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The Interconnection of the EU Regulations Brussels I Recast and Rome I

Jurisdiction and Law

Christoph Schmon

Springer

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Preface

> *The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and 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)*—Recital 7 of the Rome I Regulation.

When interpreting EU private international law rules, the task of duly assigning the proper meaning to non-defined legal terms has proved tricky because the European Union may only legislate in specific areas and the set of European substantive law rules cannot yet provide for unified contract law concepts as a reference. Neither can the much-vaunted postulation of an 'autonomous' interpretation, an interpretation detached from meanings of a specific domestic law, be easily realised by a comparative approach. In many cases, there will be no *tertitum comparationis* that could serve as a comparative function. This suggests a systematic approach of interpretation to derive benefits from the reference points under the Treaties and to interpret the provisions of a legal act in due consideration of others. After all, every Union law provision must be seen in its context and interpreted in the light of the provisions of EU law and its principles.

A systematic approach would be particularly rewarding with respect to the key instruments of EU international contract law—the Regulations Brussels I Recast and Rome I. Whilst, due to various preliminary references since 1976, an abundance of case law exists with respect to the former and its predecessors, the contrary may be said for conflict of laws. Since it lacked jurisdiction for interpretation until 2004, the Court of Justice could not substantiate the terms of the Rome Convention and, consequently, the Rome I Regulation could not rely on rich case law or defined concepts. Both Regulations are historically and dogmatically connected and are embedded within the matrix of a judicial net of legislative acts of supranational character which pursue specific Union targets and serve as potential reference points for interpretation.

However, we have learned from comparative law that when words cross boundaries a morality is thereby attached to those words. Synergized legal terms require the conveyance of language and the legal culture those terms are stemming from. Something similar may be said when comparing these Regulations. Both legal acts have their specific DNA, system and underlying idea: Brussels I Recast has a procedural focus when it governs the allocation of jurisdiction and the free circulation of judgments. Rome I follows a conflict of laws rationale when it designates the law applicable to the contract. If one wishes to exploit synergy effects and to establish whether there can be a horizontal terminology across legal boundaries, it is necessary to delimit the scope and analyse the Regulations' systems, their individual justice models, internal and external target objectives, and their balance of flexibility and legal certainty. Such analysis is even more necessary as their legal DNA is encrypted by the value-laden authority of a *preludium*, the preamble of the legal text with its citations and recitals. Recitals intend to explain the text and to give the reasons on which the legal act is based. Sometimes though, they are programmatic or may even obscure the spiritual essence of the law. Recital 7 of the Rome I Regulation explains that its provisions should be consistent with those of the Brussels I and Rome II Regulations. Without doubt, it would be comforting if the same terms were presumed to bear the same meaning across the Regulations.

The mission of this book is thus to analyse the interconnection between the Brussels I Recast and Rome I Regulations and to address the questions of uniform interpretation and whether fragmentation may be avoided by way of systematic-teleological interpretation. Attention will be paid to the amalgamation of private international law on contractual obligations and Union law, taking into account the creation of an EU area of justice. Existing parallels and differences will be investigated, and the findings employed in the example of consumer contracts.[1]

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[1]Parts of this book build on the author's Ph.D.-thesis, submitted for approval in 2016 and successfully defended at the University of Vienna the following year. The author is grateful to the members of the doctoral committee and particularly wishes to thank those who encouraged him not to stop there but to go the extra mile.

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Complementarity

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Abstract The Brussels I Recast and the Rome I Regulations are companions in a gradual unification process of private international law. Their predecessors already had a complementary function as the Rome Convention was created to thwart the tactical manoeuvre of forum shopping possible under the Brussels Convention. By embedding private international law matters in the corpus of Community law, the policy on judicial cooperation in civil matters strengthened their interrelationship even further. Keeping in mind the consistency of the unification process, the conventions were transformed into Regulations with modified content. Serving internal market purposes and being interlinked through a common Treaty competence, the Regulations serve as reference points of interpretation.

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1.1 The Age of Conventions

1.1.1 The Brussels Convention

The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), signed on 27 September 1968 by the Members of the Community, was designed as a *convention double*: it not only established a system for recognition and enforcement of judgments, authentic instruments, and court settlements, as provided in Article 220 EEC, but also established an autonomous system of international jurisdiction in all Contracting States. The Convention superseded in its scope of application various bilateral conventions on jurisdictions and judgments concluded between the Contracting Parties (listed in Article 55 of the Convention). The Jenard Report explains that the 'differences between the bilateral conventions would hinder the 'free movement' of judgments'. The Report also states that the ideal solution would certainly have been to apply the Convention to all civil and commercial matters. However, a catalogue of exempted matters, such as matrimonial relationships or succession, was necessary in light of the difficulties resulting from the absence of any overall solution to the problem of conflict of laws.[1]

Consistent interpretation was to be ensured by the Luxembourg Protocol,[2] which awarded the European Court of Justice (ECJ)[3] the power of interpretation of the Treaty provisions when a reference would be made to it by a court of a Contracting State. The courts were thus compelled to follow the rulings of the Court of Justice when applying the Convention. As a result, the Luxembourg Protocol was heavily involved in making the resolutions of the Convention a 'successful model'.[4] The Convention came into force on 1 February 1973.

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[1]Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr. P. Jenard [1979] C 59/1, 1, 7.

[2]Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971 [1975] OJ L 204/28.

[3]Since the Lisbon Treaty, the Court of Justice of the European Union consists of the Court of Justice, the General Court (formerly the Court of First Instance) and specialised courts (formerly known as judicial panels). For the sake of clarity and ease of comprehension, the term 'Court of Justice' and the abbreviation 'CJEU' will be used throughout the present text to refer to the Court of Justice of the European Union.

[4]Geimer 2002, p. 33 (noting that one reason why the Hague conventions have not reached a greater expansion is the lack of central authoritative interpretation).

Its regime was—*cum grano salis*—extended to non-EU Member States with the Lugano Convention 1988,[5] concluded between the Member States of the European Community and certain Member States of the EFTA to facilitate closer co-operation. Other States could only accede with the unanimous approval of both the Community and the EFTA-States. In 2000, Poland received these approvals and acceded to the Lugano Convention. A protocol entrusting the Court of Justice to interpret the Convention was not adopted. The EFTA states could not have accepted referring the power of interpretation of a non-Community law legal act to an institution of the Communities,[6] nor had the EFTA States agreed to establish a genuine judicial body. Confronted with the 'complex situation' of guaranteeing uniform interpretation of the Lugano Convention and, at the same time, ensuring interpretation and application of the Convention in convergence with the Brussels Convention,[7] Protocol 2 and Declarations to the Convention were annexed. In essence, provisions of the Lugano Conventions were to be interpreted in light of the twin-provisions in the Brussels Convention and, therefore, the rulings of the Court of Justice had to be taken into account.

1.1.2 The Rome Convention

Since the Brussels Convention provided for the possibility of suing the defendant at different *fora*, the plaintiff could, by picking the most beneficial forum, choose the applicable law according to different national norms on the conflict of laws. The unified provisions of the Rome Convention were therefore created to thwart the tactical manoeuvre of 'forum shopping'.[8] On top of that, upcoming reforms in the Member States caused some to fear a danger that 'existing divergences would become more marked'. It was therefore regarded as a matter of urgency to continue cooperation in order to unify the Member States' rules on conflict of laws.[9] This was expressed by the Giuliano/Lagarde Report, accompanying the publication of the Rome Convention, which advised uniform conflict of laws norms in fields of particular economic importance in order to have the same law applied irrespective of the State in which the decision was rendered.[10] The collaborative function was explicitly exhibited by the Preamble of the Rome Convention, which explained that

[5]Lugano Convention of 1988 [1988] OJ L 319/9. For general comments, see Lechner and Mayr, *Das Übereinkommen von Lugano* (1996).

[6]Jenard and Müller-Report, Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, [1988] OJ C 189/57 para 110.

[7]Id., para 111.

[8]For general thoughts on 'forum shopping', see Vareilles-Sommières 2007.

[9]Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris [1980] OJ C 282/1, 4.

[10]Id., p. 5.

the 'work of unification of law' commenced in the areas of jurisdiction and enforcement of judgments should be continued in private international law. It is worth noting that the initial proposal was addressed to bring a complete unification of the rules on conflict of laws 'over the whole field of private law':[11] the EEC preliminary draft convention[12] dealt with both contractual and non-contractual obligations. However, after the governments of the original and the new Member States[13] of the EEC re-examined the text, the expert group decided at its meeting in March 1978, 'for reasons of time' and in light of the enlargement of the EEC,[14] to restrict the scope of application of the Draft Convention to the field of contractual obligations, while the area of non-contractual obligations would be the subject of later legislative actions.[15] The Rome Convention was not formally based on Article 220 EEC but, instead, a result of the intergovernmental cooperation within the framework of traditional international law—civil cooperation outside of the legal order of the Treaty. A protocol conferring the jurisdiction of interpreting the Convention to the CJEU did not enter into force until 2004.

1.2 The Age of Regulations

1.2.1 An EC Policy on Judicial Cooperation

For decades, private international law and Community law had been considered separate areas, and initiatives had been solely taken by way of intergovernmental cooperation, as was the case with the Brussels and Rome Conventions. This changed with the coming into force of the Treaty of Amsterdam, which gave the starting signal for the harmonisation of private international law matters on a Community level. In contrast to the EEC Treaty of 1957, which did not explicitly mention private international law, the Amsterdam Treaty consolidated the areas of conflict of laws, jurisdiction, and the recognition and enforcement of foreign judgments, which comprised a new policy on judicial cooperation in civil matters. The embedding of private international law matters in the corpus of Community law resulted in adjustments to the traditional understanding of private international law. Community private international law had to serve the implementation of an internal market without frontiers and to meet the challenges brought by the process

[11]Minutes of the meeting of experts, cited in Id., at 4.

[12]Commission document, XIV/398/72. For a comprehensive commentary, see Foyer 1976, pp. 555–658; Lando/Hofmann/Siehr 1975; see also Czernich and Heiss 1999.

[13]Accession of the United Kingdom Denmark and Ireland to the EEC in 1973.

[14]Cf., however, Siehr 2000, p. 1358 (stating that the plan for a Convention on both contractual as well as non-contractual relations did not materialise because of the double actionability rule of *Phillips v Eyre*).

[15]Giuliano/Lagarde Report, n.9, p. 7.