed only once there exists sufficient experience with the existing legal instruments. Yet thus far – when considering conflict of laws in the narrow sense – we can point to neither a comprehensive legal regime nor a sufficient number of Court of Justice interpretations of existing instruments.

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[30] Where national codifications do regulate international property law, such as in Belgium or Germany, a choice of law is generally not recognized, at least not explicitly.

[31] CJEU 9 March 1999, Case C-212/97 (*Centros*), ECR 1999, I-1459.

[32] See Article 17 of the Polish PIL Act of 201; a provision having regard for the CJEU's company law jurisprudence on the freedom of establishment is set down separately in Article 19 of the Act.

In European policy-making, compromises, once reached, cast a particularly long shadow. Subsequent consultations over quite unrelated objects will build on these compromises and rarely challenge their content or assumptions. It is for this reason all the more important to base such compromises on a broad and sturdy empirical foundation. With this background in mind, it would be wise to understand that wide-ranging and practical experience is a necessary precondition for a General Part on European private international law.

d) Institutional framework – A Rome-0 or Brussels-0 Regulation – much like a comprehensive codification – is problematic also from an institutional perspective. As is well known, legal instruments based on Article 81 TFEU are applicable in Denmark, Ireland and the United Kingdom only when these Member States submit a corresponding notification.[33] This has happened in some instances but, as illustrated by the Succession Regulation, not in others.[34] In the area of the law on divorce and matrimonial property, the relevant Regulations were enacted under the regime of enhanced cooperation pursuant to Article 326 TFEU. Would Article 81 TFEU allow the enactment of general rules in the nature of a Rome-0 Regulation – covering all areas of international private law and procedure – for countries in which special instruments such as the Succession Regulation have no legal effect? Could these countries then declare that their participation in the Rome-0 regime is limited to those special instruments which are in force for them? If it is the case that the special legislative process of Article 81(3) can be drawn upon for a general legal instrument, one also touching upon special family law instruments, then is the participation of the Parliament limited to a right of consultation with unanimity required of the Council? These questions raise doubts whether the Union's institutional framework is presently suited for the creation of comprehensive legislation on private international law and the law governing international civil litigation. Ambitious plans of this nature should for the moment be set aside, with attention turned instead to the threshold question of whether the EU law of conflict of laws is in fact characterized by notable inconsistencies.

[33] See for Ireland and the United Kingdom Protocol No 21 to the TFEU, OJ 2012 C 326/295; for Denmark see Protocol No 22 to the TFEU, OJ 2012 C 326/299 and the attached Annex at p. 302. In accordance with its internal laws Denmark does not make use of this opt-in possibility.

[34] See Recitals 82 and 83 of Regulation 650/2012.

III. Inconsistencies between Parallel Conflict-of-Law Rules in Various European Instruments

The conflict-of-law rules found in various European PIL instruments should be deemed inconsistent if they regulate, without compelling reasons, similar objects differently or, alternatively, if in practice the application of the rules results in overlaps, gaps or other discrepancies. Inconsistencies of the former variety have their roots in the texts of European instruments; the latter can be the product of different structural frameworks and legal conceptions in the Member States that are conducive to divergent interpretations of the EU texts.

1. Deviating regulation of similar issues – Aspects relating to choice of law

The ascertainment of inconsistencies is an ambitious endeavour, in actuality amounting to a broad research project in its own right. The effort requires undertaking comprehensive comparative inquiries in respect of numerous terms and principles found in the various legal instruments. This would include, for instance, specific topics such as the connecting factors of habitual residence, place of business and nationality, but it would also have need to consider general legal devices such as public policy (*ordre public*) clauses, overriding mandatory rules, *dépeçage*, the treatment of preliminary questions, choice-of-law mechanisms and characterization. This cannot be achieved in a single article. Nevertheless, a number of examples may serve to illustrate what is at issue.

a) Tacit choice of law – In principle, a choice of law is allowed in all of the Union's current conflict-of-law instruments. Yet if one examines the exact manner of exercising this right, the differences become quite profound. Both Article 3(1) Rome I as well as Article 14(1) 2nd sentence Rome II permit, alongside an express choice, also an implied choice of law. But why is it that the implied choice must be demonstrated "clearly" with regards to a contract yet only with "reasonable certainty" in a non-contractual setting? Nothing in the Regulation itself explains why international tort law is prepared to recognize a tacit choice of law on a showing short of unambiguity. In fact, there is only a historical reason: The more forgiving formulation contained in the 2007 Rome II Regulation was simply carried over from Article 3(1) of the 1980 Rome Convention.[35] One year later, however, while transforming this Convention into the Rome I Regulation, the standard was found to be somewhat vague and in all events too lax, particularly

[35] Rome Convention on the law applicable to contractual obligations 19 June 1980, OJ 1980 L 266/1, consolidated version in OJ 2005 C 334/1.

as concerns a tacit choice of law effected through a choice-of-court agreement.[36] As to this point, an amendment of Rome II should be oriented on the subsequently-adopted formulation found in the Rome I Regulation.

b) Timing of a choice of law – Also treated quite heterogeneously is the question of when the window for exercising a choice of law closes. Article 14 Rome II does not address the issue in any manner, while Article 3(2) Rome I allows the parties to make a choice of law "at any time", thus extending not only into the court process but – to the extent possible under the procedural law of the forum – even after the conclusion of the first instance proceedings, with an effect projecting into the court of next instance.[37] In divorce proceedings as well, the applicable law can pursuant to Article 5(2) Rome III be selected at any time, "but at the latest at the time the court is seized". *Kohler* has correctly observed that spouses and their legal representatives will often become aware of the applicability of a – seemingly burdensome – foreign law only after the commencement of the proceedings. In theory, a choice of law allows the parties to avoid such an undesired occurrence, but this is now, in practice, excluded by the Rome III Regulation.[38] There is no discernible reason for the different timelines for exercising a choice of law, what suggests an ungrounded inconsistency on this point as well. According to the Rome I formulation, which is also found in the Hague Maintenance Protocol,[39] the choice is as a matter of substantive (not procedural) law permissible "at any time". The same does not hold true in international succession law: here the death of the testator naturally sets the outer limit for a choice of law.

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[36] See Recital 12 of the Rome I Regulation and Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), *RabelsZ* 71 (2007) 225-344, 243; Crawford/Carruthers, Note 5, above, *ICLQ* 63 (2014) 6, hold the difference in formulations to "almost certainly a matter of semantics".

[37] German case law adopts this position, as outlined by Martiny in the *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Bd. 10, 5. Auflage München 2010, Art. 3 Rom I-VO, Rz. 78 at Fn. 315-316.

[38] Christian Kohler, L'autonomie de la volonté en droit international privé: Un principe universel entre libéralisme et étatisme, *Recueil des cours* 359 (2013) 285-478 (428 f.).

[39] See Article 8, Protocol of 23 November 2007 on the law applicable to maintenance obligations, available on the website of the Hague Conference: *http://www.hcch.net/index_en_php* →conventions.

c) Choice of law and formal validity – We encounter a variety of approaches also as regards a third aspect of choice of law, its formal validity. Whereas, here again, the Rome II Regulation is silent, Article 3(5) Rome I Regulation refers to the general Article 11 provisions on the formal validity of a contract. Accordingly, reference is alternatively had to the *lex causae* or the *lex loci celebrationis*. Owing to substantive considerations this liberal approach is, however, set aside for immovable property transactions and consumer contracts; here the *lex rei sitae* and the habitual residence of the consumer are respectively controlling.

The scheme in divorce law is quite different: Under Article 7 Rome III, the formal validity of a choice of law is primarily determined with regard to substantive-law considerations and not simply by reference to a national law. The agreement must be in written form and signed and dated by both spouses, although electronic communications are explicitly permitted as well. National law comes into play only to the extent it interposes additional formal requirements. This substantive-law approach can be explained by the fact that at the time of the Regulation's enactment, a choice of law was contemplated in only a handful of countries, with a paucity of national provisions being the result. Nevertheless, it is a rather astonishing fact that a choice of law for divorce matters can be the product of e-mail correspondence whereas many property transactions require notarial certification.[40] Does this accurately reflect the hierarchy of values in Europe?

If one undertakes a cross-sectional analysis of the European Union's legal instruments, combing through individual legislative topics in the process, an array of inconsistencies can be identified. Sometimes the nature of the particular issue justifies the discrepancies. In many cases, however, they are simply the result of different consultation processes and lack any substantive basis. As a consequence, the next step is, in each case, developing an overarching solution.

2. Divergence rooted in national law

Inconsistencies of various nature can result both from different national legal schemes as well as from conflicting national conceptions that precipitate in divergent characterizations. Particularly important in this regard are the different national procedural rules on the treatment of foreign law. While the relevant connecting factors – and the governing law that results – find application *ex officio* in many Member States, the courts in other Member States, especially England and Spain, employ the European conflict-of-law rules only where a party

[40] Kohler, note 38, above, *Recueil des cours* 359 (2013) 430.

requests as much.[41] To the extent that the European conflict-of-law rules do not take their procedural implementation into account, they carry within them the seeds of an uneven and, in this sense, inconsistent application. Absent action at the Union level, the problem regarding the application of foreign law will not resolve itself.

Similar inconsistencies can result from different substantive conceptions. Illustrative here is *culpa in contrahendo*. In Germany, this legal doctrine has been developed in case law as a principle of contract law on account of the BGB's narrow rules on tortious liability. Yet other European legal regimes characterize faulty conduct in contractual negotiations as a matter of tort given that such behaviour occurs in the absence of (i.e. prior to) a contractual agreement. For the purposes of international jurisdiction, the Court of Justice of the European Union has adopted the latter view[42] and endorsed a head of jurisdiction under Article 5 No. 3 of the Brussels Convention.[43]

Such a definitive solution for *culpa in contrahendo* liability, however, made sense to only a limited degree. First, the Rome II Regulation – unlike the approach of the Brussels I Regulation with regards to jurisdiction – does not generally grant the claimant the choice between different national tort regimes, declaring instead a single law as being applicable, namely the law of the place where the harmful event occurred. Second, it is often the case that the liability resulting from *culpa in contrahendo* is purely financial in nature and can only arbitrarily be allocated to a specific place where the damage occurred. And third, contractual negotiations can often be linked to a – concededly hypothetical – contract whose connection with a specific legal order is far more readily ascertained. Thus, as is well known, Article 12 Rome II opted for an intermediary solution that primarily looks to the contract (regardless whether concluded or not) and only secondarily turns to specific connections under a tort perspective. An inconsistency between Rome I and Rome II was in this fashion avoided.

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[41] For a discussion on how courts have handled this issue in recent years, see the comprehensive comparative study by Clemens Trautmann, *Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren*, Tübingen 2011, with in-depth analyses of Germany, p. 19 ff., England, p. 47 ff. and France, p. 79 ff. as well as an overview of other jurisdictions, p. 125 ff. See also the national reports in Carlos Esplugues Mota/José Luís Iglesias/Guillermo Palao, *Application of Foreign Law*, Munich 2011.

[42] CJEU 17 September 2002, Case C-334/00 (*Tacconi ./. HWS*), ECR 2002, I-7383, para. 27.

[43] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, 1262 UNTS 153; see now Article 7(2) Brussels I *bis*.

Yet such an inconsistency can materialize in other contexts. Consider, for instance, the third-party liability of experts, e.g. auditors, lawyers or technical experts. German law conceptualizes this third-party liability as resulting from a contract with protective third-party effects, thus – once again – as a matter of contractual liability.[44] In other legal systems, such as under English common law or in French law, liability to third parties sounds in tort.[45] For the conflict of laws, the different conceptual approaches result in divergent approaches to the question of characterization. In Germany, national judges characterizing *lege fori* would turn to the Rome I Regulation. Their counterparts in England, by contrast, would look unhesitatingly to the Rome II Regulation.

When presented with the issue, the Court of Justice of the European Union would solve the problem by means of an autonomous interpretation; Recital 7 of the Rome I Regulation seemingly favours this approach, as the substantive scope and provisions of the Rome I Regulation should "be consistent" with the Rome II Regulation. A referral depends, however, on the problem being identified by the Member States' national judiciaries. Until that time, identical cases will be pigeonholed under the Rome I or Rome II Regulation depending on which country faces the issue, with the result that the two instruments assume different scopes of application in individual Member States. Thus, here as well consistency is lacking, though from a pan-European perspective and not in the application of legal instruments inside individual Member States.

IV. Consistency between Rules on Jurisdiction and Rules on Choice of Law

1. Convergence of jurisdiction and applicable law

According to Recital 7 of the Rome I Regulation, the "substantive scope and provisions of this Regulation" should "be consistent" not only with the Rome II Regulation but also with the Brussels I Regulation. The desire to coordinate the

[44] On the liability of an auditor to third parties, see eg BGH 2.4.1998, BGHZ 138/257, 261 as well as Jürgen Basedow/Wolfgang Wurmnest, *Die Dritthaftung von Klassifikationsgesellschaften*, Tübingen 2004, 35 ff.; recently also Jan de Bruyne/Cedric Vanleenhove, An EU Perspective on the Liability of Classification Societies: Selected Current Issues and Private International Law Aspects: *The Journal of International Maritime Law* 20 (2014) 103 – 120, which however does not identify the characterization problem addressed here.

[45] For England see *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd. and others – The Nicholas H*, [1995] 3 All ER 307 (HL), commented on by Cane, *LMCLQ* 1995, 433 ff; in French law, the tort conception is not undisputed, see eg Cour d'Appel de Paris, 12.12.1968, DMF 1969, 223, 229 commented on by Le Clère; on the issue as a whole see Basedow/Wurmnest, preceding note, p. 13 ff., 26 ff.

Regulations and lay the groundwork for consistency is, in a certain way, an exercise seeking to align choice-of-law rules on the one hand and jurisdiction rules on the other. Upon initial glance, this may seem surprising. In the first place, access to court and the legal basis for a court's decision are quite different issues. Second, the methodology is different: while in many areas claimants are allowed to choose between a number of jurisdictions simultaneously designated competent, it is the role of choice-of-law rules to identify a single national law as being applicable independent of the competent court.

The coordination of rules on jurisdiction and choice of law is, however, essential in those instances where special rules on jurisdiction or the applicable law have been put in place on account of particular substantive concerns. Where, for example, exclusive jurisdiction has been designated in disputes relating to the validity of intellectual property rights or immovable property, the application of the *lex fori* should most certainly be ensured. Accordingly, the relevant conflict-of-law rules – pointing here to the law of the protecting country or to the *lex situs* – should align with the rules indicating the competent court. The same holds true when the general rules on jurisdiction are restricted and additional heads of jurisdiction are named in order to protect certain categories of persons (e.g. employees and consumers). Here as well the aim is to protect the relevant individuals by resort to competent courts and an applicable law to which they are closely connected, thereby achieving legal protection at a relatively low cost. In the field of private international law and international civil procedure, the aim identified here is generally described as convergence or congruence (also known under the German term *Gleichlauf*).[46]

The aim of aligning rules on jurisdiction and choice of law played a significant role in the preparation of the Rome I Regulation. For its part, the European Commission initiated its own research project on the issue.[47] The traces of these efforts are visible in many locations, e.g. in relation to consumer contracts. After the special head of jurisdiction in Art. 15 of the Brussels I Regulation was extended to include cases in which the professional *directs* his commercial or professional activities to the consumer's Member State, the criterion was also adopted in the conflict-of-law rule for consumer contracts (Art. 6(1) Rome I). The establishment of convergence allows for the application of the *lex fori* in the

[46] For a detailed consideration of the theoretical underpinnings see Paul Heinrich Neuhaus, *Die Grundbegriffe des internationalen Privatrechts*, 2. Auflage Tübingen 1976, p. 428 ff.

[47] Johan Meeusen/Marta Pertegás/Gerd Straetmans, eds., *Enforcement of international contracts in the European Union – Convergence and divergence between Brussels I and Rome I*, Antwerp 2004.

consumer's country and thus facilitates an efficient solution in the era of online commerce.[48]

2. Gaps in convergence

This and other alignments of Brussels I, Rome I and Rome II have led *Crawford* and *Carruthers* to the conclusion that the triad of Regulations "constitutes an admirable body of law".[49] But coordination is not complete, see below a). Moreover, it is lacking in other areas, in particular as between the Brussels II*bis* Regulation and the Rome III Regulation in respect of international divorces, see below b).

a) Direct claims against insurers – As a first and illustrative example of insufficient coordination between the Brussels I and Rome II Regulations, one can look to the law of indemnity. Pursuant to Art. 9(1)(b), policyholders, the insured and beneficiaries are presented with a *forum actoris* for claims against an insurer domiciled in a Member State. In 2007 the Court of Justice extended this *forum actoris* to direct claims brought by an injured party against civil liability insurers.[50] This interpretation is based on Article 11(2) Brussels I and naturally makes it easier for injured parties to raise their claims, especially in regards to traffic accidents. Under Art. 4 Rome II, the question of liability is generally subject to the law of the place where the damage occurred.

For traffic accidents, individuals involved in an accident occurring abroad had previously raised their claims against the foreign counterparty by means of an action initiated by a foreign lawyer practicing in the jurisdiction where the accident occurred, the claim being brought either at the court of the counterparty or the court of the liability insurer – both of which were usually located in the same foreign country. The result was a convergence of international jurisdiction and applicable law. Since the Court of Justice's *Odenbreit* judgment, however, domestic residents involved in an accident in a foreign country may now bring their claim against the insurance company in the courts of their country of domicile, which then, pursuant to Art. 4 Rome II, have to consider the claim

[48] For a closer consideration see Jürgen Basedow, Consumer contracts and insurance contracts in a future Rome I-Regulation, in Meeusen/Pertegás/Straetmans, preceding note, 269-294 (286-288).

[49] Crawford/Carruthers, note 5, above, ICLQ 63 (2014) 29.

[50] CJEU 13 December 2007, Case C-463/06 (*FBTO Schadeverzekeringen NV./. Jack Odenbreit*), ECR 2007, I-11323.

under the law of the place where the damage occurred. This means, in turn, that courts are obliged to ascertain and apply foreign law.

Recently, the number of inquiries made by German courts as to the content of foreign accident liability law has steadily increased, these queries typically being presented to university institutions as well as to the Max Plank Institute for Private Law. While such requests were relatively unknown only a few years ago, they now make up 20% of the expert opinions which the Max Planck Institute in Hamburg drafts for German courts every year. Consequently, claims valued at not more than several thousand euros generate costs matching or even surpassing the value of the claim since complicated questions inevitably incur time-intensive research on foreign law, inquiries considering, for instance, the calculation of damages for pain and suffering, the reimbursement of value-added tax, or the compensability of costs associated with a rental car to which a party was entitled … but which it did not use. And if this were not enough, the defendants in these proceedings are foreign insurance companies which generally know the liability law of the place of accident in detail but which will, nevertheless, initially reject liability *in toto*. Only after confronting an expert opinion stating the contrary do they respond on the particular merits, thereby causing the courts to commission a second, supplementary expert opinion. This is plainly inefficient, and it unduly delays the making whole of injured parties. It can be asked whether it would not be wise to reinstitute convergence somehow.

b) Divorce under foreign law – In the area of divorce law, the effort to align the Brussels II*bis* Regulation with the Rome III Regulation was less intent from the onset. Art. 3 Brussels II*bis* affords the claimant a choice between numerous jurisdictions, in each of which the applicable divorce law would then be determined pursuant to the Rome III Regulation. Although the first connection affirmed in both Art. 3 Brussels II*bis* and Art. 8 Rome III is the country in which both spouses are habitually resident, this jurisdiction is merely one of several options open to the petitioning spouse. The law of this country, by contrast, is necessarily applicable when it constitutes the habitual residence of both spouses; this holds true also when the application for divorce is made in a different Member State, particularly a shared country of origin.

Thus, where a German couple living abroad initiates divorce proceedings in a German court, the judge will often be obliged to apply the law of the foreign habitual residence. In many ways, this inconsistency can be interpreted as a lingering manifestation of the traditional understanding given to marriage in continental Europe, its being seen namely as a legal institute that should in all cases and in all countries be judged under the same national law. It may,

however, be questioned whether this view is in fact compatible with the emerging dominance of the habitual residence principle. As the law governing divorce becomes increasingly mutable – such amendment now readily accomplished under the aegis of the habitual residence principle – the substantive rules of divorce are of progressively less significance in configuring one's living circumstances. Transitioning to a general application of the *lex fori* would thus seem a wholly plausible alternative and but a small conceptual step.

In any event, the inconsistency described here has led to several European countries, these including the Netherlands, Sweden and the United Kingdom, not participating in the Rome III Regulation. These jurisdictions apply the *lex fori* to divorce proceedings either uniformly or with only limited exceptions.[51] Establishing consistency, in the sense of convergence, would in this area mean a new conceptualization of the Rome III Regulation with an eye to application of the *lex fori*. The prospects of this occurring in the coming years are not particularly strong. However, it would seem that such a switch to the *lex fori* would entail a chance of more comprehensively unifying international divorce law than has been presently achieved by means of the enhanced cooperation.

The two examples demonstrate that an inconsistency between the rules on the competent court and rules on the governing law is not without its cost. While the synchronization of jurisdiction and the applicable law is concededly not the sole objective of private international law, the aim is of relatively greater significance in an era of open borders.

V. Consistency between the EU Conflict of Laws Regime and the Legal Framework Promoting European Integration

1. EU Conflict of Laws as a Catalyst of Integration

From a methodological perspective, the Union's conflict-of-law instruments are characterized by a basic approach which is conservative in nature. Many of them could – equally well – have been enacted as national laws; only a minority of the legal rules can be specifically identified as European. This is surprising if one considers two particularities of EU conflict-of-law rules: First, unlike national

[51] See for the Netherlands Art. 10:56 Burgerlijk Wetboek and in this regard *K. Boele-Woelki/D. van Iterson,* The Dutch Private International Law Codification: Principles, objectives and opportunities, Electronic Journal of Comparative Law 14.3 (2010) 1-26 (20); for Sweden see *Michael Bogdan*, Sweden, International Encyclopedia of Laws, Private International Law, Alphen aan den Rijn 2012, p. 101, No. 233; for the English common law see *Cheshire/North/Fawcett*, Private International Law, 14th ed. Oxford 2008, p. 966.

conflict-of-law regimes, they do not serve to safeguard the Union's own substantive private law, which thus far is only a piecemeal collection of rules at the EU level in any event; instead the conflict-of-law rules allow the Union to act as a referee overseeing the interplay of rights asserted by the respective Member States. Second, the role of referee is not being taken on by the EU for the purpose of delineating national legislative competence; rather the role is assumed with an eye towards promoting integration, namely creating an area of freedom, security and justice, cf Article 67 TFEU and Article 3 para 2 TEU.[52] As seen in the previous conflict-of-law rules established under Article 114 TFEU and antecedent instruments, the core issue is market integration, i.e. the creation of a single European market as envisioned in Article 3 para 3 TEU.

The existence of divergent legal regimes is only of secondary importance; the goal of integration remains paramount, and according to Article 7 TFEU "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account …". This means that Union conflict-of-law instruments promulgated under Article 81 TFEU are supposed to be consonant with the policies and legal framework put in place elsewhere in support of integration. Yet this is by no means always ensured.

2. EU Conflict of Laws and Substantive Principles of Primary Law

One is immediately struck by the various and discrepant references that exist in regards to primary Union law. Both the Rome III Regulation in its consideration of divorce law as well as the Succession Regulation include recitals that explicitly underscore each Regulation's conformity with the Charter of Fundamental Rights.[53] They do not, however, expressly declare conformity with other primary law principles such as the free movement of goods, workers, services and capital. In the area of international law of obligations, the recitals are silent as regards primary Union law, making reference to neither the Charter of Fundamental Rights nor any other provision of the Treaties except for the enabling provision of the Treaty. While the Commission's preliminary draft for the Rome II Regulation had indeed sought to include an express reference to the primacy of directly applicable Treaty provisions, it refrained from doing so in light of critical

[52] Treaty on European Union, consolidated version in OJ 2012 C 326/13.

[53] See Recital 30 Rome III, where Art. 21 of the Charter of Fundamental Rights is explicitly named and reproduced in its full length; for the Succession Regulation, see the much more modestly phrased Recital 81 found in Regulation 650/2012.

comments contending that such a reference was redundant.[54] The above-mentioned recitals found in the Succession and Rome III Regulations consequently raise the question whether the Charter of Fundamental Rights has a different status or hierarchical position than the above-noted freedoms of movement and whether, in the absence of an explicit reference in the recitals, the latter can be disregarded in application of the two Regulations. While such declaratory recitals may occasionally be useful in legal practice, their selective appearance may also result in uncertainty.

It is generally acknowledged that the freedoms of movement articulated in the European Treaties allow a certain deference to the law of the country of origin. For our purposes it is of lesser importance whether this is a choice-of-law principle or merely a restriction of connecting factors established elsewhere. Under either interpretation, the Court of Justice has made clear that the freedoms of movement may include an obligation to recognize certain legal situations that have taken hold in the country of origin as a result of the application of the latter's law.[55] This can be seen in the 1990s case law on unfair competition[56] and also in the later rulings on both company law[57] and the law of names of individuals.[58]

It is striking that this jurisprudence is not at all reflected in any of the secondary legislation thus far enacted in the field of conflict of laws. Admittedly there are no (secondary law) conflict-of-law rules in the areas of company law or the law of names. But what explains the legislation regarding unfair competition in Article 6(1) Rome II referring to the law of the market affected but not including an

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[54] See Article 23 – Relationship with other provisions of Community law in the Draft Proposal for a Council Regulation on the law applicable to non-contractual obligations of 2002, printed with, in this regard, a critical assessment in Hamburg Group for Private International Law, Comments on the European Commission's Draft Proposal for a Council Regulation on the law applicable to non-contractual obligations, *RabelsZ* 67 (2003) 1-56 (53 f.).

[55] See the various essays collected and edited by Paul Lagarde, ed., *La reconnaissance des situations en droit international privé*, Paris 2013.

[56] CJEU 7 March 1990, Case C-362/88 (*GB-INNO-BM ./. Confédération du commerce luxembourgeois*), ECR 1990, I-683; CJEU 18 May 1993, Case C-126/91 (*Schutzverband gegen Unwesen in der Wirtschaft ./. Yves Rocher*), ECR 1993, I-2384.

[57] CJEU 9 March 1999, Case C-212/97 (*Centros Ltd. ./. Erhvervs- og Selskabsstyrelsen*), ECR 1999, I-1484; CJEU 5 November 2002, Case C-208/00 (*Überseering B.V. ./. Nordic Construction Company Bau Management GmbH*), ECR 2002, I-9919 as well as a series of subsequent rulings.

[58] CJEU 2 October 2003, Case C-148/02 (*Carlos García Avello ./. Belgischer Staat*), ECR 2003, I-11635; CJEU 14 October 2008, Case C-353/06 (*Grunkin und Paul*), ECR 2008, I-7639.

exception for advertising activities that are legal in the country of origin under the rules of that State? Such a reservation can be readily derived from the case law of the Court of Justice. Moreover, given that the relevant judgments constitute primary Union law, their impact can hardly be circumvented by the subsequent enactment of the Rome II Regulation. Accordingly, the case law continues to project its effect, constituting an additional, unwritten layer in the conflict of laws regime beyond the Rome II Regulation itself. The operation of the regime is hardly simplified by such a multi-level weave of norms.

3. Conflicting Secondary Law Rules

Similar contradictory rules can be found in many areas of secondary Union law, at times even in the same legislative instrument. Famous – or infamous – is the contradictory Electronic Commerce Directive: On one hand the instrument unambiguously suggests its application to contracts, its Article 3(1) and 3(2) containing apparent references to the law of the country of origin; yet on the other hand it makes explicit in Article 1(4) that it is not establishing additional rules on private international law.[59] The Court of Justice, in turn, resolved the presented problem by developing a two-step conflict-of-law rule: After first determining the impact of the Rome I Regulation which may designate the law of the supplier's country of origin, the court must then ensure that the position of the provider resulting from the application of Rome I is not made worse by stricter requirements existing in the host Member State.[60]

An example of conflicting provisions in *different* instruments is found as regards the contractual working conditions of posted workers. Pursuant to Article 8(2) Rome I, the law of the employment contract is determined with reference to the place of habitual performance of the work in question. The Court of Justice even went so far as to amplify this connecting factor: Where the work is habitually completed in different countries, the law of the contract is not determined by application of the subsidiary connection in Article 8(3) Rome II referring to the place of the business of the employer; instead one is to have account of the totality of the circumstances and identify that country where the employee

[59] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000 L 178/1.

[60] CJEU 25 October 2011, Joined Cases C-509/09 and C-161/10 (*eDate Advertising GmbH und Martínez*), ECR 2011, I-10302.

habitually performs the majority of his obligations toward the employer.[61] Under Article 8(2)(2) Rome I, this country also remains the same where the employer temporarily carries out his work in a different country.

But a different case is presented when the temporary work carried out abroad is the result of being posted in a different country. Here, pursuant to Art. 23 Rome I, the Directive on the posting of workers remains unaffected.[62] The Posting of Workers Directive prescribes that numerous aspects of an employment relation – aspects otherwise governed by the law of the employment contract – are to be determined under the law of the host country "whatever the law applicable to the employment relationship".[63] Here as well, Union law has devised a two-step solution. As a threshold matter level, the law the employment contract is to govern; individual aspects of this contract may, however, be supplanted in the event of an employee posting. Each level of the analysis presents highly complex questions, these queries having engaged the Court of Justice already on many occasions. And while compromises reached in Brussels may indeed lend themselves to robust academic debate, the corollary is little legal certainty for the parties involved.

VI. Conclusion

The pursuit of consistency in European conflict of laws is fully understandable and of pressing importance. It demands a cross-sectional analysis of a comprehensive nature in order to align the various legislative instruments and synchronize their treatment of legal issues. In respect of the practical application of European law, attention needs to be paid to promoting a convergence of international jurisdiction and the applicable law. It is frequently the case that competing policy values face off, with the result being a multi-step legal inquiry that not only is overly complicated but is in fact outside the actual domain of conflict-of-law instruments. Here as well greater consistency is in order.

As a first and essential step, the numerous inconsistencies and contradictions must be the subject of detailed research. Only then can an earnest inquiry be undertaken as to how these shortcomings are best resolved; in part, the solutions

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[61] CJEU 15 March 2011, Case C-29/10 (*Heiko Koelzsch ./. Grand Duchy of Luxembourg*), ECR 2011, I-1595.

[62] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1.

[63] See Art. 3 of the Directive, preceding note.

will lie in the application of legal tools and devices, such as characterization and mandatory rules, and in part a consolidation of existing instruments will be called for. The time for a comprehensive codification of European private international law, by contrast, is not yet ripe. Those striving for clarity would be advised to pursue the model of a "creeping (or expanding) codification" that initially only aggregates existing texts, e.g. the Rome I, Rome II and Brussels I Regulations. The effort, moreover, needs to be conceptualized as a form of open legislation, one capable of later absorbing additional elements such as general rules, a revised Rome III Regulation or rules in regard to maintenance.