SESSION II

INTERNATIONAL LEGAL ORDER AND CHANGING INTERNATIONAL ECONOMIC REGIME
THE PRIVATE INTERNATIONAL LAW ASPECTS OF EUROPEAN INTEGRATION

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In order to understand why, and in what manner, European law has modified private international law rules, it is necessary to first step back and to analyse the impact of the European context and situations which are governed by private international law.

Generally speaking, the development of economic exchanges between neighboring countries may have two opposing effects on their private international law.

On the one hand, there may be an increase in the frequency of the issues of conflict of laws, international jurisdiction and recognition of foreign judgments, since private international relations become more numerous. This phenomenon affects not only relations of an economic nature—in particular contracts—but also family law; the shifts in population, following the internationalization of trade, give rise to mixed marriages which in turn give rise to problems of conflict of laws in the field of matrimonial status, filiation, succession etc.

On the other hand, when the countries engaged in these intense exchanges decide to develop a process of integration, and to converge their legislation this seems to eliminate the phenomenon of conflict of laws itself. If, for example, two countries have adopted the same rules in contractual matters, and a contract is entered into between two persons each domiciled in one of these countries, it would seem, at first glance, of no relevance to chose to apply the law of one country or the law of the other. One could also imagine an almost complete disappearance of the problem of recognition of judgments in the relations between these States. It would be the case, if they all agreed to give, automatically, "full faith and credit" to the judgments rendered by each of them, based on the model set forth in the American Constitution with respect to judgments rendered in the various sister States.

What is the situation in Europe, with regard to these considerations?

Undoubtedly, international relations have developed among European countries. In each of them, issues of conflict of laws, international jurisdiction and recognition of judgments most frequently bring into question other European countries. This is particularly the case in the relations between France, Germany, the United Kingdom and Italy.

On the other hand, the harmonization of the legal rules and the convergence of the court systems have not reached a sufficient level in order to eliminate the problems of private international law.

Of course there exists a European legislation which is incorporated into the law of the Member States of the European Community, and which is therefore common to these
States. However, in the field of private law, this legislation essentially consists of rules which do not substitute themselves to national rules. For instance, the rules of competition law set by the Community authorities have not superseded the rules of competition law, specific to each State. Therefore, conflicts may still arise, between the rules of competition law of the various Member States.

There is, it is true, another aspect of European legislation which must be taken into consideration, namely harmonization of national rules. It takes the form of directives which set the general principles which the internal legislation of Member States must respect. Some are of extreme importance, such as the 1985 directive on liability for defective products, or that of 1993 concerning abusive clauses in consumer contracts. However, even if the directives often set very specific rules, a certain diversity is allowed to remain in existence. One must also bear in mind that harmonization is only justified insofar as the functioning of the common market is involved.

Of limited impact is also, at present, the more ambitious project which is being implemented on the initiative of the European Parliament, and which should in a distant future lead to the drawing up of a European Code in private law. There only exists today a set of "Draft Principles of European Contract Law"; as the same indicates they are nothing more than "Principles" and they are currently only at "Draft" level.

In conclusion, even in the field of contracts, conflicts of laws are not likely to disappear soon in the relations between European States.

Regarding the problem of recognition of judgments, a rule similar to the U.S. full faith and credit clause can only be found within a federal structure; and the European Community does not—or does not yet—have such a structure. As we shall seem there has been a liberalization of the conditions for recognition of judgments, but this has not led to the disappearance of the problem of recognition.

The conditions which I have just described establish the necessity for the European Community to develop rules of private international law. It is well known that the major problem which private international law is confronted with is the lack of decisional harmony. According to whether a litigant decides to sue in a certain country, or in another, the applicable law will not be the same, each Court applying its own conflict of law rules. This lack of harmony may even give rise to conflicting decisions, if the recognition of foreign judgments is subject to strict conditions. Harmonious economic relations may not develop without a minimum of security. For this purpose, it was necessary to establish a European private international law. I shall in the first place, indicate the main aspects of this legislation, before illustrating, in the second place, the problems which its application will encounter.

I. The Content of European Private International Law

The draftsmen of the Treaty of Rome of 1957, founders of the European Economic Community, had identified one of the objectives to be achieved: the free circulation of judgments. Article 220 of the Treaty envisages the "simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts." This objective was soon made the main object of a Convention, which was signed in Brussels on 27 September
A second objective was not immediately perceived: the harmonization of rules, in matters of international jurisdiction and applicable law.

The issue of harmonizing the rules of international jurisdiction arose during the negotiations which led to the drafting of the Brussels Convention: if one wanted to adopt more liberal conditions for recognition and enforcement of judgments rendered in Member States, one had to prevent the originating court from accepting it held jurisdiction on an insufficient basis. Finally, the Brussels Convention includes both aspects and for this reason is entitled: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

It is only in 1967 that the establishment of a Convention relating to the conflict of laws was envisaged. Originally, it was to apply to all obligations, whether of a contractual or extra-contractual origin. Finally, only the contractual obligations were kept. The process which led to the Convention entering into force was lengthy: it was signed after thirteen years in 1980, and another eleven years elapsed before it actually entered into force on 1st April 1991.

As far as the conflict of laws is concerned, there might have been a third objective: that of adapting conflict of law rules for the needs of the substantive policies of the Community. Yet it is only in the field of insurance law—which Professor Yokoyama will deal with—that this objective has been taken into consideration. And we shall see that by neglecting it the European law-maker has created very serious difficulties.

It would take too long to describe in detail the content of European private international law. I shall therefore confine myself to pointing out its main characteristics and its essential rules. I shall follow the order in which the community authorities became aware of the necessity to develop such rules: recognition and enforcement of judgments, international jurisdiction and conflict of laws.

A. Recognition and Enforcement of Judgments

Although recognition and enforcement of judgments are the essential object of the Brussels Convention of 27 September 1968, the Convention does not apply to all judgments, but only to those rendered “in civil and commercial matter.” Furthermore, some matters, even though civil or commercial, are excluded: in particular, the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions.

Even though the Community does not constitute a federation it can be said, in fact, that the Convention’s aim is “federal.” It has a twofold objective. On the one hand, reciprocity: each judgment given in a contracting State must be recognized and enforced in every other contracting State, according to the same rules and therefore with equal easiness. On the other hand, decisional harmony commands that the judgments rendered in contracting States be recognized and enforced on the whole Community’s territory, on the basis of mutual trust between the Member States in their respective legal systems.

This does not, however, imply a total absence of formalities nor of control.

With regard to formalities, the Convention distinguishes between recognition and enforcement. Recognition does not entail any special procedure. In the words of Article
“if the outcome of court proceedings in a contracting State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.” It is nevertheless possible for an interested party to apply for a decision that a certain judgment be recognized, which will allow him, at any time, to take advantage of the judgment in the country which has recognized it.

Enforcement, by contrast, always requires an application for a decision (which, in France and some other countries, is referred to as “exequatur”). However the procedure is relatively expeditious, in the sense that in the first stage the party against whom enforcement is sought is not allowed to appear. It is only in the appeal that the procedure becomes inter partes.

The control which the Court proceeds with is the same, whether it is seized of an application for recognition or for enforcement. It is restricted to the bare minimum. The application may only be refused on one of the following grounds:

1. Recognition or enforcement would be contrary to public policy in the State in which it is sought;
2. The defendant was not duly served and did not appear before the foreign Court.

With a few exceptions, the lack of jurisdiction of the court which rendered the judgment is not a valid reason to refuse recognition or enforcement. Such a liberal rule was only made possible by the presence, in the same Convention, of rules relating to jurisdiction. This is the object of the second set of rules.

B. International Jurisdiction

In the law of most contracting States one finds rules of international jurisdiction which other States consider abusive. For example, French courts have jurisdiction when either the plaintiff or the defendant is of French nationality. This nationalist rule, as well as other rules of the same kind, are disregarded, according to the Convention, when the defendant is domiciled on the territory of the Community.

However the draftsmen of the Brussels Convention did not limit themselves to excluding some rules. They also developed a complete system of jurisdiction rules. As it is rather complex, let us confine ourselves to the main rules, which are found in articles 2, 5, 16 and 17.

a) According to article 2, persons domiciled in a contracting State can be sued in the courts of that State. This is the fundamental rule. However:

b) In various matters, article 5 gives the plaintiff a choice between the courts of the State of the defendant’s domicile and the courts of another contracting State.

For example, according to Article 5, §1—a text frequently applied—in matters relating to a contract, a person domiciled in a contracting State may be sued in the Courts of the place of performance of the obligation in question. Or, according to Article 5, §3, in matters relating to tort, a defendant may be sued in the Courts of the place where the harmful event occurred. Altogether there are seven jurisdiction rules of this kind.

c) Article 16 interferes with the preceding rules by setting exclusive jurisdiction rules. These rules take precedence over all the others and assign jurisdiction to a sole Court. For example, in proceedings which have as their object rights in rem
in immoveable property, or tenancies of immoveable property, the Courts of the contracting State in which the property is situated have exclusive jurisdiction. There are five rules conferring exclusive jurisdiction. A judgment which has been rendered in a contracting State in violation of one of these rules will not be recognized or enforced in any other contracting State.

d) Finally, Article 17 confers validity on clauses which purport to protogate the jurisdiction of a Court, provided that such clauses are either in writing or drawn up in accordance with the usages of international trade.

Such are the main jurisdiction rules established by the Convention. In general, they are described as rules relating to intra-Community disputes. However, this is not entirely accurate, since they do not presuppose that both parties have their domicile in a State of the Community. It is sufficient, for the application of most of the rules, that the defendant be domiciled in one of these States. For example, if a U.S. citizen domiciled in the United States wants to bring a claim against a person domiciled in France before a French Court, the Convention is applicable. I have noticed that most of the laywers and judges have not yet realized that the Convention is applicable in such situations.

This does not mean that a harmonization of the jurisdiction rules of the various European states has been achieved. National rules on international jurisdiction remain in force, and coexist with the conventional rules. They are applicable each time the defendant is not domiciled on the territory of the Community. Thus, in my previous example, if the defendant is the person domiciled in the United States, and if the plaintiff, a French national domiciled in France, seizes a French court, this court will not apply the Convention, but its own jurisdiction rules; and it will retain its jurisdiction on the basis of the French domicile of the plaintiff, or on the basis of his French nationality. This position is strongly criticized, rightly in my opinion, by American authors.

C. Applicable Law in Matters Relating to Contracts

The Rome Convention of 1980 on the law applicable to contractual obligations supersedes the conflict of law rules of those Member States of the Community which have ratified it. For the time being only seven, out of the twelve States, have ratified the Convention.

The new conflict of law rules set by the Convention are applicable whether or not the law which they select is the law of a contracting State. Therefore, the Convention does not apply to intra-Community relations. It achieves a complete harmonization of the private international law of the signatory States regarding contracts.

The system instituted by the Convention is dualistic. According to Article 3, when the parties have chosen the applicable law, that law must be applied by the court. The choice may be express or tacit, provided that it can be demonstrated with reasonable certainty.

In the absence of such a choice Article 4, §1 provides that the contract shall be governed by the law of the country with which it is most closely connected. The other paragraphs in Article 4 set forth presumptions relating to the closest connection. The most general presumption is laid down in Article 4, §2: “It shall be presumed that the contract is most closely connected with the country where the party, who is to effect the performance which is characteristic of the contract, has his habitual residence.” For instance, in a sales con-
tract the performance which is characteristic of the contract is that of the seller (who delivers the goods), not that of the purchaser (who pays the price). As a result the law applicable to a sales contract is the law of the country of the seller.

Several States, the private international law of which is based on the far more flexible concept of "proper law of the contract," are opposed to this rigid system. In a spirit of compromise, §5 of Article 4 states that the presumption "shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country." This is called the "exception clause" and, as we shall see shortly, it raises great difficulties of interpretation.

II. Problems Relating to the Application of European Private International Law

The first problem, which in fact met by every Convention aiming to harmonize the legislation of the signatory States, is that of standard interpretation (A). The second results from possible conflicts between the rules of European private international law and the substantive objectives of Community law (B).

A. The Interpretation of European Private International Law

The Brussels Convention and the Rome Convention are intended to be applied by State courts. We know that courts interpret texts of an international origin in the light of their own concepts, which inevitably introduces differences: uniformity is no longer achieved, the objective is not reached.

Within the context of the EEC, there fortunately exists a court superior to the States, which may impose upon them its own interpretation: it is the Court of Justice of the European Communities. Both Conventions provide for the possibility for a State Court seized of a dispute to raise a question of interpretation before the European Court, the reply having binding force on it. As to the other courts of the member countries, which may be seized of a question similar to that which has been settled, they have the choice between respecting the solution given—which they generally do—or raising the question once again before the Court.

However, the situation is not exactly the same regarding the Brussels Convention and the Rome Convention.

1. The Brussels Convention

A Protocol signed in Luxembourg on 3 June 1971 grants the courts of appeal—and not the lower Courts—the option of raising a question of interpretation before the Court of Justice; they can do so only when such a question is at issue in the course of a dispute which is submitted to them. On the other hand, reference to the Court of Justice is mandatory for Supreme Courts in each country whenever a problem of interpretation arises.

A great number of judgments—approximately seventy five, in the course of less than twenty years—have thus been rendered by the Court of Justice of the European Communities on the interpretation of the Brussels Convention.
There are a few terms in the Convention which the Court of Justice considers not to call for an interpretation which it would impose upon the States. Regarding for instance Article 5, §1, which grants jurisdiction to the court of the place where the disputed contractual obligation was to be performed, the European Court considers that the Convention did not intend to impose any concept of the "place of performance." Therefore, the place of performance depends on the law applicable to the contract, which in turn depends on the conflict of law rule of the court seized. It results therefrom, that as long as the Rome Convention—which adopts uniform conflict of law rules in contractual matters—had not come into force, two courts could have a different appreciation as to the court onto which jurisdiction was conferred by Article 5, §1. Even after the Rome Convention has come into force, this difference may continue to exist until the Convention has itself received a standard interpretation.

However, most often the Court of Justice considers that the terms used in the Convention must be given an independent interpretation. According to a saying in the Eurocontrol judgment of 14 October 1976, the interpretation is determined by reference, "first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems."

In this way one arrives at a standard interpretation. However, there may then arise a problem, regarding the insertion of the solution in the private international law system of the forum. This problem is illustrated by a recent decision of the Court of Justice, Jakob Handte v. TMCS of 17 June 1992.

TMCS, a French company, had purchased a machine from Jakob Handte France, which had itself purchased it from Jakob Handte Germany. The machine proved to be defective. The purchaser TMCS summoned the manufacturer, Jakob Handte Germany, before the French Court of the place where the machine had been delivered, in other words the place where the disputed obligation had been performed.

TMCS was thus relying on Article 5, §1 of the Convention, on the ground that the direct claim it was bringing against the first seller was of a contractual nature. Such is indeed the position of French law, shared by both Belgian and Luxembourg law. French law was the law applicable to the sale contract entered into between Jakob Handte France and TMCS, two French companies; and that law also governed, according to French private international law, the direct claim brought against the first seller.

The defendant claimed that, not being bound to TMCS by a contract, the claim brought against him was not based on a contract but on tort; hence Article 5, §1 was not applicable.

The French Supreme Court raised a question of interpretation before the Court of Justice. The Court of Justice decided in favour of the defendant, Jakob Handte. Amongst other arguments, it referred to the fact that according to a great majority of European States a claim, made between persons who are not "freely committed to each other," is not of a contractual nature.

This decision seems wise. However, in the future it will put the French courts in a peculiar situation. A court seized of a claim similar to that made by TMCS will now characterize the claim as being based on tort, thus respecting the Jakob Handte decision, and it will apply Article 5, §3 of the Convention which, as we have seen, deals with tort claims. If the court recognizes that it holds jurisdiction on this ground, it will then have to determine the applicable law. For that purpose, it will characterize the claim as being
based on a contract, since this is the characterization which results from its conflict of law rules, which have not been modified on this point. And if the applicable law is French law, it will apply the rules of that law relating to contracts, and not those relating to torts.

Thus, having accepted that it has jurisdiction to decide on a claim in tort, the French court will in fact decide on a contract claim, and will apply contract law.

From this example one must not conclude that referring the interpretation to the Court of Justice is in itself a bad system. If it sometimes results in incoherences, it is only because the harmonization of private international law was only—and could only be—partial.

In fact, the most serious obstacle to the good functioning of the Brussels Convention results from the fact that no one can oblige a state court to require an interpretation from the Court of Justice of the European Communities. It is up to the state court to decide whether the meaning of a given text is clear, and therefore does not require an interpretation, or on the contrary is ambiguous. Courts are sometimes tempted to find clear a rule which is not. This is particularly the case when it allows an interpretation in accordance with national traditions, which the Court of Justice might ignore.

A good illustration of this attitude can be found in a judgment of the English Court of Appeal rendered unanimously by three judges on 19 December 1990. The Court of Appeal had jurisdiction on the basis of Article 2 of the Convention (domicile of the defendant); nevertheless it declined its jurisdiction in favour of the Courts of a non-EEC country pursuant to the English theory of the forum non conveniens, which gives the court great flexibility. However, the system of the Convention is a rigid system, inspired on the continent, and which makes no reference whatsoever to this theory.

2. The Rome Convention

If we turn to the Rome Convention, it appears likely that the Court of Justice will not receive, for a very long time, the power to give its own interpretation. Several States have in fact expressed some reticence, and a compromise has been found in the adoption of a complicated system, which requires the entering into force of two Protocols, one of which must be signed by the twelve States.

Meanwhile, there is the risk of seeing significant differences of interpretation arise between the various States. Some States, such as Italy, which have a rigid system of connecting factors, will find no difficulty in keeping to the presumptions set forth in Article 4 and will, most likely, seldom resort to the exception clause. Others, on the contrary—England, Germany, France—who used to proceed to an "impressionist" determination of the proper law of the contract, will only have recourse to presumptions after having systematically checked that the contract is not "more closely connected with another country"; this will deprive the presumptions of any usefulness. Such is already the position clearly taken by the English doctrine and which will undoubtedly be followed by the English courts.

Therefore, finally there is a strong risk that no real harmonization will take place between the law of the signatory States.

B. Possible Conflicts between European Private International Law and Substantive Community Rules

Ordinarily, it is not the same experts who draft the substantive Community rules on
the one hand, and the private international law rules on the other hand. Experts in Community law often have little knowledge of private international law, and the converse suggestion is indisputably true. In the event of a conflict, the Brussels and Rome Conventions, which are not Community norms in the strict sense, since they were not adopted by the authorities instituted by the Treaty of Rome, would most likely be sacrificed by the Court of Justice.

Such a conflict could take place between the principle of free circulation of goods and services on the one hand, and the Rome Convention on the law applicable to contractual obligations on the other hand.

This calls for an explanation.

According to Community law a Member State cannot rely on its own legislation to justify a restriction to the free circulation of goods and services offered by other Member States. Especially in banking matters, a directive has specified that "the Member States must ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State." A bank, whose head office is located in England and which maintains a branch in France, may feel that the obligation to respect the constraining French rules on consumers' protection is a hindrance to the free exercise of its activity in France, because these rules often impose fairly burdensome formalities. It will claim to have English law apply to all its contracts.

However, Article 5 of the Rome Convention provides that "the choice of law made by the parties—we can assume that in this instance English law has been chosen—shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence"—which in my example is French law, the law of the host state.

In this instance it is clear that the Rome Convention conflicts with the Treaty of Rome. A possible reconciliation may be found in the notion of "general good," because the directive provides that "legal provisions protecting the general good in the host Member State" must be complied with by the foreign bank. The protection of consumers falls, in principle, within the concept of general good. However, application of the law of the host State is only justified if on the one hand, the measure of protection is not disproportionate compared to this objective, and if on the other hand the law of the bank's home States does not itself include sufficiently protective provisions. In the event of a dispute between the banker and his client it will be up to the state court to decide if the application of the law of the host State, i.e. the law of the residence of the consumer, is or is not admissible... All this seems highly unfavourable to predictability, but the blame, if any, is to be put on Community law rather than on the Rome Convention.

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These are some examples of the difficulties which have been, or will soon be, encountered in the application of European private international law. One must not forget, though, that things would be far worse if these aspects of European integration had simply been ignored.

In the future, it is likely that new provisions on various aspects of conflicts of laws will be drafted by the Commission itself, in the form of directives or regulations. This method
will allow uniform interpretation. However it will require, on the part of the Commission's legal staff, a considerable effort to familiarize themselves with the difficult science of private international law.

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