The development of a system of European conflict of laws — trying to preserve the substantive standard of harmonised private law*

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EUROPE AND CONFLICT OF LAWS

When talking about 'European private international law', one has to be aware that this expression bears a variety of meanings. Apart from a huge number of national legal orders, to which 'European' may refer in a geographical sense, the 'old continent' houses three important 'supra-national' organisations which are also engaged in private international law (PIL) legislation. In line with this article, however, the Hague Conference on Private International Law and the few relevant conventions drawn up under the auspices of the Council of Europe, will be left aside. Our topic shall be limited to the attempts undertaken by the European Union as the economically and politically most important 'regional' institution.

European Economic Community and the internal market

As a political and economic institution, the European Union developed from an idea born in post-war Germany and France. To re-stabilise relations between these two states, and to bind them within a limited framework of peaceful cooperation, in order to avert emerging rivalry over the coal-producing regions on their common border, a first treaty — setting up the

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1 Cf http://www.hcch.net/e/.
2 Cf 'http://www.coe.int' (with excellent search options).
3 The European Union was founded by the Treaty on European Union, signed in Maastricht on 7 February 1992 Official Journal (OJ) 1992 C 191/1; for the consolidated version of the Treaty as amended last by the Treaty of Amsterdam OJ 1997 C 340/1 as well as the on-line versions of the Treaties: http://europa.eu.int/eur-lex/en/treaties/index.html.'
4 Regarding the development of European integration cf P Craig and G de Búrca EU law (2ed 1998) 9.
European Coal and Steal Community — was signed in 1951. This initiated a two-fold process of integration between Germany, France, Italy and the Benelux states. While the plans for a European political union suffered a substantial setback (due to the rejection of the European Defence Community Treaty by the French national assembly in 1954), agreement was achieved on economic integration. In 1957 two further communities were established: the European Atomic Energy Community (Euratom), and the European Economic Community (EEC). The latter aimed at the establishment of a common market within twelve years' time.

A 'community of law'

However, economic integration is not the only goal of the treaty establishing the European Community. This is explicitly stated in the preamble and, even more prominently, in article 2 of the Treaty:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

These goals could not (and still cannot) be achieved without creating a general framework of uniform, or at least comparable, conditions for all economic players in the common market. This, in turn, requires the establishment of a common legal framework. In the famous words of Walter Hallstein, the first president of the European Commission, 'Die Europäische Wirtschaftsgemeinschaft ist eine Rechtsgemeinschaft.' (The European Economic Community is a legal community.) Consequently article 3 EC provides:

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3Interestingly enough, the ECSC Treaty of 18 April 1951 in terms of its art 97 was given a limited life-span of fifty years, to expire in 2002: See now the Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 23 October 2001 terminating the Agreement of 21 March 1955 on the establishment of through international railway tariffs for the carriage of coal and steel OJ 2001 288 L 38, fixing the expiry on 1 May 2002.

4The original Treaty was signed on 25 March 1957; for the consolidated version of the Treaty as amended last by the Treaty of Amsterdam see OJ 1997 C 340/173 and 'http://www.europa.eu.int/euro-lex/en/treaties/dat/ec_cons_treaty_en.pdf', respectively.

6Pursuant to the renumbering of the articles of the Treaty establishing the European Community brought about by the Treaty of Amsterdam, the Court of Justice and the Court of First Instance have introduced, with effect from 1 May 1999, a new method of citation: Where reference is made to an article of a Treaty as it stands after 1 May 1999, the number of the article is immediately followed by the two letters 'EC'; where, on the other hand, reference is made to an article of a Treaty as it stood before 1 May 1999, the number of the article is followed by the words 'of the EC (or EEC) Treaty'; cf 'http://curia.eu.int/en/jurisp/remnot.htm'.
For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty...

a) ...
h) the approximation of the laws of Member States to the extent required for the functioning of the common market

This essential legislative power in the original treaty was concentrated in the Commission and the Council. The former proposed a measure and the latter voted on it, while the European Parliament’s (EP) role was merely consultative. In the course of further integration, however, the EP has acquired a greater say in the legislative process, and since the entry into force of the Treaty of Amsterdam in 1999, the EP and Council cooperation procedures (as laid down in arts 251 and 252 EC) have been upgraded.

Community legislation — ‘European secondary law’ — may be enacted in many different forms the most important of which are described in article 249 EC which reads:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

It has been said that one of the most noteworthy features of EC law to date is the impact it is perceived to have had on the legal systems of the member states.9 One reason for this is the principle of primacy (or supremacy) of EC law, which has been established by the European Court of Justice (ECJ).10 Together with the Court of First Instance, the ECJ forms the judicial branch of the community (art 220 EC) with varied tasks. It may be called to adjudicate matters of constitutional significance (eg division of powers between Community and member states) as well as widely varying matters of substantive EC law. Article 234 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

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9Craig & de Búrca n 4 above at 163.
The mere existence of the ECJ in its function as the only authority for a binding interpretation of EC law is therefore very important for the development of a stringent, coherent and genuinely European legal order. Furthermore, in fulfilling this function the ECJ has continuously pursued a vigorous policy of integration, opening the way for further progress.\footnote{For the most recent example see n 92 below.}

**Legislative competence — reasons for harmonising PIL**

As is clear from the foregoing, the treaty requires an 'approximation' rather than a strict 'unification' of law. Such an approximation is achieved through the EC-directive.\footnote{See art 249 below.} This form of community action is addressed to the member states (as opposed to regulations which are addressed to the general public). While it is binding as regards the goal to be achieved, it leaves member states some choice as to the form and method of implementation.\footnote{Case 148/78 Criminal proceedings against Tullio Ratti [1979] ECR 1629.}

As a result, the direct effect of a directive is limited. The ECJ has, after all, recognised that directive provisions may be applied, even if not yet implemented, if they affect relations between a member state and an individual — 'vertical direct effect' — and provided that the directive provision in question sufficiently specifies the right involved.\footnote{Starting with Case 152/84 MH Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723 paragraph 48; for the field of consumer protection expressis verbis Case C-91/92 Paola Faccini Dori v Recreb Srl [1994] ECR 1-3325 paragraph 20 — contrary to that, the ECJ very recently expressed in the line of a recent preliminary proceeding that '... articles 17 and 18 of Council Directive 86/653/EEC ... which guarantee certain rights to commercial agents after termination of agency contracts, must be applied ...' (see n 92 below).}

A so-called 'horizontal direct effect' (which would touch upon the relationship between individuals), however, has so far been denied in the court's jurisdiction.\footnote{Craig & De Búrca n 4 above at 124.}

Originally, the competence to set approximation measures was limited only by the 'requirement' test described above.\footnote{Art 3 lit h EC (full text quoted above).} In 1992 this was supplemented by the so-called 'principle of subsidiarity' as stated in article 5 EC.\footnote{Cf eg D O'Keffle and PM Twomey (eds) Legal issues of the Maastricht Treaty (1994), chapter 3 39–40.}

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Space precludes an elaboration of this principle (although this might be very fruitful from a scientific point of view, as this principle is 'far from clear', especially in that there is no ready criterion for distinguishing between those
areas which are and those which are not 'within the Community's exclusive competence'). It does, however, impact on the intensity of the judicial review process of Community acts.19

Having described these principles, it is enough to state that they also apply in respect of private law. To grant equality in economic competition, it is not necessary to unify the entire branch of private law provided that PIL guarantees that all business transactions in the same field (and all participants in the same — national — market) are governed by the same — national — provisions.20 This idea does not work, however, if the respective national conflicts rules differ and thus lead to the application of different national legal orders to the same facts, which may substantially influence the outcome of the case(s). In such a situation, it may well be worthwhile to consider carefully where a claim is to be lodged. This phenomenon — generally known as 'forum shopping' — does not really promote trans-border business among the cautious. Therefore, being aware of the urgent need for greater legal certainty in some sectors of major economic importance, and led by the wish to forestall further differences in PIL rules amongst the member states, the European Economic Community promoted negotiations on a uniform PIL of contracts as early as 1969.21

Although the following statements will concentrate on the PIL of contracts, it should be noted that the 'System of European Conflict of Laws' includes other fields, which will be mentioned briefly. Preparatory works exist as to the conflicts rules on matrimonial and succession law,22 property law,23 and the law of torts.24 For international procedural law one must mention the

19Id at 128.
22See eg the proposal for a EU Convention 1994 IPRax 67–69; the international procedural aspects have now indeed been unified by Council Regulation 1347/2000 of 29 May 2000 on (in force since 1 March 2001).
24Originally, this was even part of the EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations of 1972 but was removed because of reservations from the part of the British delegation; for text and reports on the (preliminary) draft of O Lando (1974) 38 RabelsZ 6–55; and O Lando, B v Hoffmann and K Siehr (eds) European Private International Law of Obligations. Acts and Documents of an International Colloquium on the European Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations held in Copenhagen on 29 & 30 April 1974 (Tübingen, 1975). In the past six years, the work on a respective draft has been taken up again; though results have not yet been published officially, the work is regularly reported on eg in IPRax (Journal on the Practice of Private International and International Procedural Law).
successful 1968 'Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters'\textsuperscript{25} — which will be replaced by a Council Regulation on 1 March 2002\textsuperscript{26} —, the very recently enacted similar instrument on marriage and parentage judgments,\textsuperscript{27} and the Council regulations on insolvency\textsuperscript{28} and on the delivery of official documents.\textsuperscript{29} \textsuperscript{30}

**Legal basis**

As indicated above, under the EC Treaty legal harmonisation is usually achieved by means of directives and regulations. Not so for the private international law of contractual obligations. Following the example of the Brussels Convention,\textsuperscript{31} it was decided in 1969 (!) to embody the uniform conflicts rules on contracts into a member states' convention,\textsuperscript{32} although not directly based on the EC Treaty.\textsuperscript{33} Signed on 19 June 1980, the 'Rome Convention on the Law Applicable to Contractual Obligations'\textsuperscript{34} came into force only a decade later, on 1 April 1991.\textsuperscript{35} It is still doubtful whether the Brussels Convention's example will be followed again in regard to its re-enactment in the form of a Council Regulation under article 65 EC, which would 'automatically' confer jurisdiction on the ECJ.\textsuperscript{36}

\textsuperscript{25}Done on 27 September 1968 OJ 1978 L 304/77 (consolidated version OJ 1998 C 27/1); for the characterisation as 'natural consequence' see explicitly Giuliano & Lagarde n 21 above at C 282/5.


\textsuperscript{30}In respect of the measures mentioned above as well as to future measures see the Action Plan by the Council and the Commission of 3 December 1998 for the optimal implementation of the Amsterdam Treaty provisions on establishing a close judicial cooperation in civil matters OJ 1999 C 19/1.

\textsuperscript{31}\textsuperscript{25} above.

\textsuperscript{32}Since this excluded the review by the European Court of Justice, the commission once even threatened to propose a directive or a regulation instead in a Comment on the Rome Convention (80/383/EEC) OJ 1984 L 94/41.

\textsuperscript{33}Cf art 293 EC (former art 220 EC Treaty).

\textsuperscript{34}OJ 1980 L 166/1; see also OJ 1998 C 27/34.

\textsuperscript{35}Cf the respective note by the Council OJ 1991 C 52/1.

\textsuperscript{36}This should have been done already in respect of the convention itself by means of two Protocols which have been signed on 19 December 1980, but unfortunately have not been ratified by enough member states so far: Cf B Rudisch in: D Czernich and H Heiss (eds) EVÜ — Das Europäische Schuldbvertragsüberkommen — Kommentar (1999) EVÜ ('Rome Convention') art 18 paras 21-30.
Scope of application: relation to other sources of PIL and community law

As pointed out above, the harmonisation of the conflict rules in regard to contracts has not been worked out as ‘art pour l’art’, but with the aim of meeting the demands of the internal market. Therefore, the Convention is pragmatic in the limitation of its scope of application. Article 1 narrows it down to business obligations by excluding typical ‘private life contracts’ (like contractual relationships relating to family law or to the law of succession, art 1 paragraph 2 lit b). Other exclusions refer to special fields which at that time - 1969 - were regulated by international conventions or the subject of Community legislative endeavours. The former include, eg, obligations arising under negotiable instruments or arbitration contracts, and agreements conferring jurisdiction (art 1 paragraph 2 lit c and d as well as art 21), examples of the latter are questions governed by the law of companies or certain insurance contracts covering risks situated in the territories of the member states (art 1 paragraph 3). Moreover, a general restriction of the scope of the Convention is stated in its article 20, which provides for the primacy of EC harmonisation acts.

From the exceptions just mentioned, the EC international insurance contract law deserves a second look. Finally laid down in directives dating from 1988 to 1992, it explicitly imports certain of the Rome Convention’s provisions (eg art 7 on mandatory law) into European secondary law and thus - crabwise - into ECJ jurisdiction as well. This is remarkable, since the ECJ does not (yet) have the power to bindingly interpret the Convention itself.

38 See eg art II and V of the New York Convention of 10 June 1958, on the Recognition and Enforcement of Foreign Arbitral Awards; the Geneva Conventions of 24 September 1923, and of 26 September 1927; and the European Convention of 21 April 1961.
39 Cf art 17 of the Brussels Convention n 31 above.
40 See the Convention of 29 February 1968 (not yet in force).
41 Commission proposals on this topic date back to 1967; see B Rudisch Österreichisches internationales Versicherungsvertragsrecht. Das Kollisionsrecht des Versicherungsvertrages vor und nach einem EWR — bzw EG-Betritt (1994).
42 For details cf K Nemeth in: Czernich & Heiss n 36 above, art 20 EVÜ paras 12–62; Rudisch n 23 above at 109–129.
The Rome Convention: a brief summary
The Rome Convention was intended to provide legal certainty. Most authors agree that this goal has been achieved, since its ‘rules are comparatively easy to discern and are openly presented’. Article 3 states the principle that the parties may freely and at any time choose the law applicable to their contract; the exceptions to this principle are clearly stated and limited only to safeguard the mandatory rules of other laws (art 3 paragraph 3, art 5 paragraph 2, art 6 paragraph 1, art 7 paragraphs 1 and 2, art 9 paragraph 6). If there is no express choice of law, courts have to look for a ‘reasonably certain’ implicit choice (art 3 paragraph 1 sentence 2) before proceeding to find the law of the ‘most closely connected’ country (art 4 paragraph 1 with rebuttable presumptions of closest connection(s) in paragraphs 2-4 and an exceptional clause in paragraph 5). Special ‘weaker party protection’ is granted for employees (art 6) and consumers (art 5), usually providing for the application of the law of the country of their habitual performance of work, and their habitual residence, respectively. In conclusion of this overview it should be mentioned that renvoi is excluded (art 15).

INTERNATIONAL CONSUMER CONTRACTS
In this section attention is directed at the EC conflicts regime on consumer contracts since this field offers a very good example for the chosen topic, namely the EC attempts to preserve harmonised substantive law standards.

The role of the consumer in the internal market
Although the EC aims, inter alia, at ‘an internal market characterised by the abolition ... of obstacles to the free movement of goods, persons, services and capital’, as well as ‘a system ensuring that competition in the internal market is not distorted’ (art 3 EC), its activities were long limited to the legal framework governing the enterprises’ access to the market. Express consumer policy, on the other hand, was introduced comparatively late, namely by the EC Treaty revisions of 1986 and 1992. Obviously Brussels took some time to realise that a ‘market’ is defined not only by supply, but also by demand.

5 See art 3 lit t (former lit s), art 95 (former art 100a) paragraph 3 and art 153 (former art 129a) EC, introduced by the Single European Act of 1986 and the Maastricht Treaty of 1992, respectively; on this development cf H Heiss ‘Verbraucherschutz im Binnenmarkt: Art 129a EGV und die wirtschaftlichen Verbraucherinteressen’ 1996 ZEuP 625-647. The first explicit consumer directives date from 1985 onwards; cf the handout given at the conference. For a historical sketch of consumer law see eg E von Hippel Verbraucherschutz (3ed 1986); F Reichert-Facilides ‘Einführung in die Thematik “Internationales Verbraucherschutzrecht”’ in AK Schnyder, H Heiss and B Rudisch (eds) Internationales Verbraucherschutzrecht. Erfahrungen und Entwicklungen in Deutschland, Liechtenstein, Österreich und der Schweiz (1995) 3 et seq.

Article 5 of the Rome Convention

Article 5, entitled 'Certain consumer contracts', is one of the newest provisions of the Rome Convention. It first of all defines its scope in paragraph 1 (with exceptions in paragraph 4 and a counter-exception in paragraph 5) thereby limiting consumer contracts to contracts dealing with the supply of goods and services to a non-professional (or the provision of credit for that object). Paragraph 2 then contains a restriction on the free choice of law; finally paragraph 3 stipulates an exception as to the applicable law in the absence of choice. The main aim of the provision is to shift the risk of the unknown legal order away from the typically weaker party and — at the same time — to protect him by granting him the legal standard of the country in which he has his habitual residence.

Deficiencies in article 5

A famous Austrian saying goes: 'Gut gemeint ist das Gegenteil von gut gemacht' ('the opposite of well done is well meant'). Title of article 5 already indicates that the provision does not even try to cover all possible aspects of contractual consumer protection. Since space precludes a comprehensive analysis, only the most important deficiencies will be presented.

Deficiencies regarding the passive consumer

Protection under article 5 depends on the object of the contract: The provision covers the sale of goods but the purchase of neither real property nor of securities; it covers the rendering of services but not contracts of carriage or contracts under which the services are supplied to the consumer exclusively in a country other than his home country; and it covers contracts on the financing of the covered transactions but not 'pure' credit agreements. In this respect, the European standard lags far behind (even pre-existing) national standards.

Deficiencies regarding the active consumer

Furthermore, the weight of this 'jeopardised shield of protection' does not burden an 'active' consumer, for he will not be allowed to carry it. The criteria in article 5 paragraph 2 make it clear that the provision should protect only consumers who are 'overwhelmed' in their home state by the aggressive professional or — even worse — decoyed away to hostile ground by a reckless vendor. But is this really the very market participant fitting into the model of a borderless internal market? Consumers, on the other hand, who engage

Footnotes:

47 Not yet part of the preliminary draft (n 24 above), the provision was inserted on Irish proposals: Cf Rudlsch n 23 above at 147-148.

48 This, however, is under dispute; cf D Martiny Münchener Kommentar zum bürgerlichen Gesetzbuch Vol 10 (3ed 1998); art 29 EGBGB paragraph 7 notes 26 et seq.

49 The consumer protection clause in (former) s 41 of the Austrian private international law code of 1978, for example, was clearly further reaching: Cf in more detail Heiss in Czernich & Heiss n 36 above, art 3 EVU paras 14-27; Rudisch n 23 above at 150-152.

50 Note that this last of the three alternatives mentioned in art 5 paragraph 2 explicitly refers only to the sale of goods, thus excluding contracts on the supply of services.
in the European idea of economic integration and who look for supply in other member states on their own initiative, find no protection at all under the article 5 regime. Ironically, one might state that the true pioneers of the European single market are punished for their engagement.

THE NEED FOR ADDITIONAL PROTECTION — EXISTING MEANS
Resulting from the deficiencies identified in the previous sections, many consumer contracts fall within the scope of article 4 paragraph 2 of the Rome Convention which — as a general rule — provides that a contract is governed by the law of the country where the provider of the characteristic service has his habitual residence, or — in the case of a body corporate or unincorporate — its central administration. Unless a contract of that kind has a closer relation to another country, which would prevail as a connecting link according to article 4 paragraph 5, this principle will almost always lead to the application of the law of the other party to the contract. It would go beyond the scope of this article, however, to question whether article 4 paragraph 2 provides for an 'appropriate' connecting factor. Suffice it to say that it has been criticised as '... an implicit value judgement, namely that it is more blessed to produce than to consume'.

The consumer in Europe, faced with fifteen different member state laws, is not only in danger of losing certain rights guaranteed in national consumer contract codes, but also faces information costs which arise as soon as he must accumulate information about a different legal order — notwithstanding the standard of protection this legal order provides in the end. Furthermore, this also results in a language problem, as the relevant legal provisions as well as information available from other sources are usually in a foreign language. Apart from actual costs, which arise, this might be a barrier to a consumer entering another member state’s market in the first place. A further obstacle for the consumer in this respect lies within the possibility of bringing actions against the supplier. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters favours the consumer by largely excluding the possibility of a disadvantageous choice of forum, and by guaranteeing him the right to bring proceedings against the other party to a contract in the member state where he (the consumer) is domiciled. However, this only applies if criteria similar to those in article 5 paragraph 2 of the Rome Convention are met. The Brussels Convention, too,

53Quoted in n 25 above.
54Art 15 of the Brussels Convention.
55Art 14 of the Brussels Convention, which also provides that claims against the consumer can be lodged only in the country where he is domiciled with the consequence that all other places of jurisdiction are excluded.
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therefore only favours a passive consumer.\textsuperscript{56} An amended version of the Convention was recently re-enacted in an EC-regulation\textsuperscript{57} which will enter into force on 1 March 2002. The deficiency regarding the consumer concept, however, was not entirely eliminated; in many cases passive consumer behaviour will stay decisive.\textsuperscript{58}

This argument is underlined by a 1996 European Parliament resolution recognising the importance of the existing means of consumer protection in the Rome and Brussels Conventions, but noting that these means of protection are inadequate in regard to the problems and obstacles the consumer faces in the internal market.\textsuperscript{59}

In the following we shall focus on how European legislation in the field of consumer protection provides a partial solution to this dilemma by introducing a certain level of substantial protection. A few of these harmonisation measures contain new PIL provisions which try to fill a gap in consumer protection that only came to light during the harmonisation process. These will be described below — followed by deficiencies that continue to exist.

The active consumer: protection by means of EC-harmonisation

By adhering to the concept that an active demand side — for our purposes, an active consumer side — is indispensable in the internal market, the European legislator became very active in the field of consumer protection. As the elaboration of a comprehensive European consumer protection code would have failed due to a lack of political consensus,\textsuperscript{60} another approach was chosen, namely the harmonisation of certain fields of the law of consumer contracts, where a harmonisation measure was seen to be necessary and — more than that — also achievable. The legal measures taken in the form of EC-directives were therefore reactions to the economic reality.\textsuperscript{61}

The directives so far enacted cover eg the following fields: certain aspects of

\textsuperscript{56}Note, however, a judgment of the District Court of Innsbruck which decided in favour of an active consumer who does not exist according to the Brussels Convention (LG Innsbruck court order 14 September 1998 Case 2 R 359/98b).

\textsuperscript{57}See n 26 above.

\textsuperscript{58}Cf arts 15, 16 and 17 of Regulation 44/2001.

\textsuperscript{59}OJ 1996 C 362/275.

\textsuperscript{60}Cf the slow progress of the so-called Lando Commission which elaborates common principles of the law of contracts in Europe by means of comparative law; the results are published in: O Lando (ed) \textit{Principles of European contract law — parts 1 and 2} (2000) concerning eg the conclusion of contracts, performance, non-performance and remedies, agency and interpretation.

\textsuperscript{61}To point out only one example: The so-called timesharing-directive (Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis OJ 1994 L 280/83) was enacted after a scandal due to the more and more aggressive methods the providers of such services used; cf the German cases of LG (Landesgericht, District Court) Tübingen, judgement of 8 February 1995, 1995 NJW-RR 1142; LG Detmold 'Judgment of 29 September 1994' 1995 IPRax 249.
consumer contracts which are negotiated away from business premises, \(^{62}\) consumer credit, \(^{63}\) package travel, package holidays and package tours, \(^{64}\) unfair terms in consumer contracts, \(^{65}\) the protection of the purchaser of the right to use immovable properties on a timeshare basis, \(^{66}\) and consumer protection in respect of distance contracts. \(^{67}\) \(^{68}\) Only the last directive on certain aspects of the sale of consumer goods and associated guarantees, \(^{69}\) which was enacted in 1999, harmonises — at least in cases with consumer participation — a core issue of private law as it regulates the legal consequences of bad performance. \(^{70}\)

The European legislator’s aim was not only to guarantee the consumer certain rights, eg by ensuring a so-called cooling-off period, \(^{71}\) but also to guarantee a substantial state of the law which provides the basis to take autonomous decisions. Emphasis therefore falls on consumer information, \(^{72}\) which is inherent within the country-of-origin principle. Moreover, all the directives contain provisions which restrict the contractual autonomy of the parties. Contractual exclusion of the rights resulting from the directives is therefore not binding on the consumer. \(^{73}\)

The consumer directives which have been enacted to date are all based on article 95 EC \(^{74}\) as ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in the member states which have as their object the establishment and functioning of the internal market’. The particularity of the consumer directives enacted lies in the fact that they leave the member states not only the choice in regard to the form and method of implementation which is inherent in the directives’ legal character, but also

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\(^{65}\) Quoted in n 52 above.

\(^{66}\) Quoted in n 61 above.


\(^{68}\) See for a more general overview B von Hoffmann ‘Richtlinien der Europäischen Gemeinschaft und Internationales Privatrecht’ 1995 ZRV 53.


\(^{70}\) Rightly described by A Schwartz ‘Die zukünftige Sachmängelgewährleistung in Europa — die Verbrauchsgüterkauf-Richtlinie vor ihrer Umsetzung’ 2000 ZEuP 545.

\(^{71}\) See eg art 5 of Directive 85/577/EEC n 62 above.


\(^{73}\) Eg in art 6 of Directive 85/577/EEC quoted in n 62 above: ‘The consumer may not waive the rights conferred on him by this Directive.’

\(^{74}\) Before the Treaty of Amsterdam amendments ex Art 100a EC Treaty.
allow the member states to '... adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by [the respective] Directive, to ensure a higher level of consumer protection'. The consumer directives therefore only provide for a minimum standard.

The thoughtful reader might immediately see a problem here. With a harmonisation approach, conflict rules continue to be of importance for two reasons. First of all directives have to be implemented. Therefore they are not applied directly but in the form of the national implementation whose designation is determined by the respective national conflict rules, in our case the Rome Convention. This is even more important as national implementations can differ in accordance with the directives' character of minimum harmonisation. This notwithstanding, within the internal market minimum harmonisation contributes to eliminate the deficiencies of article 5. The fact that according to the Rome Convention the consumer often loses the application of the law of his habitual residence is no longer disadvantageous as in the field of harmonised consumer protection law it does not matter which member state law is applied. Provided that every member state has implemented the European standard a certain level of protection, namely the standard foreseen in the directives, is guaranteed even if article 5 is irrelevant. The law of the state where the supplier of the service has his habitual residence or seat provides for the necessary level of protection as well. The still existing differences in national law, which are possible due to the directives' character of minimum harmonisation, are seen to be in accordance with this concept. As long as a certain standard is guaranteed, the legal uncertainty that remains concerns only the question how much higher the standard is and is as such tolerable.

An example shall serve to illustrate this result: A Greek travel agency and a German consumer conclude a contract dealing with a package holiday in Turkey. During the performance of the contract, the German tourist breaks his leg while getting off the bus bringing him to the holiday destination. The accident happens because of a loose footboard which should have been replaced by the supplier. When the German consumer sues for compensation, the supplier objects, as the contract contains a clause excluding any legal liability of the supplier in the event of personal injury resulting from an act or omission of the supplier. Under German law such a clause would be void. In our case, however, the Rome Convention does not lead to the application

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75Art 8 of Directive 99/44/EC n 69 above; it is noteworthy in this respect to point out that the proposed directive concerning the distance marketing of consumer financial services does not contain a minimal clause (COM (1998) 468 final, amended proposal COM (1999) 385 final).


77Heiss n 45 above at 642.

78Section 11 paragraph 7 German AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, Statute on general terms and conditions).
of German law, as the contract was concluded in Greece, while the German
was on a business trip. However, in our case, the application of Greek law
leads to the same result. The contractual clause in question is listed in the
appendix to the unfair-terms-directive\(^7^9\) and is therefore an abusive clause
within the scope of this directive. Every member state, among them Greece,
was obliged to implement national provisions providing for the non-binding
character of such contractual terms.

At first sight it therefore seems that in regard to the aspects of consumer
contracts subject to European harmonisation measures, there is no need for
a higher PIL protection level than the one foreseen in the Rome Convention.
As long as he stays in Europe, the active consumer can rely on a certain level
of protection. However, when leaving the territory of the European Union by
actively entering a third country’s market, he does not benefit.\(^8^0\)

Circumvention of the minimum standard
The choice of a third country law
To illustrate how the protection level guaranteed by the directives can be
circumvented, the example above shall be taken further. The scenario of the
case is the same, only that now the contract contains a choice of law clause
submitting the contract to Turkish law, i.e., the law of a non-EU-member state.
A problem for our consumer evolves, if we assume that Turkish law does not
provide that the ‘unfair term’ in question is non-binding. In terms of article 3
of the Rome Convention, which adheres to the principle of a free choice of
law, the supplier would then have circumvented the directive in perfect and
— more than that — also legal manner.\(^8^1\)

Similar examples can be found for the participation of a third country supplier,
as long as the conflict rules of the Rome Convention would — in the absence
of a choice of law — lead to the application of a member state’s law.

New PIL provisions in consumer directives
The European legislator was aware of the problems just outlined and started
to introduce special conflict rules in the respective consumer protection
directives.

Article 6 paragraph 2 of the unfair-terms-directive, the first directive to contain
a PIL provision of this kind, states for instance:

> Member States shall take the necessary measures to ensure that the consumer
does not lose the protection granted by this Directive by virtue of the choice
of the law of a non-Member country as the law applicable to the contract if the

\(^7^9\)N 52 above.
\(^8^0\)Unless the national PIL provides for mandatory rules which are to be applied not-
withstanding the otherwise applicable law which — in relation to third countries
— do not have to fulfil the principle of proportionality and the general good,
respectively.
\(^8^1\)Although being in fact an infringement of the effet utile principle of community
law; see R Michaels and H-G Kamann, ‘Grundlagen eines allgemeinen gemein-
schäftlichen Richtlinienkollisionsrechts — ‘Amerikanisierung’ des Gemeinschafts-
IPR?’ 2000 Europäisches Wirtschafts- und Steuerrecht (EWS) 301.
latter has a close connection with the territory of the Member States.

The national legislators therefore have to restrict the parties’ autonomy to choose the applicable law as far as the chosen third country law — in regard to the individual case concerned — only provides for a lower level of protection than the one foreseen in the directive. Instead of these disadvantageous provisions the corresponding rules of the member state law which would govern the contract in the absence of a choice, must be applied. For the rest, the choice of law prevails.

In our example above, this would mean that the PIL of the forum would have to contain a provision declaring such a choice of law void insofar as it leads to less protection than foreseen in the unfair-terms-directive.

The directive on the protection of consumers in respect of distance contracts, and the directive on certain aspects of the sale of consumer goods and associated guarantees, contain similar provisions. The directives enacted before that, eg the directive on consumer contracts which are negotiated away from business premises, do not contain respective rules. An explicit protection level in this regard therefore only exists as to aspects of consumer contracts which were harmonised by directives enacted after 1993.

The special case of timesharing

Among these directives, the timesharing directive has a special status. As long as the immovable property concerned is situated within the territory of a member state, it not only provides for a restriction of the choice of a third country law. Article 9 of the respective directive states that

> [t]he Member States shall take the measures necessary to ensure that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive ...

In the case of timesharing the standard of protection is therefore also to be guaranteed if a third country law applies in terms of article 4 of the Rome Convention. Admittedly, the cases in which an immovable property lies within the territory of the European Union and the conflict rules still lead to the application of a third country law, are rare, since article 4 paragraph 3 of the Rome Convention presumes that a contract about a right in immovable property, or a right to use immovable property, is most closely connected with the state where the immovable property is situated. This principle, however, is rebuttable (art 4 paragraph 5).

82 Cf K Nemeth Kollisionsrechtlicher Verbraucherschutz in Europa — Art 5 EVÜ und die einschlägigen Verbraucherschutzrichtlinien (2000) 98 with further references.

83 Art 12 paragraph 2 of Directive 97/7/EC n 67 above and art 7 paragraph 2 of Directive 99/44/EC n 69 above.

84 N 62 above.

85 Although such cases will be limited, as according to art 4 paragraph 3 a contract concerning immovable property is most closely connected to the law of the state where the immovable property is situated.
Summary: the system of European conflict of laws for consumer contracts

In the system of European conflict of laws, the relationship between the Rome Convention and the PIL provisions in the directives is — as stated above — regulated by article 20 of the Rome Convention which provides for a 'precedence' of conflict rules which are or will be contained in actions of the institutions of the European Communities or in national laws harmonised in implementation of such acts. This also means, however, that the directives' minimum clauses must be interpreted as restricted to the directives' substantial provisions so as not to come into conflict with the Rome Convention. Unfortunately this was not always adhered to by the national legislators. Space precludes a closer examination of the resulting problems.

It is also important to state that the existing system of European PIL cannot provide for a comprehensive solution to all conflicts questions. The next section will therefore focus on the gaps which are still to be filled.

SURVIVING DEFICIENCIES

Directives without PIL provisions

As pointed out above, only the consumer directives enacted after 1993 contain PIL provisions and therefore explicitly provide that the standard introduced by the directives has to be defended against the application of a non-member state law. But does this really imply that the need for a demarcation of EC law against third country law is only justified in these restricted areas? After all, the other consumer protection directives also show common features, especially in so far as they do not allow a contractual exclusion of the minimum rights they granted.

A recent judgment of the ECJ dating from November 2000 allows speculations as to an implicit PIL content of other EC harmonisation directives. In Ingmar GB Ltd v Eaton Leonhard Technologies Inc, a case referred to the ECJ for a preliminary ruling, the Court decided that articles 17 and 18 of the so-called EC-commercial-agents-directive, which guarantee the commercial agent certain rights to financial compensation after termination of the agency contract, are to be applied even if the parties have submitted the contract to

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86 Cf supra 15 at n 42.
87 M Helmberg in: Czernich & Heiss n 36 above, art 20 EVÜ paragraph 11 et seq.
88 For an overview of German and Austrian national implementations see Nemeth n 82 above at 95 et seq.
89 This would give a wholly novel aspect to the 'magic date' of 1992 — the date foreseen for the completion of the internal market by the Single European Act and the 'White Paper' (COM [85] 310 final), respectively.
90 See n 73 above.
92 Art 234 EC (ex art 177 before the Treaty of Amsterdam amendments).
a third country law.

Admittedly, this case does not directly touch upon consumer protection law. The point is, however, that with this interpretation of EC law, the court has recognised that in certain cases directive provisions can have a PIL content even if the respective directive does not contain an explicit PIL provision. Of course, unless such provisions are not referred to the ECJ for a binding interpretation, this leads to a state of legal uncertainty, since it is not clear where gap-filling is allowed and where not. The European legislator, however, could intervene with positive regulation. This seems realistic, as a similar development can be observed in regard to injunctions for the protection of consumers. After a few consumer directives, such as the unfair-terms-directive and the directive concerning distance contracts, had provided for a right of action of certain persons and/or organisations, having a legitimate interest in protecting consumers, the European legislator decided to extend the scope for such injunctions by enacting a separate directive allowing it also for aspects of consumer directives harmonised by older directives. A similar development could take place in regard to the restriction of the choice of a third country law.

Non-implementation of directives

The solutions presented up to now all try to fill systematic gaps in existing European PIL. However, sometimes one faces the much more practical problem that member states do not fulfil their duty to implement the standard introduced by the consumer directives.

For such cases we unfortunately only have a partial solution. Should the law of a non-implementing state be chosen by the parties, we suggest an analogous application of the directives' PIL provisions. In our opinion the European legislator's intent to defend the standard of protection against the choice of a third country law, which manifests itself in the 'younger' directives' PIL provisions, should be extended to these cases of non-implementation. Admittedly, normally member states cannot apply their national rules against other member states' laws in a field which has been subject to European harmonisation measures. This is once more a consequence of the country-of-origin principle. Exceptions only exist insofar as national provisions are seen to be safeguarding the so-called 'general good' provided that the aim is not already guaranteed by the member state law against which the provisions in question are to be applied. This exception of a 'general good' is consumed, however, once the member states have agreed on a common standard of protection by means of harmonisation. Yet, in the case of non-implentation-

\[95\text{Eg art 7 paragraph 2 of Directive 93/13/EEC n 52 above and art 11 paragraph 2 of Directive 97/7/EC n 67 above.}\]


\[97\text{See the annex of Directive 98/27/EC n 96 above.}\]

\[98\text{ Cf eg W-H Roth 'Der Einfluß des Europäischen Gemeinschaftsrechts auf das internationale Privatrecht' (1991) 55 RabelsZ at 655 et seq.}\]
tion this argumentation is invalid, as the common standard to be achieved is undermined.

If the law of a non-implementing state applies in terms of article 4 of the Rome Convention, however, this construction does not work. Instead we are faced with a real gap of protection, since the ECJ has so far denied the direct effect of directive provisions as far as the relationship between individuals is concerned.99

CONCLUDING REMARKS
It becomes clear from the statements above that European conflict of laws appears as a system of multilevel governance. PIL provisions can be found in international conventions, EC law as well as national law.

Problem solving is particularly difficult as long as the ECJ does not have the competence to bindingly interpret all three legal layers. Special difficulties in this respect arise as to the implicit PIL content of directive provisions. In this context it is therefore once more important to state that appropriate solutions presuppose both discipline of the member states when implementing EC measures as well as a functioning dialogue — where possible — between the national courts and the ECJ.

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99Cf n 15 above.