ROME CONVENTION

ROME I REGULATION

COMMENTARY

NEW EU CONFLICT-OF-LAWS RULES FOR CONTRACTUAL OBLIGATIONS

December 17, 2010

Volume 1

Alexander J. Belohlavek

JURIS
# TABLE OF CONTENTS

Auctorium/About the author V
Gratiarum/Acknowledgement VI
Table of Contents VII
Index compendiorum LXXV

**INTRODUCTORY METHODICAL REMARKS TO THE OVERVIEW OF ABBREVIATIONS** LXXXV

I. Legislation (*ICZI, ISKI* and other countries, including Community rules and international agreements) LXXXVI

II. Published sources CVI

III. Abbreviations used in citations of legal sources (including citations of jurisprudence) and abbreviations of significant judicial bodies in certain countries CXXXI

IV. Courts (general), government bodies, bureaus, governmental and non-governmental international organisations, institutions and non-governmental organisations, professional associations excluding permanent arbitration courts and arbitration centers CXLVI

V. Permanent arbitration courts and arbitration centres, their rules and guidelines, and professional associations in the field of arbitral proceedings CLV

VI. Abbreviations used when referring to individual countries and states CLVIII

VII. Other abbreviations CLXIV

VIII. Abbreviations of certain often cited works CLXXI

---

## PROLOGUE

**P.I. • HISTORICAL DEVELOPMENT OF INTERNATIONAL AND EUROPEAN PRIVATE LAW** 1

P.I.1. Judicial cooperation as a central concept of European international private law 1

P.I.2. Certain milestones of the development of European international private law significant from the perspective of contractual obligation relationships 4


P.I.3.1. Genesis of the *Convention* and its interpretation 6

P.I.3.2. Enlargement of the contracting parties 6

P.I.4. Transition from the *Convention to the Regulation* 8

P.I.4.1. The *Hague Programme* 8

P.I.4.2. *Green Paper* 9

P.I.4.3. *Draft Regulation* 10

P.I.4.4. Reading the *Draft Regulation* before the EP and the compromise amendments 11

P.I.4.5. Adoption of the *Regulation* 13

P.I.4.6. Predominantly evolutionary conception of the *Regulation* from the perspective of the connections with the provisions of the *Convention* 16

P.I.4.7. Future legislative development in relation to the *Regulation* 16
P.I.5. Conception of the conflict (regulation of contractual obligations in the Community environment and in Community law)

P.I.5.1. Conception of the Convention

P.I.5.2. Conception of the Regulation

P.I.5.3. Conception of the Regulation in comparison to the Convention

P.I.6. Primary principles of the Regulation

P.I.6.1. Aims and key principles of the Regulation

P.I.6.2. Free and limited choice of law

P.I.6.3. Conjunction of the conflict regulation of directives with the conception of the Regulation (on law applicable to insurance contracts, consumer protection legislation)

P.I.6.4. Conformity with the procedural law of conflict of laws

P.I.6.5. Conformity of the conflict regulation of contractual and non-contractual obligations

P.I.6.6. Conformity with the fundamental principles of the single market (relation to the TEC, market liberties)

P.I.7. Legal foundation of the Regulation within the mechanisms of Community law

P.I.8. Structure and content of the Regulation

P.I.9. Interpretation of the Convention

P.I.9.1. Legal foundation for the interpretation of the Convention

P.I.9.2. ECJ authority to interpret the Convention

P.I.10. Interpretation of the Regulation

P.I.10.1. Interpretation of the Regulation from the perspective of its nature and legal force as an act of Community law

P.I.10.2. Historical context of the creation of the Regulation

P.I.10.3. Significance of existing experience with the application of the Convention and the Report

P.I.10.4. Interpretation of law as an issue of procedure

P.I.10.5. Position of the ECJ within the interpretation of the Regulation and other acts of Community law

P.I.11. Significance of procedural interpretation for the substantive conflict law regulation of the Convention and of the Regulation


P.I.12.1. Unified interpretation as a prerequisite of the unified effect of Community law

P.I.12.2. Effective protection of individual (subjective) rights

P.I.12.3. Application of the ratione materiae principle—the material scope of the Regulation in connection to its interpretation (the strict definition of the effects of the Regulation exclusively within the conflict of laws)

P.I.12.4. Application of the ratione temporis principle—the time applicability of the Regulation in connection to its interpretation

P.I.13. Approach to legal information as a condition of the unified interpretation and a prerequisite for legal certainty

P.I.13.1. Irreplaceable significance of comparative legal science

P.I.13.2. Insufficient access to legal information on a supranational level

P.I.14. Significance of the Preamble for the interpretation of the Regulation

P.I.15. Interpretation of the Regulation and the significance of the Report (i.e. the Report of Giulian Lagarde)
P.II. PURPOSE, CONTENT, STRUCTURE AND METHOD OF THE PROCESSING OF THIS PUBLICATION 45

P.II.1. Purpose of this publication 45

P.II.2. Content scope 46

P.II.2.1. Conflict regulation of European and international private law in the field of contractual obligation relationships 46

P.II.2.2. Substantive law regulation of contractual obligation relationships 47

P.II.2.3. Structure of the commentary to the Regulation and to the Convention 48

P.II.2.4. Segmentation of this publication 49

P.II.2.5. Segmentation of the individual Titles (commentaries to Articles) 50

P.II.3. Citations of sources of law 51

P.II.3.1. Reasons of citations of domestic sources and foreign sources (of national origin) 51

P.II.3.2. Non-binding nature of the orientational translations of the citation of sources of law 52

P.II.3.3. Citations of sources of Czech law of national origin 52

P.II.3.4. Citations of the TEC 53

P.II.4. Decisions explicitly applying the Convention or directly related to the Convention and other jurisprudence 53

P.II.5. Manuscript freeze: its updated nature or lack thereof 54

• Comparative table of the Convention and the Regulation (arranged by the subject of regulation) 55

• Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) without the Preamble 61

• Convention on the law applicable to contractual obligations of 19 June 1980 (Consolidated version) without the Preamble 71

* * *

• Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) \[\text{Regulation}\] 79

• The Preamble Convention on the law applicable to contractual obligations (Consolidated version) 87

• The Preamble 89

* * *

Article 1 of the \[\text{Regulation}\]! Article 1 of the \[\text{Convention}\] 91

A: The qualification and positive limitation of the material extent of the Regulation and the Convention 93

1.1. Broad significance of the \[\text{Regulation}\] 93

1.II. Presence of the international element 94

1.III. Contract typology and its significance from the private international law perspective 95
1.111.1. Contract for purposes of the substantive ascertainment of subjective rights 95
1.111.2. A contract for the resolution of conflict of laws 95

1.IV. The terms contractual obligation relationship and contractual obligation within the Convention and the Regulation 97
1.IV.1. Obligation versus obligation relationship 97
1.IV.2. The Civil Law concept 97
1.IV.3. Common Law 98

1.V. Procedural and harmonising relationships of the formulating changes in the Regulation in comparison to the Convention 98

1.VI. Extent of the qualification problem 99
1.VI.1. The difference between the autonomous conflict qualification and the substantive qualification lex causae 99
1.VI.2. The procedure for the resolution of a qualification problem 100
1.VI.3. The impossibility of solving a qualification problem through an analogy 102

1.VII. The definition of contractual and non-contractual (tort) obligations 102
1.VII.1. The absence of a regulatory defining base for conflict qualification 102
1.VII.2. Autonomous qualification as a solution alien to an individual legal system, yet characteristic of all legal systems of Member States and the law of the Community 103
1.VII.3. Doctrinal conflict of differences of qualification provided by the Civil Law concept and by Common Law 103

1.VIII. Differences between national concepts of a contract and the base of an abstract autonomous conflict law qualification 106
1.VIII.1. The different approach in conceptual issues (essentialia negotii) and in partial issues: the absence of an international defining determination 106
1.VIII.2. Common attributes as the possible future base of an autonomous definition of a contract and a contractual obligation relationship 106
1.VIII.3. The significance of the close connection and the characteristic performance for the qualification of a contractual obligation relationship 107
1.VIII.4. The autonomous interpretation as a unique chance to make law less formalistic 108

1.IX. The significance of general principles of law 109

1.X. A contrario qualification of contractual obligations using the definition of non-contractual obligations provided by the Treaty of Brussels and Regulation 44/2001 110
1.X.1. The aim of the autonomous interpretation according to the case law of ECJ 110
1.X.2. The willingness to assume an obligation 110
1.X.3. The determination of a contract and claims following from a contract for the purpose of determining competences (international [court] jurisdiction) 111

1.XI. Civil and commercial matters 112
1.XI.1. The formulation difference between the Regulation and the Convention: accustoming to the articulation of Regulation 44/2001 112
1.XI.2. The autonomous interpretation 112
1.XII. The negative determination of the material scope of the Regulation and the Convention

1.XIII.1. The general negative determination—and Article 1(1) of the Regulation!Article 1(1) of the Convention

1.XIII.2. The conception of the Regulation in the context of the Convention .. 113

1.XIII.3. A comparison of the negative catalogue in Article 1(2) of the Regulation!Article 1 (2) of the Convention

1.XIII.3.1. The editorial character of the majority of formulation modifications

1.XIII.3.2. The risk of generalising the comparison of the Convention's and the Regulation's negative catalogues

1.XIII.3.3. Particular individual exceptions from the material extent

1.XIII. Case law

1.XIII.1. Case law to contractual obligations, their qualification and an extract from general case law related to the issues in the Convention/Regulation

1.XIII.1.1. ECJ—The Court of Justice of the European Communities

1.XIII.1.2. Case law of Member States

1.XIII.1.2.1. (A) Austria

1.XIII.1.2.2. (CZ) Czech Republic

1.XIII.1.2.3. (D) Germany

1.XIII.1.2.4. (F) France

1.XIII.1.2.5. (I) Italy

1.XIII.1.2.6. (SK) Slovakia

1.XIII.1.2.7. (UK) The United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN)

1.XIII.1.3. Case law of Non-Member States

1.XIII.1.3.1. (HK) Hong Kong (Special Administrative Region of (PRC)

1.XIII.2. Case law on the conflict determination of contractual and non-contractual obligations (non-contractual obligation relationships)... 147

1.XIII.2.1. (A) Austria

1.XIII.2.2. (UK) The United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN)

1.XIII.3. Case law to a conflict determination of commercial matters and the extent of the conflict problem in corporation relationships 149

1.XIII.3.1. (D) Germany

Literature 150

1.XIV. The international element—a positive condition of the material scope—re Article 1(1) of the Regulation!Article 1(1) of the Convention 0161

1.XIV.1. The qualification and recognition of an international element .. 165

1.XIV.1.1. The qualification of an international element

1.XIV.1.1.1. The international element as the basic qualification issue for the conflict of law and the material scope

1.XIV.1.1.2. The national qualification of the international element versus autonomous Community interpretation (international)

1.XIV.1.1.3. Superficial approach of doctrine to the qualification of the international element (notoriety?—By no means)

1.XIV.1.1.4. Issue of qualification with regard to international elements 167
contractual obligation (contractual obligation relationship)—primary qualification

1.XV.3. Exclusion of certain contractual obligation relationships (contractual obligations)—secondary qualification

1.XV.4. Unilateral contractual obligation relationships vs. unilateral non-contractual obligations (as concerns the synallagmatic nature of obligations and obligation relationships from the perspective of international private law) and the absence of an intersection of the expressions of will of the parties (absence of consensus)

1.XV.4.1. Testamentary dispositions

1.XV.4.2. Donations (gifts)

1.XV.5. Certain special provisions regulating unilateral obligation relationships under national rules of private international law

1.XV.5.1. (A) Austria

1.XV.5.2. (CZ) Czech Republic

1.XV.5.3. (E) Spain

1.XV.5.4. (I) Italy

1.XV.6. Donations and the qualification thereof

1.XV.6.1. Donatio under Roman Law

1.XV.6.2. Donations in ECJ case law and in Community law

1.XV.6.2.1. ECJ case law

1.XV.6.2.2. Community law

1.XV.6.3. Donations from the perspective of selected national legal systems (comparative approach and private international law) ...

1.XV.6.3.1. (A) Austria

1.XV.6.3.1.1. General national laws on donation (civil law)

1.XV.6.3.1.2. Donation under Austrian private international law

1.XV.6.3.2. (CZ) Czech Republic

1.XV.6.3.2.1. General national laws on donation (civil law)

1.XV.6.3.2.2. Donations under Czech private international law (conflict of law rules of national origin)

1.XV.6.3.2.3. Intended recodification of Czech Private International Law

1.XV.6.3.3. (D) Germany

1.XV.6.3.4. (E) Spain

1.XV.6.3.4.1. Civil law conception of donations under Spanish law

1.XV.6.3.4.2. Spanish national laws on private international law

1.XV.6.3.5. (F) France

1.XV.6.3.6. (I) Italy

1.XV.6.3.6.1. General national laws on donations (civil law)

1.XV.6.3.6.2. Donations under Italian private international law legislation

1.XV.6.3.7. (CH) Switzerland

1.XV.6.3.8. (PL) Poland

1.XV.6.3.9. (SE) Sweden

1.XV.6.3.10. (SK) Slovakia

1.XV.6.3.10.1. Donation agreements under Slovak law

1.XV.6.3.10.2. Donations under Slovak private international law

1.XV.6.3.11. (UK) The United Kingdom of Great Britain and Northern Ireland and the Common Law
1.XV.6.3.11.1. Regulation of donations under Common Law (English law) 226
1.XV.6.3.11.2. Donations from the perspective of (UK) conflict of law rules, especially (UK/EN) rules 226
1.XV.6.3.11.3. Conflict of law qualification of donations under English law in connection with the Regulation (Convention) and the solution of the qualification conflict of donations in relation to the Regulation (Convention) from the perspective of English law and the Civil law legal systems 227
1.XV.7. Donations and mandatory rules; special cases of donations ... 229
1.XV.7.1. Contractual qualification of donations under Canon Law (The Roman Catholic Church and other Churches) 230
1.XV.7.2. The historical development of donations as a legal institution in Canon Law and national restrictions related to the acceptance of the Church by public law authorities 231
1.XV.7.3. Donations to the Church from the perspective of private international law, public order, and reflection on the sources of international (public) law 232
1.XV.8. Other types of donations 233
1.XV.9. Donor's obligations resulting from the acquisition of ownership 233
1.XV.9.1. Constitutional basis for restrictions of ownership, the social function of ownership and the doctrine stipulating that ownership entails obligations as an antipole of the individualistic doctrine of ownership 233
1.XV.9.2. Examples of the provisions pertaining to ownership under selected constitutional regimes (although it appears to feature, to a certain extent, in virtually all constitutional regimes; often in connection with provisions (if any) stipulating an exceptional option to expropriate and specifying the necessary conditions for such expropriation) 235
1.XV.9.3. The proclamationary nature of the civil law regulation following the constitutional limits of the right of ownership 237
1.XV.10. A close connection between donations and public law regulation 239
1.XV.10.1. Obligations of the donee (recipient of the gift) under public law ... 239
1.XV.10.2. Fiscal and other similar obligations 239
1.XV.11. Donations and unified conflict of law rules of the Convention and die Regulation 240
1.XV.11.1. Absence of explicit provisions and the consensus of expressions of will as the main prerequisite for a contractual obligation (contractual obligation relationship) 240
1.XV.11.2. Conflict of law qualification of donations as contractual obligations 240
1.XV.11.2.1. Definition of the general features of contractual relationships from the perspective of donations 240
1.XV.11.2.2. Synallagmatic obligations and synallagmatic performance 240
1.XV.11.3. Absence of any negative delimitation of the material scope in relation to donations 243
1.XV.12. Conflict of law determination of the law applicable to donations 243
1.XV.12.1. Choice of the applicable law 243
1.XV.12.2. Law applicable to donations determined according to general connecting factors 244
1.XV.12.2.1. Determination of the applicable law according to characteristic performance (most often on part of the donor) 244
1.XV.12.2.2. Exceptional cases in which the characteristic performance is associated with the performance provided by an individual/entity other than the donor 244
1.XV.12.2.3. Donations of immovable property and immobilised things (combination of obligation status and property rights status related to the gift) 245
1.XV.12.2.4. Special cases of donations and unilateral dispositions with comparable effects 245
1.XV.12.2.4.1. Testamentary donations (mortis causa dispositions) 245
1.XV.12.2.4.2. Release of debts 245
1.XV.13. Case law of Member States 248
1.XV.13.1. (A) Austria 248
1.XV.13.2. (CZ) Czech Republic 249
1.XV.13.3. (PL) Poland 250
Literature 269

B: Negative definition of the material scope of the Regulation 270

1.XVI. Personal law—negative exemption concerning the scope of application—Concerning Article 1(2) (a) of the Regulation/Article 1(2) (b) of the Convention 0262 270
1.XVI.1. Legal capacity of natural persons 270
1.XVI.2. Conflict of law rules in MPSaP (CZ) 271
1.XVI.2.1. Legal capacity 271
1.XVI.2.2. Jurisdiction of Czech courts in matters of capacity and guardianship 271
1.XVI.2.3. Jurisdiction of Czech courts over issues concerning declarations of death 272
1.XVI.3. Community law—The Green Paper on Succession and Wills (Green Paper (succession)) 272
1.XVII. Obligations arising out of family relationships—negative exemption concerning the material scope—Concerning Article 1(2)(b) of the Regulation!Article 1(2)(b) of the Convention III
1.XVII.1. Subject matter and sources of substantive law of national origin 277
1.XVII.2. Qualification of family relationships in connection with contractual obligations 278
1.XVII.2.1. Qualification of contractual obligations and contracts that are considered a domain of family law 278
1.XVII.2.2. Delimitation of the qualification in case law 278
1.XVII.2.2.1. Representation in common affairs and the exercise of rights 278
1.XVII.2.2.2. Lease relationships 279
1.XVII.2.2.3. Separation agreement on the settlement of the mutual relationships between spouses as a concept of family law, as opposed to the law of contractual obligations 280

1.XVII.3. Qualification of the contractual obligations and family relationships in connection with divorce and the relationships between the parents, upbringing and maintenance, determination of parenthood and the relationships between children and third parties 281

1.XVII.4. The connection between the special rules governing relationships analogous to family relationships and the general civil law rules (including contractual obligations)—registered partnership 283

1.XVII.4.1. General definition of registered partnership and the purpose thereof 283

1.XVII.4.2. Registered partnership from the perspective of the negative delimitation of the scope of the Convention and the Regulation 284

1.XVII.4.3. Subject matter of the statutory regulation of registered partnerships 284

1.XVII.5. Conflict rules in MSPaP (CZ) 285

1.XVII.5.1. Legal capacity 285

1.XVII.5.2. Inheritance law 285

1.XVII.5.3. Family law—relationships between spouses 285

1.XVII.5.4. Family law—relationships between parents and children 285

1.XVII.5.5. Family law—guardianship 286

1.XVII.5.6. Jurisdiction of Czech courts in family matters 286

1.XVII.6. Community law 287

1.XVII.6.1. Family law rules in Community legislation—Regulation 2201/2003 287

1.XVII.6.2. Anticipated new provisions (amendment) of Regulation 2201/2003 in relation to forum selection and the choice of law .. 291

1.XVII.7. Maintenance obligation 294

1.XVII.7.1. Procedural regulation of jurisdiction and recognition under Regulation No 44/2001 294

1.XVII.7.2. New substantive rules (conflict rules) and procedural rules under Regulation No 4/2009 295

1.XVII.7.3. Material scope of Regulation No 4/2009 298

1.XVII.7.3.1. Authority ([international] jurisdiction) under Regulation No 4/2009 298

1.XVII.7.3.2. Conflict rules (substantive) under Regulation No 4/2009 299


1.XVII.8.1. Adoption of the Protocol as a result of membership of the Community in HCCH 300

1.XVII.8.2. Amount of maintenance 300

1.XVII.8.3. Conditions of application 300

1.XVII.9. Community law—Regulation No 664/2009 301

1.XVII.9.1. Purpose of the regulation 301

1.XVII.9.2. Material scope of the regulation 303

1.XVII.9.3. Future review of the application of Regulation No 664/2009 305
1.XVII.10. Case law
1.XVII.10.1. ECJ—Court of Justice of the European Communities 305
1.XVII.10.2. Case law of Member States 309
1.XVII.10.2.1. (A) Austria 309
1.XVII.10.3. ECtHR case law 310

Literature 310

1.XVIII. Obligations in matrimonial property regimes and inheritance status—a negative exception from the material scope of Article 1(2) (c) of the Regulation/Article 1(2) (b) of the Convention 0303

1.XVIII.1. The scope of application and the sources of the substantive law provisions of a national origin (CZ) 312

1.XVIII.2. Qualification of inheritance regimes in relation to contractual obligations (in case law): agreement to settle the inheritance 313

1.XVIII.3. Conflict of law rules in private international and procedural law (CZ) 314

1.XVIII.3.1. Inheritance law 314

1.XVIII.3.2. Competence of Czech judicial bodies concerning matters of inheritance 314

1.XVIII.4. Community Law


1.XVIII.4.1.1. Community priorities in family law and family property regimes 315

1.XVIII.4.1.2. Definition of certain basic terms and their significance for autonomous (unified) qualification of definition of terms within Article 1 of the Regulation/Article 1 of the Convention {prenuptial agreement, regulation of matrimonial property regimes, civil partnership, unmarried cohabitation} 315

1.XVIII.4.1.3. Concept of conflict regulation provided by the Green Paper (matrimonial) 316

1.XVIII.4.2. The connection between the Convention/the Regulation (conflict of law rules for contractual obligations) and relationships of persons not joined by marriage or by civil partnership 318

1.XVIII.5. Case law

1.XVIII.5.1. ECJ—The Court of Justice of the European Communities 318

1.XVIII.5.2. Case law of Member States 319

1.XVIII.5.2.1. (A) Austria 319

Literature 321

1.XIX. Bills of exchange, cheques, negotiable instruments—negative exception from the material scope—Article 1(2) (d) of the Regulation/Article 1(2) (c) of the Convention 322

1.XIX.1. Qualification of bill (or cheque) obligations in the under Civil Law (Geneva Convention), Common Law and in the Community environment 322
1.XIX.1. Concept of bills of exchange and promissory notes in Czech law and in the law of Continental Europe
322
1.XIX.1.2. The connection between a bill of exchange and other obligation relationships (especially of a contractual nature)
323
1.XIX.2. Sources of Law
324
1.XIX.3. The restriction of contractual autonomy as an obvious reason for ruling out negotiable instrument relationships from the conflict regime of the Convention and the Regulation
325
1.XIX.4. Differences in the level of contractual autonomy of substantive law regulation
326
1.XIX.5. Contractual qualification under the Common Law
328
1.XIX.5.1. Negotiable instruments
328
1.XIX.5.2. Higher qualitative level of a contractual obligation
328
1.XIX.5.3. Basic types of negotiable instruments
329
1.XIX.5.3.1. Promissory notes
329
1.XIX.5.3.2. Bills of exchange
329
1.XIX.5.4. Negotiable instruments under the United States regime and the (US) legal system
330
1.XIX.6. The law of negotiable instruments from the perspective of Community legislation
331
1.XIX.7. International law of negotiable instruments (CZ) and the conflict approach to determine the different statuses of bills of exchange
332
1.XIX.7.1. The relation between the conflict regulation of the SSZ (CZ) and of the MPSaP (CZ) as a typical example of the relation between special and general regulations of private international law
332
1.XIX.7.2. The possibility of choice of law
334
1.XIX.8. The relationship between the law of negotiable instruments and European private international law regulations
338
1.XIX.9. The significance of the qualification of bill of exchange and similar relationships from the Community perspective
341
1.XIX.10. Solutions for the nature of bill of exchange relationships
342
1.XIX.11. Bill of exchange contract
344
1.XIX.12. Content of a bill of exchange in relation to the choice of governing law
346
1.XIX.13. Contemporary evaluation of the possibility of the choice of law in Czech case law
347
1.XIX.14. Case law of Member States
348
1.XIX.14.1. (CZ) Czech Republic
348
Literature
353

1.XX. Substantive law contracts versus procedural contracts
Consensus on the course of action within a proceeding, evidence and proof (agreements on the choice of court)—negative material scope exceptions—ad Article 1 (3) of the Regulation!Article 1 (2)(d) of the Convention—and the qualification of mediation, forum selection and arbitration agreements and other agreements relating to the procedural exercise of subjective rights
355
1.XX.1. Substantive law contracts and procedural contracts 355
1.XX.1.1. Arbitration agreements and agreements on the choice of court as an expression of compromise between the substantive law and procedural conception of contracts and legal acts 355
1.XX.1.2. The meeting of the expressions of will in the primary contract and the dispute resolution provisions 356
1.XX.1.3. The object of agreements on dispute resolution methods 357
1.XX.1.4. [Potential] dispute resolution as a qualitative factor of a substantive law relationship 358
1.XX.2. The cause and effects of procedural agreements (arbitration agreements and agreements on the choice of court) 358
1.XX.3. The functional dependency of choice of court and arbitration agreement 359
1.XX.4. The prevailing procedural effect and the terminological classification 360
1.XX.5. Applicable law in relation to procedural agreements 361
1.XX.6. Procedural agreements under the Regulation and the Convention 362
1.XX.6.2. Proof, evidence and procedural agreements in the narrow sense within the meaning of the material scope of the Regulation and the Convention 362
1.XX.6.2.1. The importance of distinguishing between proof and evidence .... 362
1.XX.6.2.2. Proof and onus of proof 362
1.XX.7. Arbitration agreements, agreements on the choice-of-court and procedural agreements under selected legal systems 363
1.XX.7.1. (A) Austria 363
1.XX.7.2. (D) Germany 363
1.XX.7.3. (CH) Switzerland 364
1.XX.8. Agreement on mediation or other methods of dispute resolution different from court/arbitration proceedings 366
1.XX.8.1. Mediation agreements versus agreements establishing jurisdiction 366
1.XX.8.2. Substantive law nature of mediation agreements and similar clauses 366
1.XX.8.3. The law applicable to the effects of mediation agreements 367
1.XX.8.4. Autonomous classification of agreements on dispute resolution mechanisms 368
1.XX.8.5. The approach adopted by certain selected countries by a failure to adhere to the agreed mediation procedure (especially from the perspective of case law) 369
1.XX.8.5.1. (D) Germany 369
1.XX.8.5.1.1. Substantive law nature of mediation agreements and similar clauses 369
1.XX.8.5.1.2. Analogy with expiration of the procedural possibility to raise a substantive law objection of limitation of actions 369
1.XX.8.5.2. (F) France 370
1.XX.8.5.3. (CH) Switzerland 370
1.XX.8.5.3.1. Judgment of the Zurich (CH) Court of Appeal of 1999 370

XIX
1.XXI.7.6.1. *Lex fori versus lex arbitri* 406
1.XXI.7.6.2. Legislation applicable to arbitration agreements in the context of the European law 406
1.XXI.7.6.3. Choice of the status of an arbitration agreement and solution contained in certain national *lex arbitri* legislation 407
1.XXI.7.6.4. Relation to the place of proceedings and/or to the substantive [conflict of law] status of the subject-matter of a dispute 408

1.XXI.8. **Substantive law applicable to arbitral proceedings** 410

1.XXI.8.1. International element in arbitral proceedings and its impact on the substantive status of the merits of a dispute 410
1.XXI.8.2. Free choice of law 411
1.XXI.8.3. ICC Rules and other rules of permanent arbitration courts 411
1.XXI.8.3.1. Article 17 of the ICC Rules 411
1.XXI.8.3.2. Rules of other permanent arbitration courts 412
1.XXI.8.4. Application of conflict of law rules and the conflict of law method by arbitral tribunals 413
1.XXI.8.5. Cumulative method of determination of conflict of law rules 413
1.XXI.8.6. Application of certain standard rules and provisions 413
1.XXI.8.7. Voie directe 414
1.XXI.8.8. Determination of the governing law carried out by arbitrators in international practice 414
1.XXI.8.9. Subjective assessment factors for the determination of the governing substantive law 416

1.XXI.9. **Consideration and application of non-state substantive systems in arbitral proceedings** 417

1.XXI.10. Arbitration versus *Regulation* and *Convention* 418
1.XXI.10.1. Arbitration and the Regulation from the point of view of the arbitration practice 418
1.XXI.10.2. Arbitration and the *Regulation* from the point of view of Community law 419

1.XXI.11. **Deciding according to equity** 420

1.XXI.11.1. Exception from the application of substantive rules in arbitration 420
1.XXI.11.2. The effects of an agreement on deciding according to equity—exclusively on substantive law 421
1.XXI.11.2.1. Czech *lex arbitri* legislation 421
1.XXI.11.2.2. ICC Rules 421
1.XXI.11.2.3. UNCITRAL Rules 421
1.XXI.11.2.4. Non-uniform doctrinal specification of the difference between *ex aequo et bono* and *amiable compositeur* 422
1.XXI.11.3. Deciding as an *amiable compositeur* 424
1.XXI.11.4. Admissibility of *depegage* in consequence of partial authorisation to decide according to *equity* or *as an amiable compositeur* 425
1.XXI.11.5. Arbitrator's right to modify an agreement between parties 426
1.XXI.11.6. Deciding *ex aequo et bono* 428
1.XXI.11.7. Certainty of the authorisation granted to arbitrators 428
1.XXI.11.8. Deciding outside the law versus deciding within the scope of a particular legal system 430

XXI
1.XXI.11.9. The content of deciding *ex aequo et bono* in terms of the extent and method of exercising the powers 432
1.XXI.11.10. Prohibition against acting at will 432
1.XXI.11.11. Authorisation of arbitrators to decide according to equity as a mandate with exclusively substantive effects 433
1.XXI.11.12. Principles of deciding *ex aequo et bono* 434
1.XXI.11.13. Predictability of decision-making 435
1.XXI.11.14. Importance of public policy as a factor limiting deciding according to equity 435
1.XXI.11.15. English *common law* approach 435
1.XXI.11.16. Case-law opinions in (F) 436
1.XXI.11.17. Approach of (US) 437
1.XXI.11.18. Relation between deciding according to equity and "lex mercatoria" 438
1.XXI.11.19. ICSID arbitration in practice 438
1.XXI.12. Position of arbitration in the community law regime *pro Jutoro*: proposed change to Regulation 44/2001 and the development of European private international law 440
1.XXI.12.1. Proposed change to Regulation 44/2001 (Regulation of 22 December 2000 on competence of a court and the recognition and execution of court rulings in civil and business matters) 440
1.XXI.12.2. Interrelation between arbitration and Regulation 44/2001 441
1.XXI.12.3. Commission Report (EC) and Green Paper [to Regulation 44/2001] 446
1.XXI.12.4. Rules for specification of the place of arbitration 448
1.XXI.13. Uniform conflict of law rules for law applicable to arbitration agreements 452
1.XXI.13.1. Consideration of uniform conflict of law for arbitration agreements 452
1.XXI.13.2. Recognition and enforcement of court judgments issued in relation to arbitration 452
1.XXI.13.3. Professional public regarding the intention to expand the contextual scope of Regulation 44/2001 454
1.XXI.13.4.1. Theme of rejection in the majority of national standpoints as an example of separation of the Brussels administration from the reality of the international environment 456
1.XXI.13.4.2. Specific standpoints of various Member States 457
1.XXI.13.4.2.1. Standpoint of the (CZ) Czech Republic 457
1.XXI.13.4.2.2. Standpoint of (D) Germany 457
1.XXI.13.4.2.3. Standpoint of (D) France 457
1.XXI.13.4.2.4. Standpoint of (I) Italy 458
1.XXI.13.4.2.5. Standpoint of (NL) the Netherlands 458
1.XXI.13.4.2.6. Standpoint of (UK) the United Kingdom of Great Britain and Northern Ireland 458
1.XXI.13.5. Heidelberg Report 459
1.XXI.13.5.1. Dissenting conclusion of the *Heidelberg Report* in context of the risks of limited application and the uniform international interpretation and application of the *New York Convention* 459

XXII
l.XXI.13.5.2. Position of *Heidelberg Report* on Individual Aspects of EC proposal

1.XXI.13.5.2.1. Recognition of foreign (declaratory) court judgments on the validity of the arbitration agreement (points /121/ to /123/ of the *Heidelberg Report*)

1.XXI.13.5.2.2. Related measures (point /124/ of the *Heidelberg Report*)

1.XXI.13.5.3. Proposals for explicit regulation of arbitration in Regulation 44/2001 (point /125/ and others of the *Heidelberg Report*) in relation to [substantive] conflict rules of the *Convention* and *Regulation*

1.XXI.13.5.4. Recognition (points /127/ to /130/ of the *Heidelberg Report*) and prevalence thereof over jurisdiction of [general] courts as a facet of public policy

1.XXI.13.5.5. Proposal for future regulation (points /131/ to /136/ of the *Heidelberg Report*)

1.XXI.13.5.6. IBA Report (*International Bar Association*)

1.XXI.13.5.6.1. Adverse opinion by IBA

1.XXI.13.5.6.2. Measure in support of arbitration proceedings

1.XXI.13.5.7. Ruling on the validity of the arbitration agreement or arbitral awards

1.XXI.13.6. Coordination of proceedings concerning the validity of the arbitration treaty between arbitration courts and [general] courts

1.XXI.13.7. Obstacles to pending disputes

1.XXI.13.8. Proposal Contained in the Green Paper [on Regulation No. 44/2001] regarding Uniform Conflict Rule for Determining Governing Law of an Arbitration Agreement (connecting to the law of the place of arbitration), and Interplay with the [*Rome*] *Convention* and the [*Rome I*] *Regulation*

1.XXI.13.9. Recognition of arbitration awards

1.XXI.14. Case law

1.XXI.14.1. Case law of Member States

1.XXI.14.1.1. (A) Austria

1.XXI.14.1.2. (CZ) Czech Republic

1.XXI.14.1.3. (D) Germany

1.XXI.14.1.4. (F) France

1.XXI.14.1.5. (SE) Sweden

1.XXI.14.1.6. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN)

1.XXI.14.2. Case law of Non—Member States

1.XXI.14.2.1. (CH) Switzerland

1.XXI.14.2.2. (HK) Hong Kong [Special administrative region of (PRC)]

1.XXI.14.2.3. (Iran)

1.XXI.14.2.4. (TU) Turkey

1.XXI.14.3. From the arbitration practice

1.XXI.14.3.1. (CZ) Czech Republic

1.XXI.14.3.2. (ICC) Czech Republic

1.XXI.14.4. Literature
Appendices to Section XXI of the Commentary to Article 1 of the Regulation/Convention (Arbitration proceedings): overview of certain issues in selected countries

- Table Annex No. 01: Overview of the law applicable to arbitration agreements
- Table Annex No. 02: Overview of the law applicable to arbitral proceedings
- Table Annex No. 03: Overview of conflict of laws legislation
- Table Annex No. 04: Overview of laws on decision making ex aequo et bono decisions and/or acting as amiable compositeur

1.XXII. Prorogation agreements (choice of court agreements)—negative exception from the material scope—ad Article 1 (2) (e) of the Regulation! Article 1 (2) (d) of the Convention

1.XXII.1. Prorogation agreements

1.XXII.2. Forum selection under the (CZ) regulation

1.XXII.2.1. Forum selection under the current regulation of MPSaP (CZ) in comparison to regulations of some other countries

1.XXII.2.2. The new private international law (CZ) regulation

1.XXII.2.3. Mutual legal assistance treaties

1.XXII.3. Laws of other than national origin in the European context

1.XXII.3.1. Exclusion of prorogation agreements from the material scope of the Regulation (and of the Convention)

1.XXII.3.2. Historical foundation in the form of the Brussels convention

1.XXII.3.3. The Lugano convention

1.XXII.3.4. Regulation 44/2001

1.XXII.3.4.1. General regulation and concept of Regulation 44/2001

1.XXII.3.4.2. Special regulation of the Regulation 44/2001

1.XXII.4. The Hague conventions (HCCH) on the Choice of Court

1.XXII.4.1. The Hague convention (HCCH) on the Choice of Court concluded 25 November 1965

1.XXII.4.2. Basic principles of the Convention (HCCH, 1965)

1.XXII.4.2.1. Recognition of the choice of law (the first principle)

1.XXII.4.2.2. Positive and negative effect of the choice (the second principle)

1.XXII.4.2.3. Enforceability of decisions issued in proceedings before an agreed forum (the third principle)

1.XXII.4.3. The Hague Convention (HCCH) on Choice of Court Agreements of 30 June 2005

1.XXII.4.3.1. Origination of the Convention (HCCH, 2005)

1.XXII.4.3.2. Comparison with CREFAA (recognition and enforcement of foreign arbitral awards) and the basic principles

1.XXII.4.3.3. Subject of the convention

1.XXII.4.3.4. Concept of the regulation included in the Convention (HCCH, 2005)

1.XXII.4.3.5. Basic rules of the Convention (HCCH, 2005)

1.XXII.4.3.6. Other principles included in the Convention (HCCH, 2005)

1.XXII.4.3.7. Relationship with other instruments (The Brussels Convention, Regulation 44/2001, The Lugano convention)
1.XXII.4.3.8. Regional Economic Integration Organisations

1.XXII.5. Another regulation of forum selection of the Community origin

1.XXII.6. Case law

1.XXII.6.1. ECJ—The European Court of Justice
1.XXII.6.2. Case law of Member States
1.XXII.6.2.1. (CZ) Czech Republic
1.XXII.6.2.2. (F) France

Literature

1.XXIII. Obligations taken over by an agent in relation to a third party—negative exception from the material scope—ad Article 1(2)(g) of the Regulation! Article 1(2)(f) of the Convention—Material scope of the issue and extent of this treatise in this part of the publication (commentaries)

1.XXIII.1. Material scope of the negative definition under Article 1 (2)(g) of the Regulation/Article 1 (2)(g) of the Convention

1.XXIII.2. Professional representation and consultancy services

1.XXIII.2.1. Qualification of contracts for the provision of legal services
1.XXIII.2.1.1. Qualification of the sphere of contractual relations
1.XXIII.2.1.2. Power of attorney
1.XXIII.2.1.3. The Community qualification and determination of the subject of the contract
1.XXIII.2.1.4. Service according to the Community law
1.XXIII.2.2. Choice of applicable law—regime of the Convention
1.XXIII.2.2.1. Choice of law
1.XXIII.2.2.2. Closest connection
1.XXIII.2.2.3. Characteristic performance
1.XXIII.2.3. Practise of a profession as a business activity
1.XXIII.2.4. Principal place of business, other than principal place of business
1.XXIII.2.5. The international element in the subject of the person providing the characteristic performance—foreign legal practitioners and the principal place of business of foreign legal practitioners
1.XXIII.2.5.1. European legal practitioners
1.XXIII.2.5.2. Visiting European legal practitioners
1.XXIII.2.5.3. Established European legal practitioner
1.XXIII.2.5.4. The place of provision of characteristic performance, head office and place of business (of a legal practitioner, consultant, agent)
1.XXIII.2.5.5. The place of business of a foreign law company
1.XXIII.2.5.6. Subsidiary company of the foreign law company
1.XXIII.2.5.7. Relocation of the Seat of a Foreign Law Company
1.XXIII.2.6. The international element in persons providing the characteristic performance—services provided by a domestic legal practitioner (law company) in relation to foreign countries (the foreign element) from the conflict of law perspective
1.XXIII.2.6.1. Services provided by a domestic legal practitioner for foreign clients
1.XXIII.2.6.2. Services provided by a domestic legal practitioner abroad for clients abroad
1.XXIII.2.6.3. Services provided by a domestic legal practitioner abroad for clients coming from their own home state
1.XXIII.2.7. The applicable law in the regime of the Convention
1.XXIII.2.8. The Client as a consumer
1.XXIII.3. Limitation of the material scope of the Regulation/the Convention and the application of other conflict of law rules [application of MPSaP (CZ)]
1.XXIII.4. The Proposal for a Regulation
1.XXIII.5. Applicable law in the regime of the Regulation
1.XXIII.5.1. Choice of law
1.XXIII.5.2. The regime different from the regime of the Convention—special conflict of law rules under Article 4 (1) (b)
1.XXIII.5.3. Regime identical to the regime of the Convention
1.XXIII.6. Provision of services by tax advisers, notaries public and patent attorneys
1.XXIII.7. Non-contractual obligations
1.XXIII.8. The Hague Convention (HCCH') of 14 March 1978 on the Law Applicable to Agency
1.XXIII.8.2. Subject of the regulation: the international element in agency agreements
1.XXIII.8.3. Positive delimitation of the scope
1.XXIII.8.4. Negative delimitation of the scope: Exclusion of some types of agency relationships
1.XXIII.8.5. Option for a Contracting State to reserve the right not to apply the Convention
1.XXIII.8.6. Non-application of the regime of the Convention/the Regulation to employment relationships
1.XXIII.8.7. Universal application
1.XXIII.8.8. Relations between the principal and agent
1.XXIII.8.8.1. Choice of law
1.XXIII.8.8.2. Applicable law in the absence of choice
1.XXIII.8.9. Relations with a third party
1.XXIII.8.9.1. Existence and extent of relations with a third party, partial dependence on the internal relationship between the agent and the principal
1.XXIII.8.9.2. Choice of law
1.XXIII.8.9.3. Common conflict of law and auxiliary rules applicable to internal and external relations
1.XXIII.9. National regulations
1.XXIII.10. Case law of Member States
1.XXIII.10.1. (CZ) Czech Republic

Literature

XXVI
l.XXIV. Constitution of trusts and the relationship between settlors, trustees and beneficiaries—negative exception to the material scope—re Article 1(2)(h) of the Regulation!Article 1(2)(g) of the Convention 0571

l.XXIV.1. Trusts in the context of EC private international law 585
l.XXIV.2. Trust as an institute from the point of view of private international law 586
l.XXIV.3. Systematic classification of trusts: comparison between common law and civil law (analogy) 587
l.XXIV.4. Autonomous qualification 590
l.XXIV.5. Convention on the Law Applicable to Trusts and on their Recognition 595
l.XXIV.5.1. The Trust Convention as a product of the Hague Conference on Private International Law 595
l.XXIV.5.2. Trust definition 596
l.XXIV.5.3. Choice of law by unilateral legal act 596
l.XXIV.5.4. Principle of conservation of the effect of a trust and the connecting factor of closest connection 597
l.XXIV.5.5. Recognition of trusts 598
l.XXIV.6. Absence of provisions concerning trusts or analogous constructions in the national doctrine 601
l.XXIV.7. Public policy 602
l.XXIV.8. Priority application of mandatory rules (internationally mandatory rules) in the context of trust constructions 604
l.XXIV.9. Trust and the duty to identify the capital, its sources and persons involved in financial transactions 606
l.XXIV.10. Ultimate (end) beneficiary in the international context 610
l.XXIV.11. Compatibility of the concept of trusts with the identification duty 613
l.XXIV.12. Case law of Member States 614
l.XXIV.12.1. (D) Germany 614

Literature 615

l.XXV. Pre-contractual obligations—a negative exception from the material scope—ad Art. l(2)(i) of the Regulation 0602
l.XXV.1. Pre-contractual contractual autonomy 618
l.XXV.2. Culpa in Contrahendo according to R. von Jhering—the duty to observe the necessary diligentia (diligentia in contrahendo) ... 618
l.XXV.3. The material scope of pre-contractual liability—incorrectness at the pre-contractual stage 619
l.XXV.4. The purpose of liability for negotiations held at the pre-contractual stage 619
l.XXV.5. The scope of culpa de contrahendo 619
l.XXV.6. The diversity of the legal basis, circumstances and consequences 619
l.XXV.7. Unjustified termination of pre-contractual negotiations 619
l.XXV.8. Breach of the duty of disclosure and abuse of information acquired through pre-contractual negotiations 620
l.XXV.9. Termination of pre-contractual negotiations without serious cause 620

XXVII
1.XXV.10. Certain national doctrines and conceptual approaches to the provisions of pre-contractual liability 621
1.XXV.10.1. (A) Austria 621
1.XXV.10.1. Legal concept: culpa in contrahendo 621
1.XXV.10.1.2. Scope of liability 621
1.XXV.10.1.3. Conditions for liability 622
1.XXV.10.2. (D) Germany 622
1.XXV.10.2.1. The legal basis of pre-contractual liability in German law 622
1.XXV.10.2.2. Creation of an obligation 623
1.XXV.10.2.3. Obligations towards third parties 623
1.XXV.10.2.4. Invalidity/unenforceability of a contract: acting in good faith 624
1.XXV.10.2.5. The qualitative aspect of relations between parties 625
1.XXV.10.2.6. Conditions for the creation of a pre-contractual obligation relationship 625
1.XXV.10.2.7. Creation of an obligation 626
1.XXV.10.2.8. Culpa in contrahendo as a part of the constitution of obligation pursuant to German law 626
1.XXV.10.3. (F) France 627
1.XXV.10.3.1. The doctrine of delict 627
1.XXV.10.3.2. The basis of liability 627
1.XXV.10.3.3. The scope of liability 627
1.XXV.10.3.4. Duty of disclosure 627
1.XXV.10.4. (CH) Switzerland 628
1.XXV.10.4.1. The doctrine of a contractual obligation 628
1.XXV.10.4.2. The conditions (presumptions) of liability 628
1.XXV.10.4.3. The scope of pre-contractual obligations 629
1.XXV.10.5. (I) Italy 629
1.XXV.10.6. (NL) Netherlands 629
1.XXV.10.7. (UK) The United Kingdom of Great Britain and Northern Ireland (law: England and Wales) and the concept of common law 629
1.XXV.10.7.1. The superiority of contractual autonomy 629
1.XXV.10.7.2. The intention to enter a contract vs an actual obligation to enter into a contract 630
1.XXV.10.7.3. Means of sanctioning breaches of obligations at the pre-contractual stage 630
1.XXV.10.7.4. The basis of liability established by contract negotiations 631
1.XXV.10.7.5. Estoppel 632
1.XXV.10.7.6. A preliminary agreement as a condition of the successfulness of a claim related to the pre-contractual stage 632
1.XXV.10.7.7. The duty of disclosure 633
1.XXV.10.7.8. Breaking off contract negotiations 633
1.XXV.10.7.9. The pre-contractual stage 633
1.XXV.10.7.10. Consequences of breaching an obligation: damage, compensation for damage and the duty to continue contract negotiation 634
1.XXV.11. The Vienna Convention 634
1.XXV.12. Liability in connection with pre-contractual negotiations in Community law (in conflict of laws rules) 634
1.XXV.12.1. The amendment to the concept of the Regulation compared to the Convention 634

XXVIII
1.XXV.12.2. Procedural relevance to the *Treaty of Brussels, Regulation 44/2001* and ECJ case-law 635

1.XXV.12.3. Categorisation and subsequent classification of obligations arising out of dealings prior to the conclusion of a contract pursuant to *Community* conflict law 635

1.XXV.12.4. Conflict solutions in the interaction of the *Regulation* (contractual obligations) and *Regulation 864/2007* (non-contractual obligations) 636

1.XXV.12.5. *Regulation 864/2007* (non-contractual obligations) 637

1.XXV.12.6. Other express reflection in *Community* regulations 639

1.XXV.12.6.1. Directive 2008/52/EC (Mediation) 639

1.XXV.12.6.2. Regulations on the protection of consumers 639

1.XXV.13. Private law unification 640

1.XXV.13.1. Non-normative unification attempts 640

1.XXV.13.2. Principles of European contract law (PECL) 640

1.XXV.13.3. PECL versus UNIDROIT Principles 641

1.XXV.13.4. European Contract Code (ECC) 641

1.XXV.14. The concept of pre-contractual liability in Czech law 643

1.XXV.14.1. Current normative provision 643

1.XXV.14.2. Case law 643

1.XXV.14.3. Proposed new Civil Code 643

1.XXV.15. Case law 644

1.XXV.15.1. ECJ—The Court of Justice of the European Communities 644

1.XXV.15.2. Case law of Member States 644

1.XXV.15.2.1. (CZ) Czech Republic 644

1.XXV.15.2.2. (D) Germany 645

1.XXV.15.2.3. (UK) The United Kingdom of Great Britain and Northern Ireland (law: England and Wales) (UK/EN) 645

1.XXV.15.2.3.1. Specific features of the position of (DK), (IRL) and (UK) within the *Community* (from the view of *Community* law) 652

1.XXV.15.2.3.2. The position of (UK) and (IRL) 652

1.XXV.15.2.3.3. The position of (DK) in relation to the *Regulation* 655

Literature 655

Article 2 of the *Regulation*! Article 2 of the *Convention* 657

2.1. Universality of application 657
2.11. The conditions of the universal application (the conditions of the universality of the Regulation) 658
2.111. The court of Member State 659
2.IV. Suspension of other conflict rules 659
2.V. Universal application of the Convention 659
2.V1. Case law 660
2.VI.1. (I) Italy 660
2.VI.2. (UK) United Kingdom of Great Britain and Northern Ireland—law of England and Wales (UK/EN) 660

Literature 661

Article 3 of the Regulation!Article 3 of the Convention 663

3.1. Freedom of contract as a fundamental principle of EC contract law and principles of choice-of-law rules in the Regulation and Convention 664
3.11. Freedom to contract the choice-of-law provision; its purpose and part in public policy—protection of legal certainty 665
3.11.1. Autonomy as a humane manifestation of fundamental human freedoms 665
3.11.2. Concern over predictability and legal certainty 666
3.11.3. Freedom of Choice of Law as part of Public Policy 666
3.III1. The freedom of choice versus free choice of law: the autonomous function of the word freedom ("svoboda" in Czech) under Article 3 of the Regulation (error in the Czech version of the translation) 667
3.IV. Choice of Law at Common Law 667
3.IV.1. Importance of a comparative excursion into certain common law patterns in interpreting the Regulation and Convention 667
3.IV.2. English Law as the leading representative of Common Law traditions [not only] in resolving the question of choice-of-law rules 668
3.IV.4. Limitations by overriding mandatory provisions in other Common Law countries 669
3.IV.4.2. Reception of English Law (in a qualified form) in other Common Law jurisdictions 670
3.IV.5. Importance of good faith standards in choice-of-law rules and restrictions on the freedom of contract at common law 672
3.V. The Law parties can choose 673
3.V.1. Unrestricted choice 673
3.V.2. Prohibition of internationalisation of relations by means of a subjective choice: elimination of autonomous interference with the choice-of-law status in relations with no foreign law element 674
3.VI. Exclusion of renvoi as a result of Choice of Law 674
3.VII. The moment of the Choice of Law 674
3.VII.1. Autonomy of determining the Choice of Law 674
3.VII.2. Subsequent Choice of Law 675
3.VIII. Choice of Law as an independent agreement 675
3.IX. Other than an explicit Choice of Law 675
3.IX.1. Positive and negative Freedom of Contract 675

XXX
3.IX.2. 'Implicit' choice vs. 'explicit absence of choice 676
3.IX.3. Circumstances inferring the Choice of Law 677
3.IX.3.1. References to a legal regulation 677
3.IX.3.2. The Importance of rules of interpretation and rules of quasi-normative character 678
3.IX.3.3. Importance of contract negotiations 679
3.IX.3.4. Explicit and implicit choice of law in the Regulation and Convention 679
3.X. Choice of Law under the Convention 680
3.XI. The different wording of the requirements for an implicit Choice of Law in the Regulation and Convention (Convention: reasonable certainty vs. Regulation: clearly demonstrated) 681
3.XII. Prohibition of simplifying approach by the courts and preference for lex fori as a potentially incorrect approach bordering on violation of public policy by the Courts 681
3.XIII. Examples of an implicit Choice of Law under the Regulation and Convention 682
3.XIII.1. Examples of an implicit Choice of Law according to the Report 682
3.XIII.2. Determining the governing law on the basis of the choice of forum 683
3.XIII.2.1. Relation of governing law and place of proceedings (dispute resolution) in the historical context of choice-of-law approach 683
3.XIII.2.2. Prorogation versus Choice of Law in the European Private International Law context 686
3.XIII.2.3. The birth of EC doctrine and drafting the Regulation with prorogation of justice as a possible indicator of Choice of Law .... 687
3.XIII.2.4. The Regulation in fine and the significance of prorogation for determining the Choice of Law 688
3.XIII.2.5. Lasting criticism: the unwillingness (rather than lack of understanding) of some countries to acquiesce to the regime of the Regulation 689
3.XIII.3. Choice of Law and choice of forum as two aspects of determining contractual status 690
3.XIV. Law versus Body of Law versus non-state normative systems and the Choice of Law 692
3.XIV.1. The meaning of the term Law pursuant Article 3 of the Convention and Article 3 of the Regulation 692
3.XIV.2. Non-State rules and international treaties (conventions) 692
3.XIV.3. The exclusion of the possibility to choose a non-state body of law (a departure from the concept of the Proposal for a Regulation) 692
3.XIV.3.1. Choice of non-State rules under the Convention 692
3.XIV.3.2. The conceptual genesis of the Regulation 693
3.XIV.3.3. The choice of a non-State body of law under the Regulation 694
3.XV. Customs regarding the choice-of-law status and their importance from the perspective on Private International Law 697
3.XV.1. Legal principles and customs pursuant to national legal regulations

3.XV.2. Significance of customs under the Convention and Regulation

3.XVI. Lex mercatoria (and private-law codification)

3.XVII. Hypothetical Choice of Law

3.XVII.1. Presumption of Choice

3.XVII.2. Refusal of the hypothetical choice of law by European (contractual) choice-of-law rules

3.XVIII. Priority of the closest link and the priority of mandatory rules of the European Community

3.XIX. Internationalisation of the contractual status by autonomous determination of dispute resolution

3.XX. Conceptual differences of legal systems as a reason for special legislative techniques prohibiting subjective internationalisation by setting restrictions on its seeming permissibility

3.XX.1. Practical importance of comprehending the distinct approaches of different schools of thought from the perspective of Article 3(3) of the Regulation

3.XXII. Mandatory versus overriding mandatory/Article 3(3) of the Regulation (Convention) versus Article 9 of the Regulation (Article 7 of the Convention)

3.XXIII.1. Contractually technical manifestations of doctrinal differences in understanding the Freedom of Contract and the mandatory (overriding-mandatory) nature of Substantive-Law rules from the choice-of-law perspective

3.XXIII.2. Difference between the Regulation and the Convention—removing the requirement of reasonable certainty

3.XXIII.3. The prohibition of circumventing EC mandatory rules—Article 3(4) of the Regulation

3.XXIII.4. The purpose and concept of Article 3(4) of the Regulation

3.XXIII.5. The common purpose of Article 3(3) of the Regulation/Article 3(4) of the Regulation

3.XXIII.6. Territorial scope of Article 3(4) of the Regulation—application to (DK)

3.XXIV. Restriction of the choice to the law with a qualified link to the legal relationship

3.XXV. A comparison of certain Member States' experience with the interpretation and application of restrictions on the choice of law contained in Article 3 of the Convention (selected cases)

3.XXV.1. Germany

3.XXV.1.1. Lasting doctrinal problem of German law: joinder of prorogation and choice of law


3.XXV.2. France
3.XXV.2.1. Case SA CIEC v. M. Piriou 714
3.XXV.2.2. Case Soc. Hick Hargreaves v. Soc. CAC Degremont et al. 715
3.XXV.3. (I) Italy 715
3.XXV.3.1. Giannantonio Judgment 715
3.XXV.3.2. Basciano Judgment 716
3.XXV.3.3. Augusta Judgment 716

3.XXVI. A comparison of judicial decisions concerning the restrictions on choice of law in employment relations and consumer contracts 716

3.XXVII. Choice of law in HCCH Conventions 717
3.XXVII.1. Choice of law in individual HCCH Conventions 717
3.XXVII.2. The aim of the HCCH Convention regarding the choice of law governing contracts 721

3.XXVIII. Mutual Legal Assistance Treaties (CZ) 721
3.XXVIII.1. The limited importance of Legal Assistance Treaties 721
3.XXVIII.2. Legal Assistance Treaties encompassing explicit choice-of-law rules for contractual relations 722
3.XXVIII.2.1. Legal Assistance Treaty with (HU) 722
3.XXVIII.2.2. Legal Assistance Treaty with (Mongolia) 722
3.XXVIII.2.3. Legal Assistance Treaty with (PL) 722
3.XXVIII.2.4. Legal Assistance Treaty with (RO) 723
3.XXVIII.2.5. Legal Assistance Treaty with (UA) 723

3.XXIX. Case law 724
3.XXIX.1. EC—Court of Justice of the European Communities 724
3.XXIX.2. Case Law of Member States 726
3.XXIX.2.1. (A) Austria 726
3.XXIX.2.2. (B) Belgium 737
3.XXIX.2.3. (CZ) Czech Republic 738
3.XXIX.2.4. (D) Germany 742
3.XXIX.2.5. (F) France 742
3.XXIX.2.6. (I) Italy 744
3.XXIX.2.7. (SK) Slovakia 746
3.XXIX.2.9. (DK) Denmark 747
3.XXIX.3. Case Law of Non-Member States 748
3.XXIX.3.1. (PNG) Papua New Guinea 748
3.XXIX.4. Arbitration Court Judgments 749
3.XXIX.4.1. (CZ) Czech Republic 749

Literature 750

Article 4 of the Regulation!Article 4 of the Convention 763

A: Development, Concept and Application of the Choice-of-law Regime Pursuant to the Convention and the Regulation 764

4.1. Conflict of law Doctrines from the Perspective of Legal Schools of Thought 765
4.11. Instruments and Methods of Choice-of-law Rules 767
4.IV. The Continental and Community Approach 768
4.IV.1. Objective Identification of Contractual Connections and the Law 768
4.IV.2. Resulting and Implicit Choice of Law and Absence of Choice of Law 769
4.IV.3. Characteristic performance 769
4.V. The Common law Approach 770
4.V.1. Proper Law versus Applicable Law 770
4.V.2. The Proper Law Doctrine 770
4.VI. The Convention and the Regulation: The Principles and the Structure of Article 4 of the Convention and Article 4 of the Regulation 773
4.VI.1. The Concept and Structure of Article 4 of the Convention 773
4.VI.2. The General Presumption regarding the Closest Connection: Article 4 (2) of the Convention—Residence of the Party with an Obligation Characteristic for the Contract 774
4.VI.2.1. Residence of the Person Effecting Characteristic Performance .... 774
4.VI.2.2. Persons Effecting Characteristic Performance during Entrepreneurial and Comparable Activities 775
4.VI.3. Important Linguistic Mistakes in the Czech Version of the Convention 777
4.VI.3.1. Formulation: Party Who Is to Effect the Performance of the Contract 777
4.VI.3.2. Formulation: Central Administration 777
4.VI.3.3. Formulation: Performance Effected Through a Place of Business other than the Principal Place of Business 778
4.VI.4. Escape clause: Finding the Closest Connection Outside the Scope of the Article 4 (2) Convention Presumption 778
4.VII. The Concept and Structure of Article 4 of the Regulation 779
4.VIII. The Genesis of the Convention’s Transformation into an Instrument of Community Law (Regulation), Historical Links and their Usage Pro Futuro 780
4.VIII.1. Reasons for Review from a General Conflict of Law Perspective 780
4.VIII.2. Historical Link with the Convention 781
4.VIII.3. Transition Period and Solutions Adhering to the Compulsory Application of the Convention but Not to the Concept of the Regulation 782
4.IX. The Concept of General Choice of Law in the Regulation in Comparison to the Convention 783
4.X. The Procedure When Qualifying Contract Types for Choice-of-law Determination—Differences Between Choice of Law and Substantive Qualifications 784
4.XI. Emphasis on the Habitual Residence 786
4.XII. The Closest Connection Concept as a General and Subsidiary Link to Selected Law 787
4.XIII. The Abolishment of Depe^age (The Difference Between the Convention and the Regulation) 787
4.XIV. The Meaning of Characteristic Performance in the Convention and the Regulation: A Difference in Approaches 787

XXXIV
4.XIV.1. The Criterion of Characteristic Performance Pursuant to the Regulation

4.XIV.2. Application of the Characteristic Performance Criterion pursuant to the Regulation

4.XIV.3. The Meaning of Characteristic Performance

4.XIV.4. Objective Determination of Applicable Law Pursuant to the Regulation

4.XIV.5. A Firmly Designated Set of Rules for Specific Contract Types

4.XIV.6. The Criterion of Characteristic Performance as the First Subsidiary Rule

4.XIV.7. The Closest Connection Concept as an Escape Clause

4.XIV.8. The General Closest Connection Doctrine as the Second Subsidiary Rule

4.XIV.9. The Definition of Characteristic Performance pursuant to the Regulation

4.XIV.10. The Presumption of Application of Characteristic Performance Pursuant to the Regulation: Absence of Choice of Law

4.XIV.10.1. The Difference Between Resulting Choice of Law and Absence of Choice of Law

4.XIV.10.2. Factors Analysed for the Purposes of Ascertaining the Existence of Resulting Choice of Law or Absence of Law and for Using Normative Choice-of-law Connections

4.XIV.10.3. Choice of Law Deduced from Contract Stipulations

4.XIV.10.4. Choice of Law Inferred from the Circumstances of the Case

4.XV. System of Exceptions with regard to Choice-of-law Rules in Article 4 of the Regulation

4.XV.1. Special Exceptions Pursuant to Articles 5 and 8 of the Regulation within the Framework of the Concept of Weaker Party Protection in Contractual Obligations


4.XVI. The Escape Clause (Article 4 (4) of the Regulation and Article 4 (5) of the Convention)

4.XVI.1. The Escape Clause Regime as a Method of Finding Fair Solutions to Choice-of-law Problems

4.XVI.2. The Escape Clause as a Special Case of the General Clause

4.XVI.3. Examples of Factors Significantly or Subsidiarily Influencing the Application of the Escape Clause in Case Law

4.XVI.3.1. The Place of Performance

4.XVI.3.2. The Link Between the Contractual Status and the Legis Rei Sitae Substantive Status

4.XVI.3.3. Escape Clause pursuant to Article 4 (3) of the Regulation and Article 4 (5) of the Convention

4.XVII. The Subjective Aspect of the Choice-of-law Analysis

4.XVII.1. The Discretion of National Courts When Ascertaining Governing Law of Contractual Obligations Pursuant to the Regulation

4.XVII.1.1. Maintaining a Minimal Level of Subjective Elements in Choice-of-law Analysis
4.XVII.1.2. Judicial Discretion During the Four-Stage Choice-of-law Determination

4.XVII.1.3. Judicial Discretion When judgment on Choice-of-law Issues

4.XVII.2. The Difference Between Choice-of-law Provisions Under Article 4 (3) of the Regulation and the Escape Clause under Article 4 (4) of the Regulation as Exemplified by a Subjective Element Case

4.XVIII. General Choice-of-law Provisions in the HCCH

Conventions—Overview of Solutions and Principles Pertaining to Private International Law Standards (Choice of Law, Substantive and Procedural)

4.XIX. Mutual Legal Assistance Treaties (CZ)

4.XIX.1. The Limited Importance of Legal Assistance Treaties

4.XIX.2. Legal Assistance Treaties Containing Explicit Choice-of-law Provisions for Contractual Obligations

4.XIX.2.1. Legal assistance Treaty with (HU)

4.XIX.2.2. Legal Assistance Treaty with (Mongolia)

4.XIX.2.3. Legal Assistance Treaty with (PL)

4.XIX.2.4. Legal Assistance Treaty with (RO)

4.XIX.2.5. Legal Assistance Treaty with (UA)

4.XX. Case Law

4.XX.1. ECJ—The Court of Justice of the European Communities

4.XX.2. Case law of Member States

4.XX.2.1. (A) Austria

4.XX.2.2. (B) Belgium

4.XX.2.3. (CZ) Czech Republic

4.XX.2.4. (D) Germany

4.XX.2.5. (F) France

4.XX.2.6. (I) Italy

4.XX.2.7. (UK) The United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN)

4.XX.3. Case law of Non-Member States

4.XX.4. Arbitration

Literature

B: Special commentary on the unification of conflict of law rules and of substantive law in the field of some types of contracts from the perspective of private international law (the Convention and the Regulation)

4.XXI. Contract for the sale of goods—special conflict of law rules—Article 4(l)(a) of the Regulation

4.XXI.1. The importance of the unification of conflict of law rules and of substantive law with respect to purchase and sale in mutual interactions

4.XXI.2. Development of a uniform Evolution of unified law of applicable to contracts for the international sale of goods

4.XXI.3. Hague unification (HCCH) of law applicable to international sale of goods (1955 and 1986)


4.XXI.3.2.1. The relationship between the *HCCH Convention*, the Convention of 1986 on the law applicable to contracts for the international sale of goods, the *Conventio*, 2 the *Convention*, and the *Vienna Convention* 882

4.XXI.3.2.2. Conflict of contractual obligations of Member States 882

4.XXI.3.2.3. Continuity with the regulation embodied in the *Convention* and comparison with the *Convention* and the *Regulation* 883


4.XXI.4.1. The scope of application 886

4.XXI.4.2. The difference between a contract for the sale of goods and a fixed job contract 887

4.XXI.4.3. Conflict of law regime of the Vienna Convention in practice 887

4.XXI.4.4. So-called incompleteness of the regulation and the solution of these in the Vienna Convention and the rules of interpretation 888

4.XXI.4.5. Usages, international commercial usages and practices of the contracting parties in the Vienna Convention 888

4.XXI.4.6. International commercial terms, INCOTERMS 2000—the meaning of INCOTERMS 888

4.XXI.5. Case law 891

4.XXI.5.1. Case law of Member States 891

4.XXI.5.1.1. (A) Austria 891

4.XXI.5.1.2. (CZ) Czech Republic 894

4.XXI.5.1.3. (D) Germany 896

4.XXI.5.1.4. (I) Italy 897

4.XXI.5.1.5. (NL) Netherlands 897

4.XXI.5.2. Case law of Non-Member States 898

4.XXI.5.2.1. (CH) Switzerland 898

4.XXI.5.2.2. (US) United States of America 900

4.XXI.5.3. Arbitration 900

4.XXI.5.3.1. ICC 900

Literature 902

4.XXII. Franchise contract—special conflict of law rules—Article 4(l)(e) of the Regulation 910

4.XXII.1. Definition of franchise from the commercial and legal perspective (primarily in the international context) 910

4.XXII.1.1. Franchise as a term created by commercial and legal practice .... 910

4.XXII.1.2. Difference between mixed contractual relationships on one hand and new types of contracts based on simple institutes of contractual law on the other 911

---

4.XXII.1.3. Definition as formulated by the European franchise federation in the international context and regime of national legal systems 912
4.XXII.1.4. Legal definition versus commercial definition 913
4.XXII.1.5. Franchise as a particular type of licence to a package of assets .... 913
4.XXII.1.6. Financial and legal independence of participants in the franchise 916
4.XXII.1.7. Relationship between the franchise contract and antitrust regulation 916
4.XXII.2. Conflict of law rules for a franchise 918
4.XXII.2.1. Franchise from the international (European) private law (conflict of law rules) perspective 918
4.XXII.2.2. The Regulation as a revolutionary change in the concept of conflict of law regulation of the franchise and a comparison with applicable law for distribution contracts 919
4.XXII.2.3. Characteristic performance for the franchise 920
4.XXII.2.4. Applicable law for the franchise contract in relation to the protection of industrial rights and the licence to use intangible assets from the conflict of law perspective 924
4.XXII.3. Other parts of Community law relevant to the franchise 926
4.XXII.3.1. Decision Judgment (ECJ) In re Pronuptis, a definition of franchise, of the distribution of goods and the relationship between the franchise and antitrust regulation 926
4.XXII.3.4. Regulation (EEC) 2790/1999 relating to block exemptions for franchises 932
4.XXII.4. Substantive law of selected countries, of international and national origin (in an international comparison and an evaluation of relationships with an international element) 934
4.XXII.4.1. Absence of explicit substantive law on the franchise 934
4.XXII.4.2. (D) Germany 934
4.XXII.4.2.1. Concept of franchise in German law 934
4.XXII.4.2.2. The franchise and [individual] labour contracts 935
4.XXII.4.3. (E) Spain 936
4.XXII.4.4. (I) Italy 937
4.XXII.4.5. (F) France 940
4.XXII.4.6. (NL) Netherlands 941
4.XXII.4.7. (PL) Poland 944
4.XXII.4.9. (UK) United Kingdom of Great Britain and Northern Ireland .... 946
4.XXII.4.10. (US) United States of America 948
4.XXII.5. Difference between franchise and distribution (from the perspective of the franchise) 951
4.XXIII. Distribution agreements (distribution contracts)—special conflict of law rules—re: Article 4(I)(f) of the Regulation 0913 955
4.XXIII.1. Legal and economic definition of distribution agreements (distributor contracts) 955
4.XXIII.1.1. Distribution agreement as a business and legal model 955
4.XXIII.1.2. Special separate concept and not only mixed or hybrid agreement 955
4.XXIII.1.3. Distribution relationship in the broad and narrow sense 956
4.XXIII.1.4. Difference between a distribution agreement and a franchise agreement 956
4.XXIII.2.1. Distribution agreement as a contract type not explicitly provided for by law 957
4.XXIII.2.2. Relation to protection of competition 958
4.XXIII.2.3. Vertical agreements 958
4.XXIII.2.4. So-called collective cartels 958
4.XXIII.2.5. Exemptions from prohibition on agreements 959
4.XXIII.2.6. General (block) exemptions 959
4.XXIII.3. Distribution agreements in Polish law 960
4.XXIII.3.1. Expression of freedom of contract 960
4.XXIII.3.2. Distribution in the narrow sense 961
4.XXIII.3.3. Distribution in the broad sense 962
4.XXIII.3.4. Master contracts 962
4.XXIII.3.5. Polish competition restrictions 962
4.XXIII.3.6. Distribution agreements in Polish case law 963
4.XXIII.3.7. Distribution agreements in Community law 964
4.XXIII.3.7.1. Primary Community law 964
4.XXIII.3.7.2. Definition of distribution agreements in secondary Community law 965
4.XXIII.3.7.3. Acts implementing Article 81(3) of the TEC (exemptions from prohibition) 965
4.XXIII.4. Regulation No. 2790/1990 on the application of Article 81(3) of the TEC to categories of vertical agreements and concerted practices 966
4.XXIII.4.1. The principle of block exemptions under Article 81(3) of the TEC and Regulation No. 2790/199 966
4.XXIII.4.2. Positive definition 966
4.XXIII.4.3. Negative definition 967
4.XXIII.5. Non-binding Guidelines on Vertical Restraints 968
4.XXIII.6. Commercial agency 968
4.XXIII.6.1. Commercial agency agreements 968
4.XXIII.6.2. Genuine commercial agency agreements 969
4.XXIII.6.3. Non-genuine commercial agency agreements 969
4.XXIII.6.4. Distinction between genuine and non-genuine commercial agreements according to risks borne by the commercial agent ... 969
4.XXIII.7. Specific rules for individual sectors 970
4.XXIII.8.1. Definition of distribution agreement 970
4.XXIII.8.2. Sole and exclusive distribution agreements 970
4.XXIII.8.3. Selective distribution agreements
4.XXIII.8.4. Exclusive purchasing contracts
4.XXIII.8.5. Mixed contracts
4.XXIII.8.6. De facto distribution agreements and de facto exclusivity
4.XXIII.9. Law governing distribution agreements under the Community legislation
4.XXIII.9.1. The Convention in comparison to the Regulation
4.XXIII.9.2. Determinants of the conflict of law close connection in distribution and franchise agreements (from the point of view of distribution agreements)
4.XXIII.9.3. Connection of franchise and distribution as one of the reasons for an identical conflict of law solution
4.XXIII.9.4. Protection of the weaker party to a contract versus unrestricted choice of law
4.XXIII.10. Case law
4.XXIII.10.1. ECJ—The Court of Justice of the European Communities
4.XXIII.10.2. Other decision-making practice under Community law and within the jurisdiction of Community authorities
4.XXIII.10.3. Case law of the courts of Member States

4.XXIII.10.3.1. (D) Germany
4.XXIII.10.3.2. (F) France
4.XXIII.10.3.3. (I) Italy
4.XXIII.10.3.4. (PL) Poland
4.XXIII.10.3.5. (UK) United Kingdom of the Great Britain and Northern Ireland—law: England and Wales (UK/EN)

Literature

4.XXIV. Financial markets, financial and investment instruments and some contractual obligation relationships in the area of the capital market—special conflict of law rule—Article 1(4)(h) of the Regulation
4.XXIV.1. Contracts in the area of financial markets and multilateral systems
4.XXIV.2. Financial market and contracts concluded within the multilateral systems (Article 4(l)(h))
4.XXIV.2.1. Material and subjective scope of 4(l)(h) of the Regulation
4.XXIV.2.1.1. Contracts concluded during trading with financial instruments...
4.XXIV.2.1.2. The term financial instruments
4.XXIV.2.1.3. The term multilateral systems [...] and contracts concluded on the platform of those systems
4.XXIV.2.2. Subjective scope of Article 4(l)(h) of the Regulation
4.XXIV.2.2.1. Closer subjective scope
4.XXIV.2.2.2. Broader subjective scope
4.XXIV.3. Conflict of law rules for contracts within the trade with financial instruments
4.XXIV.3.1. Choice of law and consideration of principles for providing financial services
4.XXIV.3.2. Applicable law in the absence of choice
4.XXIV.4. Payment systems and their finality from a conflict of law perspective
4.XXIV.4.1. Priority of the payment system mode and point (31) of the Preamble to the Regulation 992
4.XXIV.4.2. Comparison to the Community regulation of insolvency proceedings with an international element 993
4.XXIV.4.3. The term 'payment system' from the conflict law perspective .... 995
4.XXIV.5. Financial market 996
4.XXIV.6. Subjective scope of regulations of payment systems (the participant) 998
4.XXIV.7. Securing rights of parties within the payment systems 998
4.XXIV.8. Security (collateral) 999
4.XXIV.9. Payment systems in the statutory regulation (CZ) 999
4.XXIV.9.1. Considering the principle of finality in Czech regulations of national origin 999
4.XXIV.9.2. List of systems managed by CNB (CZ) 1001
4.XXIV.9.3. Conflict of law consideration of the Settlement Finality Directive in domestic private international law legislation ... 1001
4.XXIV.10. Conflict law significance of point (31) of the Preamble to the Regulation 1002
4.XXIV.11. Consumer protection within the systems 1003
4.XXIV.12. Custodian contract, contract on administration, contract of bailment and contract on securities control 1004
4.XXV. Letter of credit 1005
4.XXV.1. Nature of the letter of credit and its types 1005
4.XXV.2. Letter of credit from the perspective of private international law 1006
4.XXV.3. Choice of law 1007
4.XXV.4. Applicability of the Regulation and characteristic performance . 1007
4.XXV.5. Relationship between the buyer (payer) and the bank opening the letter of credit 1009
4.XXV.6. Rights of the beneficiary of the letter of credit in relation to the bank opening the letter of credit 1009
4.XXV.7. Relationship of the bank issuing the letter of credit and the bank advising/confirming the letter of credit and the beneficiary (the seller) 1010
4.XXV.7.1. Relationship among the banks and the beneficiary 1010
4.XXV.7.1.1. Confirmed letter of credit 1010
4.XXV.7.1.2. Advised letter of credit 1010
4.XXV.7.2. Relationship between the bank opening the letter of credit and the bank advising/confirming the letter of credit and the beneficiary (the seller) 1011
4.XXV.8. Directly applicable substantive-law regulations and uniform rules 1012
4.XXV.8.1. Uniform rules and customs for documentary credit (UCP) 1012
4.XXV.8.2. Other uniform rules and analogous non-governmental sources 1014
Literature (Letters of credit) 1015

4.XXVI. Intangible property rights and licence agreements 0973 1016
4.XXVI.1. Applicable law for obligation relationships in connection to transfer or application of certain intangible property rights(intellectual and industrial property) 1016

XLI
4.XXVI.1.2. Relationship between the Regulation and obligations in connection to the transfer or application of intangible property rights (concept of the Regulation concerning intangible property rights) 1016

4.XXVI.1.3. Conflict of law rule of the Regulation [in fine] concerning contractual obligations related to intangible property and maintenance of the concept analogous to the concept of the Convention 1018

4.XXVI.2. Basic characteristic of certain rights to intangible property in the context of appropriate Community regulation 1018

4.XXVI.2.1. Patent law of the Community 1019
4.XXVI.2.2. Community plant variety rights 1019
4.XXVI.2.3. Community trademark 1020
4.XXVI.2.4. Community design 1021

4.XXVI.2.5. Designation of origin and geographic indication 1021
4.XXVI.2.6. Protected geographical indication 1022
4.XXVI.2.7. Protected designation of origin 1022
4.XXVI.2.8. Traditional specialities guaranteed 1022
4.XXVI.3. Case law 1023
4.XXVI.3.1. ECJ—The Court of Justice of the European Communities 1023

Article 5 of the Regulation! Article 4(4) of the Convention 1025

5.1. The significance of international carriage and the subject matter of contractual relationships 1027

5.11. Conflict of law provisions of national origin (CZ) 1028
5.11.1. Act on international private and procedural law (MPSaP) 1028
5.11.2. Intended changes in the international private law of national origin 1028
5.11.3. Direct and conflict of law provisions of international origin 1028

5.111. The conflict of law provisions of the Convention and of the Regulation (a comparison) 1028

5.1V. Contracts of carriage under the Convention 1029
5.1V.1. General conflict of law rules 1029
5.1V.2. Consumer contracts 1029

5.V. Qualification of the contract for the carriage of goods and differences between the Convention and the Regulation 1029

5.V.1. Qualification under the Convention 1029
5.V.2. Qualification under the Regulation 1029
5.V.3. Principles of autonomous conflict of law qualification under the Regulation and the Convention 1030

5.VI. Definitions of the contract of carriage, the travel contract and the accommodation contract 1030

5.VI.1. Travel contract (travel services) 1031
5.VI.1.1. Qualification of travel service (contract) as a service (contract) which is complex (composite) 1031
5.VI.1.2. The provision of complementary services as a necessary component or an above standard complement of service (the
carrier provides accommodation, or, inversely, accommodation facilities provide transportation) 1031
5.VI.1.3. Accommodation provided by the carrier 1031
5.VI.1.4. Conflict of law determination of the applicable law for contracts of carriage 1032
5.VI.2. Contract of accommodation 1032
5.VII. **Contract of carriage under the Regulation** 1033
5.VII.1. Definition (qualification) and material scope 1033
5.VII.1.2. Contracts for the carriage of goods 1033
5.VII.1.3. "Consignor" and "carrier" 1033
5.VII.2. Contracts for the carriage of goods 1034
5.VII.3. Contracts for the carriage of persons 1034
5.VII.4. Restrictions on the choice of law 1035
5.VII.5. Contract of carriage in the framework of consumer relationships . 1036
5.VII.6. Escape clause (Article 5(3) of the Regulation) 1036
5.VIII. **Further conflict of law and substantive-law provisions of other than national origin** 1036
5.VIII.1. The priority of application of special enactments of the Community and of international treaties 1037
5.VIII.2. Carriage by rail (COTIF) 1037
5.VIII.2.1. The importance of transport by rail and basic Acts and institutions 1037
5.VIII.2.2. The Convention concerning International Carriage by Rail (COTIF) 1038
5.VIII.2.3. CIV—carriage by rail of persons and their baggage 1038
5.VIII.2.4. CIM—carriage of goods by rail 1039
5.VIII.3. Carriage by road 1040
5.VIII.3.1. The significance of carriage by road 1040
5.VIII.3.2. Carriage of goods by road under the CMR 1041
5.VIII.4. Carriage by water 1042
5.VIII.4.1. Sources of substantive law 1042
5.VIII.4.2. *Hague-Visby rules* 1042
5.VIII.4.3. *Hamburg rules* 1042
5.VIII.4.4. Bill of lading 1042
5.VIII.4.5. The obligations and the liability of the carrier 1043
5.VIII.5. Carriage by air 1044
5.VIII.5.1. The significance of carriage by air 1044
5.VIII.5.2. The provisions of the *Warsaw Convention* 1044
5.VIII.5.3. Liability of the carrier 1045
5.VIII.5.4. Other law relating to carriage by air 1046
5.VIII.5.5. The *Montreal Convention* 1046
5.VIII.5.6. The practice with regard to the application of the *Warsaw Convention* and of other enactments of international origin relating to international carriage (case law) 1046
5.IX. **Carriage documents (in the carriage of goods)** 1047
5.IX.1. The function of carriage documents 1047
5.IX.2. The significance of carriage documents in the perspective of private international law 1048
5.IX.3. Types of carriage documents
5.IX.3.1. An overview of especially significant carriage documents
5.IX.3.2. Bill of lading
5.IX.3.3. Packing notice
5.IX.3.4. Carnets (especially ATA carnets)
5.IX.3.5. Consignment notes
5.IX.3.6. Postal receipt
5.X. The Law of the Flag
5.X.1. The Law of the Flag is one of the possible connecting factors in the domain of international carriage of goods
5.X.2. The law of the flag and the Convention/Regulation
5.X.3. The law of the flag in some other obligation relationships regarding vehicles
5.XI. Case law
5.XI.1. ECJ—The Court of Justice of the European Communities
5.XI.2. Case law of Member States
5.XI.2.1. (A) Austria
5.XI.2.2. (CZ) Czech Republic
5.XI.2.3. (D) Germany
5.XI.2.4. (I) Italy
5.XI.2.5. (NL) Netherlands
5.XI.2.6. (UK) United Kingdom of Great Britain and Northern Ireland—the law of: England and Wales (UK/EN)
5.XI.3. Case law of Non-Member States
5.XI.3.1. (CH) Switzerland
5.XI.3.2. (US) The United States of America
5.XI.4. Arbitration
5.XI.5. Literature

Annex to the commentary on Article 5 of the Regulation: Conflict of law provisions, liability for damage, application of usages and contractual terms as regulated by certain sources of international law relating to contracts of carriage

Article 6 of the Regulation/Article 5 of the Convention

6.1. Concept and purpose of consumer protection, principles underlying substantive law rules as well as conflict rules in consumer protection legislation of the Community
6.11. Community specifics of consumer protection
6.11.1. Objectives of the Community legislation in consumer protection
6.11.2. The basic normative framework of consumer legislation
6.111.1. The purpose, objective and the concept of Directive 93/13/EEC
6.111.3. Choice of law and choice of forum (dispute resolution) from the perspective of fairness/unfairness

XLIV
6.111.3.1. Significance of the Annex to Directive 93/13/EEC (indicative list of unfair terms) from the perspective of conflict rules 1094
6.111.3.2. Real opportunity of becoming acquainted with the contract terms (point (i) of the Annex to Directive 93/13/EEC) 1096
6.111.3.3. Hindering the consumer's right to enforce his or her rights (point (q) of the Annex to Directive 93/13/EEC)/arbitration in consumer disputes and application of the laws and regulations on consumer protection in arbitration proceedings 1097
6.111.3.4. Prohibition of restricting evidence and impairing the procedural standing of litigants in consumer disputes 1102
6.111.3.5. Agreements on evidence and procedure and absence of analogy with Article 1(2)(h) of the Convention in the Regulation 1102
6.111.3.6. The interaction of points (i) and (q) of the Annex to Directive 93/13/EEC in the context of Article 6 of the Regulation 1105
6.111.3.7. Relative autonomy of the choice-of-law clauses and the dispute resolution clauses with respect to the remaining provisions of consumer contracts (separability principle) 1105
6.111.3.8. Protection of consumers against unfair terms in contracts (contract terms) from the perspective of certain selected countries, in connection with agreements on the applicable law and on dispute resolution 1106
6.111.3.9. (A) Austria 1107
6.111.3.10. (CZ) Czech Republic 1108
6.111.3.11. (D) Germany 1108
6.111.3.12. (F) France 1109
6.111.3.13. (IRL) Ireland 1110
6.111.3.14. (PL) Poland 1110
6.111.3.15. (SE) Sweden 1111
6.111.3.16. (SK) Slovakia 1111
6.111.3.17. (UK) United Kingdom of Great Britain and Northern Ireland 1111
6.111.4. Procedural issues of consumer protection in contracts with international elements 1112
6.111.4.1. Significance of combining procedural and substantive-law issues 1112
6.111.4.2. Judgment of the ECJ in Mostaza-Claro versus Centro Movil 1114
6.111.5. Other sources of Community law and case law of the ECJ relevant for the resolution of consumer disputes in proceedings other than ordinary court proceedings 1116
6.IV. Community structures/EU and their tasks in connection with consumer protection 1117
6.V. Consumer contract as an institution, not as a type of contract 1118
6.V.I. Consumer contract as a qualifier of a category of contracts according to the subjective element 1118
6.V.2. Categories of consumer contracts 1119
6.V.3. Distance contracts 1119
6.V.4. Types of contractual obligations 1121
6.VI. Principles of consumer protection under the Convention 1121
6.VII. Genesis of the Regulation in relation to consumer protection 1122
6.VII.1. Conceptual intentions
6.VII.2. Proposal for the Regulation
6.VII.3. Concept of the conflict rules incorporated in the Regulation (the Convention)
6.VII.4. Radical nature of the Proposal for a Regulation
6.VIII. Scope of application
6.VIII.1. Subjective scope of Article 6 of the Regulation
6.VIII.2. Definition of consumer and professional
6.VIII.3. Consumer
6.VIII.3.1. Meaning and method of qualification (classification) of the consumer
6.VIII.3.2. Definition of consumer from the perspective of professional ....
6.VIII.3.3. Legal personality of consumers
6.VIII.3.4. Extending the protection to other categories of persons
6.VIII.3.5. The status of consumer protection interest groups and associations
6.VIII.3.6. Importance of the purpose of the contract for the qualification of consumer
6.VIII.3.7. Mixed purpose of the contract
6.VIII.3.8. Influence of the nature of performance on the qualification of consumer and consumer relationship
6.VIII.3.9. General and special definition of consumer
6.VIII.3.10. Differing definitions of consumer under certain sources of Community law
6.VIII.3.11. Definitions in substantive law rules incorporated in directives
6.VIII.3.12. Definition of consumer under the conflict rules incorporated in the Regulation
6.VIII.3.13. Professional
6.1X. Focus on the country where the consumer has his or her residence (objective territorial condition determining the subjective scope of the Regulation)
6.1X.1. Activity of the professional must be focused on the country (territory) where the consumer has his or her residence
6.1X.2. Interconnection of the professional's activities and the acts of actual conclusion of the contract within the scope of these activities
6.1X.3. Questionable existence of the international element
6.1X.4. Analogy to the interpretation of Regulation 44/2001
6.1X.5. The manner of presentation of the professional's activities
6.1X.6. Local presence of the professional versus local presence of the producer and his or her advertisements
6.X. The solution of certain borderline cases of consumer protection and connection to the application of overriding mandatory provisions and the exclusive court jurisdiction (international jurisdiction)
6.XI. Consumer's residence and extra-Community consequences
6.XI.1. Form of consumer contracts
6.XII.1. Special rules stipulating an alternative conflict of law connection applicable to the form of contracts
XLVI
6.XII. Application of the *lex electa* more favourable to the consumer 1157

6.XIII. Article 6(2) of the Regulation—Limitation of the choice of law by the priority accorded to the standards of protection stipulated by the laws of the country where the consumer has his or her habitual residence 1158

6.XIII.1. Permissibility of the choice of law 1158

6.XIII.2. Materialisation of the conflict rules (limitation of the choice of law by the standard of consumer protection) 1158

6.XIII.3. Mandatory character of the rules regulating consumers/influence of the directives implemented in the substantive laws of the Member States 1160

6.XIII.4. The *Convention* versus the Regulation—comparison 1161

6.XIV. Article 6(4) of the Regulation (et al.)—Exclusion of the application of the rule (negative definition of the material scope of Article 6 of the Regulation) 1162

6.XV. Some of the conflict of law issues common to the contractual obligations under Article 6(4) of the Regulation—the application of minimum standards 1164

6.XVI. Contracts provided exclusively in a country other than that in which the consumer has his or her habitual residence (Article 6(4)(a) of the Regulation) 1166

6.XVII. Contracts of carriage other than contracts relating to package travel (Article 6(4)(b) of the Regulation) 1167


6.XVII.4. Conflict of law issues relating to contracts regulating the creation of rights *in rem* in immovable properties, tenancy agreements and timeshares (Article 6(4)(c)) 1170

6.XVII.1. Limitation of material scope of Article 6 of the Regulation in connection with timeshares 1170

6.XVII.2. Conflict between the applicable legislation 1171

6.XVII.3. Conflict rules applicable to other than timeshare contracts 1172

6.XVII.4. Timeshare 1172


6.XVII.5.1. Purpose of the Directive 1172

6.XVII.5.2. *Timeshare* contract model 1173

6.XVII.5.3. Legal basis for the rules harmonising timeshare 1174


6.XVII.5.5. Substantive law (harmonisation) rules under Directive 94/47/EC 1177

6.XVII.5.5.1. Subject matter of the rules 1177

6.XVII.5.5.2. Material scope (Article 2 of Directive 94/47/EC) 1178

6.XVII.5.5.3. Obligation to provide information (Articles 3 and 4 of Directive 94/47/EC) 1179

6.XVII.5.5.4. Withdrawal from the contract (Article 5 of Directive 94/47/EC) 1179

6.XVII.5.5.5. Prohibition of advance payments (Article 6 of Directive 94/47/EC) 1180
6.XVIII.5.5.6. Credit financing (Article 7 of Directive 94/47/EC) 1180
6.XVIII.5.5.7. Prohibition of waiver of rights (Article 8 of Directive 94/47/EC) 1180
6.XVIII.5.5.8. Choice of the applicable law (Article 9 of Directive 94/47/EC) 1180
6.XVIII.5.5.9. Standard of protection 1181
6.XVIII.5.7. Proceedings relating to insufficient implementation and/or breach of the standards under Directive 94/47/EC 1181
6.XVIII.5.8. Case law concerning the application of Directive 94/47/EC 1182

6.XVIII.5.8.2. Other relevant case law 1185
6.XVIII.5.9. Implementation in the (CZ) legal system 1186
6.XVIII.6.4.1. Material scope 1190
6.XVIII.6.4.2. New definitions for certain concepts 1190
6.XVIII.6.4.3. Specification of the rules of advertising and requirements concerning pre-contractual information and contents of the contract 1191
6.XVIII.6.4.4. Withdrawal from the contract 1192
6.XVIII.6.4.5. Ancillary contracts 1192
6.XVIII.6.4.6. Application in relationships with international elements 1193

6.XIX. Trading with financial instruments and the capital market (Article 6(4)(d) of the Regulation) 1193
6.XIX.1. Material scope of Article 6(4)(d) of the Regulation 1193
6.XIX.2. Capital market versus money market 1194
6.XIX.2.1. Economic and legal definition of the market 1194
6.XIX.2.2. Legal framework regulating trading in financial instruments on the money market/capital market/regulated market—secondary EUlaw 1195
6.XIX.3. Laws of national origin (CZ—Czech Republic) 1196
6.XIX.4. Financial instruments 1197
6.XIX.5. Principles of investing in financial instruments 1199
6.XIX.6. Grounds for an exclusion from the scope of conflict rules regulating consumer contracts 1199
6.XIX.7. Takeover bids 1200
6.XIX.8. Units in collective investment entities (undertakings) 1201
6.XIX.8.1. Terminological inconsistency of the Czech version (entity versus undertaking) 1201
6.XIX.8.2. Exclusion of consumer protection by the conflict rules in Article 6 of the Regulation 1202
6.XIX.9. Transactions within multilateral systems which bring together or facilitate the bringing together of multiple third-party buying and selling interests in financial instruments (Article 6(4)(e) of the Regulation) 1202
6.XIX.10. Certain aspects common to the conflict of law regulation of contractual obligations under Article 6(4)(d) and (e) of the Regulation

6.XIX.10.1. Participation of the consumer in the payment systems

6.XIX.10.2. Consumer obligations arising out of negotiations (pre-contractual consumer obligations)

6.XX. **Assessment of the protection accorded to consumers under the conflict rules incorporated in the Regulation**

6.XXI. **Assessment of the protection accorded to consumers under the conflict rules incorporated in the Regulation**

6.XXI.1. Importance of *quasi* conflict rules incorporated in directives and their relationship to the conflict rules under Article 5 of the *Convention* and Article 6 of the *Regulation*

6.XXI.2. Some of the common denominators of conflict rules incorporated in consumer protection directives

6.XXI.3. Conflict rules incorporated in directives adopt one or the other of two basic approaches

6.XXI.4. Conflict rules incorporated in selected directives


6.XXI.4.7. Significance of the Annex to Directive 93/13/EEC (indicative list of unfair terms) from the perspective of conflict rules

6.XXI1. **Case law**

6.XXI1.1. ECJ—The Court of Justice of the European Communities

6.XXI1.2. Case law of Member States

6.XXI2.1. (A) Austria

6.XXI2.2. (B) Belgium

6.XXI2.3. (CZ) Czech Republic

6.XXI2.4. (D) Germany

6.XXI2.5. (F) France

6.XXI2.6. (I) Italy

6.XXI2.7. (SK) Slovakia
Article 7 of the Regulation

7.1. Significance of insurance from the perspective of private international law

7.1.1. The legislative framework prior to the Regulation

7.3. Conflict of law rules contained in the Directives

7.4. Regime of application of the Convention

7.4.1. Sources of law and definition

7.4.2. Conflict of law rules of the Convention for obligations under insurance contracts

7.4.3. Reinsurance contracts

7.4.4. Insurance contracts as consumer contracts in the regime of the Convention

7.4.5. Qualification of claims from insurance contracts

7.4.6. Draft provisions in the Proposal for a Regulation

7.4.7. The outcome of negotiations on the framework of conflict of law rules for insurance as embodied in the Regulation

7.5. Experience of Member States and transition to the regime of the Regulation

7.5.1. Basic structure of the text

7.5.2. Purpose of the Regulation

7.5.3.1. Scope of application (territorial and material)

7.5.3.2. The significance of risk dislocation as the connecting factor

7.5.4. The framework of conflict of law rules in the Regulation

7.5.5. Determination of applicable law on the basis of risk dislocation

7.5.6. Determination of the place where the risk is situated

7.5.7. Insurance contracts covering large risk

7.5.8. Insurance contracts covering multiple risks

7.5.9. Risk situated on the territory of the Member States

7.5.10. Extension of the freedom of choice of law within the meaning of the application of laws of national origin

7.5.11. Governing law in the absence of choice of law

7.5.12. Risks situated outside of the territorial space of the Member States

7.5.13. Special case of the mandatory insurance contract

7.6. Insurance contracts concluded by consumers (the provisions of the Regulation)

7.7. Reinsurance contracts (the provisions of the Regulation)

7.8. Direct insurance other than life assurance (taking-up and pursuit of the business of direct insurance other than life assurance (Council Directive 73/239/EEC)—especially in
relation to conflict of law rules and to other sources of law of the Community] 1296

7.IX.1. The normative foundations of direct insurance other than life assurance in the law of the Community 1296

7.IX.2. The purpose of the provision 1296


7.IX.4. The object, concept and contents of the Directive 73/239/EEC 1298

7.IX.5. Content—principles of the Directive 73/239/EEC 1300

7.IX.6. Treatment of governing law—conflict of law rules 1300

7.IX.6.1. Article 7 of the Second Directive on non-life insurance 1300

7.IX.6.2. Choice of law 1302

7.IX.6.3. Governing law for insurance contracts covering large risk and its relation to some regimes of the Convention and of the Regulation 1302

7.IX.6.4. Restriction of choice of law 1302

7.IX.7. Jurisdiction (international jurisdiction) 1302

7.IX.8. Mandatory rules (Article 7(2) of Directive 73/239/EEC) 1303

7.IX.9. Other conflict of law rules 1303

7.IX.10. The adoption procedure of the Directive 1304

7.IX.11. Case law related to the interpretation of Community legislation on insurance other than life assurance 1304

7.IX.11.1. Case Skandia (ECJ, C-241/97)—admissibility of restrictions on capital participation of insurance companies under Swedish law 1304

7.IX.11.2. The Epikouriko case (ECJ, C-28/03)—use of reserves created for insurance contract liabilities in order to meet wage contract liabilities 1307

7.IX.11.3. ECJ Case Association basco-bearnaise des opticiens independants (, C-109/99)—capital participation by an insurance company 1308


7.X.1.1. The purpose of the Directive 1309

7.X.1.2. Universal scope of application 1310

7.X.1.3. Universal authorisation 1310


7.X.3. Law applicable and choice of law (Chapter 4 of Directive 2002/83/EC) 1312

7.X.3.1. The law of the Member State of the commitment 1312

7.X.3.2. Choice of law 1312

7.X.3.3. Technique and principles of conflict of law rules for the choice of applicable law. Contractual autonomy versus the requirement of protection 1312

7.X.3.4. General conflict of law rules determining the possibility and limits of choice of law 1313
7.X.3.5. Materialised conflict of law and connection to citizenship in lex electa 1313
7.X.3.6. Multi-legal state (a state with a larger number of legal orders/systems) 1313
7.X.3.7. The priority of mandatory rules of the forum and mandatory rules of law 1314
7.X.4. Relationship of Directive 2002/83/EC to the Regulation (‘Convention’) and to other enactments of the Community 1315
7.X.4.1. Relationship to the Convention, the Regulation, eventually to other conflict of law rules applicable in individual Member States 1315
7.X.4.2. Relation to other enactments of the Community 1315
7.X.6. Other than conflict of law protection of the policy holder as the weaker party/respecting the role of consumer 1316
7.X.6.1. Indirect protection of the consumer—policy holder 1316
7.X.6.2.2. Rules relating to conditions of assurance and scales of premiums (Article 34 of Directive 2002/83/EC) 1317
7.X.6.2.3. Cancellation periods for individual life assurance (Article 35 of Directive 2002/83/EC) 1317
7.X.6.2.4. Mandatory information disclosure/information for policy holders (Article 36 of Directive 2002/83/EC) 1318
7.XI. Case law 1318
7.XI.1. ECJ—The Court of Justice of the European Communities 1318
7.XI.2. Case law of Member States 1323
7.XI.2.1. (A) Austria 1323
7.XI.2.2. (CZ) Czech Republic 1326
7.XI.2.3. (D) Germany 1327
Literature 1331

Article 8 of the Regulation! Article 6 of the Convention 1339

8.1. Labour-law relationships with international aspects and regulation of private international law of national origin .... 1340
8.11. Czech provisions of private international law of national origin 1341
8.11.1. Party autonomy (freedom of contract) under the Czech Private International Law Act 1341
8.11.2. Scope of the application of private international law rules to labour-law relationships with international aspects 1344
8.11.3. Application of foreign law on labour-law relationships for work performed in the Czech Republic 1345
8.11.3.1. The principle of original method of application of foreign law 1345
8.11.3.2. Restrictions in labour-law relationships imposed under the reservation of public policy 1346
8.11.3.3. Restrictions under the overriding mandatory provisions (provisions mandatory from the international perspective) 1349
Conflict of law rules of national origin (CZ) in the Bill on Private International Law 1349
Bilateral conflict of law rules of international origin regulating labour-law relationships 1350
Fundamental provisions of the EU and the Community law regulating work and labour-law relationships 1352
Freedom of employment and freedom to move and settle within the single market (public-law dimension) 1352
EU citizenship, freedom of movement and freedom of employment as fundamental principles of primary law 1352
Implementation of the fundamental principles in secondary law 1353
Equality of men and women in labour-law relationships as the fundamental principle of European (labour-law) policy 1354
Private law dimension of freedom of movement and freedom of employment 1357
Place of work and personal status as the private-law antithesis of nationality as a connecting factor under public law 1357
Universal nature of the Convention/Regulation as the expression of private-law equality independent of nationality 1358
Application of the lex fori conflict of law rules 1358
Conflict of law rules under the Regulation and the Convention 1358
The concept common to the material scope of both the Regulation and the Convention 1359
Subject matter (material scope) 1359
The concept of individual employment contract and the interpretation thereof in connection with Regulation 44/2001 .. 1359
Characteristic features of individual employment contracts (individual labour-law relationships) 1359
Major importance of the true contents of the contract and the contractual relationship 1360
Employment contracts and labour-law relationships 1362
The meaning of the concept of individual employment contracts and individual labour-law relationships 1363
Individual employment contracts 1363
Individual labour-law relationships 1363
De facto labour-law relationships 1363
The specialities of the conflict labour-law rules compared to the general regulation of the effects of the applicable law on the consequences of nullity under Article 12(I)(e) of the Regulation (Article 10(I)(e) of the Convention) 1364
8.V.2. Other categories of individual labour-law relationships covered by the scope of Article 8 of the Regulation!Article 6 of the Convention 1364
8.V.2.I. The so-called family labour-law relationships, both between spouses and between parents and children 1365
8.V.2.2. Apprenticeship 1365
8.V.2.3. Trainees, volunteers 1366
8.V.2.4. Public sector workers 1367

LIII
8.V.2.4.I. Private law employment relationships and the exercise of power by public authorities from the conflict of law perspective 1367

8.V.2.4.2. Workers employed by diplomatic and consular missions, international organizations and other international (public) law entities 1369

8.VI. Differences compared to the Convention 1370
8.VI.1. Formal terminological clarification of the material scope 1370
8.VI.2. Specific features of distribution and franchise agreements and the qualitative difference between the wording of the Regulation and the wording of the Convention in connection with the amended wording of Article 4 of the Convention versus Article 4 of the Regulation 1370

8.VII. Conflict of law rules incorporated in the Regulation and the Convention 1371
8.VII.1. Party autonomy 1371
8.VII.1.1. Choice of law 1371
8.VII.1.2. Restrictions of party autonomy in the interest of the protection of employees 1372
8.VII.2. Agreements on the validity of law outside of the sovereign territory of a particular state 1373
8.VII.2.1. Effects of the internal market clause 1373
8.VII.2.1.1. Law applicable in the absence of choice of law 1373
8.VII.2.1.2. Determination of the place where the employee habitually carries out his or her work 1374
8.VII.2.1.2.1. A more precise definition of the place of work in the Regulation as opposed to the Convention 1374
8.VII.2.1.2.2. The influence of the ECJ judgment in Mulox and Rutten to Regulation 44/2001 1374
8.VII.2.2. Flight crews 1374
8.VII.2.2.1. Flight attendants (stewards and stewardesses) 1374
8.VII.2.2.2. Pilots 1375
8.VII.2.3. Distance work 1376
8.VII.2.4. Temporary work in a different Member State 1377
8.VII.2.4.1. Posting of employees 1377
8.VII.2.4.2. Posting within the same [holding-type] group of companies 1379
8.VII.2.4.3. Connection to the Directive concerning the posting of workers 1380
8.VII.2.4.4. Contents of the governing law/law applicable in the framework of the posting of employees 1382
8.VII.3. Work performed outside the sovereign territory of a state 1383
8.VII.3.1. Unsuccessful proposal for special provisions along the lines of the Proposal for the Regulation 1383
8.VII.3.2. Labour-law relationships of employees on sea vessels 1383
8.VII.4. Escape clause 1384
8.VII.5. Further space for case law 1385

8.VIII. Employees as consumers—the individual doctrine of German labour and consumer law 1385
8.VIII.1. Special manifestation of the protection accorded to the weaker party as a reason for this treatise on the German doctrine 1385
8.VI.1. Labour-law relationships with international aspects from the perspective of German conflict of law rules 1385

8.VIII.3. Application of consumer protection to labour-law relationships 1387

8.IX. Social security regulations and their application to (labour-law) contractual obligations (obligation relationships) with international aspects 1388

8.X. Case law 1389

8.X.I. EC)—The Court of Justice of the European Communities 1389

8.X.II. Case law of the courts of Member States 1403

8.X.II.1. (A) Austria 1403

8.X.II.2. (CZ) Czech Republic 1410

8.X.II.3. (D) Germany 1415

8.X.II.4. (F) France 1432

8.X.II.5. (I) Italy 1436

8.X.II.6. (NL) The Netherlands 1436

8.X.II.7. (SK) Slovakia 1438

8.X.II.8. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN) 1441

8.X.II.9. (DK) Denmark 1442

Literature 1445

Article 9 of the Regulation! Article 7 of the Convention 1463

09.1. The Purpose of the Stipulation 1464

09.I. Terminology of Article 9 of the Regulation (Article 7 of the Convention) in reference to Article 3(3) of the Regulation (Article 3(3) of the Convention)—A problem of more than just language 1464

09.I.1. Mandatory Rules versus Overriding Mandatory Provisions 1464

09.I.2. Terminological ambiguity of the Convention 1466

09.III. Mandatory rule as a directly applicable norm 1469

09.IV. Classification, identification and definitions of mandatory rules 1474

09.IV.1. Defining mandatory norms as a basic judicial function 1474

09.IV.2. The definitions of mandatory rules in reference to the content of mandatory rules and to the jurisprudence of the ECJ 1478

09.IV.2.1. Perspective: content 1478

09.IV.2.2. Perspective: terminology in connection with the character and content of mandatory rules (definition) 1478

09.IV.2.3. Definitions of mandatory norms according to the decision of the ECJ in the case of Arblade 1479

09.IV.2.4. A compromise solution 1480

09.V. Restrictions on freedom of contract and the relationship of Article 3(4) to mandatory norms [overriding mandatory provisions] of Art 9 of the Regulation 1480

09.VI. Distinguishing between mandatory norms (in Czech: imperativní normy and kogentní normy) 1481

09.VI.1. Mandatory rules—Article 7 of the Convention and Article 9 of the Regulation 1481
09.VI.2. The character of mandatory rules 1482
09.VI.2.1. Legal construction 1482
09.VI.2.2. The function of mandatory provisions 1482
09.VI.3. The relationship between forms of mandatory rules 1484
09.VII. Comparison of mandatory rules with public policy 1487
09.VIII. Types of mandatory rules 1492
09.IX. Examples of mandatory provisions (and rules) (versus public policy) 1493
09.IX.1. Example of provisions identified as mandatory or which may be considered mandatory in terms of practice 1493
09.IX.1.1. (A) Austria 1493
09.IX.1.2. (CZ) Czech Republic 1493
09.IX.1.3. (D) Germany 1495
09.IX.1.4. (F) France 1495
09.IX.1.5. (NL) Netherlands 1496
09.IX.1.6. (EU) Rules of Community origin 1496
09.IX.2. Examples of provisions which do not have mandatory character or are not expressly identified as mandatory 1496
09.IX.2.1. (CZ) Czech Republic 1496
09.IX.2.2. (D) Germany 1497
09.IX.3. Examples of provisions identified as mandatory but excluded from the scope of the 'public policy' exception 1497
09.IX.3.1. (A) Austria 1497
09.IX.3.2. (NL) The Netherlands 1497
09.IX.4. Examples of breach of public policy with potential application of the public policy exception 1498
09.IX.4.1. (D) Germany 1498
09.IX.4.2. (F) France 1498
09.IX.4.3. (SK) Slovakia 1499
09.X. The character of mandatory provisions—public law versus private law 1499
09.XI. Mandatory provisions and the requirement of guaranteeing the fundamental freedoms of the Community/admissible exceptions from the perspective of the decisions of the EC) in the cases Arblade and Ingmar 1500
09.XII. Authority of the ECJ to interpret 1502
09.XIII. Judicial discretion 1503
09.XIII.1. Classification of norms as mandatory and the means of their application 1503
09.XIII.2. Consideration in the case of a conflict between mandatory provisions of lex causae and those of lex loci solutionis 1504
09.XIII.3. Requirements concerning the exercise of judicial discretion 1504
09.XIV. Application of mandatory rules under the Convention and under the Regulation 1505
09.XIV.1. Mandatory rules of lex fori 1505
09.XIV.2. Mandatory rules of a third state (foreign mandatory rules) 1506
09.XIV.2.1. Restriction of mandatory rules of countries other than lex fori 1506
09.XIV.2.2. Difference in application 1506
09.XIV.2.3. The Convention

09.XIV.2.4. Genesis of the Regulation and its relation to the Convention ....

09.XIV.2.5. The Regulation

09.XIV.2.5.1. Concept of the Regulation [in fine]

09.XIV.2.5.2. Restrictions in the form of conditions for the determination and application of mandatory rules

09.XIV.2.5.3. Cases of uncertain place of performance

09.XIV.2.5.4. Mandatory rules of the lex loci solutionis

09.XV. Application of foreign mandatory rules in reference to English law (UK)

09.XV.1. Criticism of legal uncertainty and the threat to uniform application of the law

09.XV.2. The English decision in the case of Ralli Bros v. Compani Naviera Sota y Aznar as one of the historical foundations for the application of mandatory rules

09.XVI. Experience of Member States with interpretation and application of stipulations concerning mandatory rules, and the theoretical and practical approach of selected countries

09.XVI.1. (D) Germany

09.XVI.1.1. German Legal Theory

09.XVI.1.2. Germany Case law

09.XVI.2. (F) France

09.XVI.2.1. Decision in the case of Epoux Rousseau (F) versus Commerzbank (D)

09.XVI.2.2. Decision in the case of Mme Moquin (F) versus Deutsche Bank (D)

09.XVI.3. (NL) The Netherlands

09.XVI.4. (UK The United Kingdom of Great Britain and Northern Ireland (in this instance, the law of England and Wales)

09.XVII. Case law

09.XVII.1. ECJ—The Court of Justice of the European Communities

09.XVII.2. Case law of Member States

09.XVII.2.1. (A) Austria

09.XVII.2.2. (CZ) Czech Republic

09.XVII.2.3. (D) Germany

09.XVII.2.4. (F) France

09.XVII.2.5. (NL) The Netherlands

09.XVII.2.6. (SE) Sweden

09.XVII.2.7. (SK) Slovakia

09.XVII.2.8. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN)

09.XVII.2.9. (DK) Denmark

09.XVII.3. Case law of Non-Member States

09.XVII.3.1. (CH) Switzerland

09.XVII.4. Arbitration

09.XVII.4.1. ICC (International Chamber of Commerce)

Literature
Article 10 of the Regulation! Article 8 of the Convention

10.1. Material scope of the regulation
10.11. Existence and validity of a contract—Article 10(1) of the Regulation
10.11.1. Comparison of language versions
10.11.2. Conception and purpose of the regulation
10.111. Absence of consensus—Article 10(2) of the Regulation
10.111.1. Comparison of the frequented language versions
10.111.2. Non-existence of consensus and existence of validity
10.111.3. Silence of the participant
10.IV. Conditions of application of Article 10(2) of the Regulation/Article 8(2) of the Convention
10.IV.1. Subjective scope
10.IV.2. Possibility of application [of protection] of Article 10(2) of the Regulation!Article 8(2) of the Convention
10.V. Law of the country in which the habitual residence is located
10.VI. Habitual residence
10.VII. Purpose of finding out the absence of consent
10.VIII. Circumstances establishing inadequacy
10.VIII.1. Circumstances of inadequacy
10.VIII.2. Adequacy (inadequacy)
10.VIII.3. Determination of effects of the conduct of the contractual party
10.VIII.4. Inadequacy of law under Article 10(1) of the Regulation (Article 8(1) of the Convention)
10.VII.5. Inadequacy in the sense of public policy
10.VIII.6. Freedom of will and its manifestation
10.VIII.6.1. Constitutional and international context of freedom of will and its manifestation
10.VIII.6.2. Connection to the constitutional right to appeal to the court ...
10.IX. Selection from case law of the Member States
10.IX.1. (B) Belgium
10.IX.2. (CZ) Czech Republic
10.IX.3. (F) France
10.IX.4. (NL) The Netherlands
Literature

Article 11 of the Regulation! Article 9 of the Convention

11.1. Purpose and subject matter of the rules
11.11. Comparison between the Regulation and the Convention ...
11.111. Scope of Article 11 of the Regulation!Article 9 of the Convention
11.111.1. Exclusion of acts before public authorities
11.111.2. The concept of formal validity
11.111.3. The difference between material validity and formal requirements imposed on the external manifestation of an expression of will
11.111.4. Formal and material validity

11.111.5. Historical roots of the origin of the rules incorporated in the Convention and the material scope of Article 11 of the Regulation (Article 9 of the Convention) and the genesis of Article 11 of the Regulation

11.111.6. Unsuccessful attempt of the EC at the broadening of the alternative connecting factor so as to include the place of habitual residence and distance contracts

11.111.7. Experience of the Member States with the interpretation and application of the conflict rules regulating formal validity of contracts

11.111.8. A compromise between favor negotii and the due observance of the requirements of form

11.111.9. Overriding mandatory provisions

II.IV. Contracts concluded between the parties or their agents [physically] present in the same country: lex contractus or lex loci actum (Article 11(1) of the Regulation)

II.IV.1. Comparison of the wording employed by the most important language versions and the fundamental concept of the connecting factor under Article 11(1) of the Regulation

II.IV.2. The law applicable to the formal conditions of validity and splitting of the applicable law

II.IV.2.1. Lex contractus

II.IV.2.2. Depe^age

II.IV.2.3. The answer provided by Article 11 of the Regulation and the Report

II.IV.2.4. Depe^age for the assessment of the formal requirements as the possible solution

II.IV.2.5. The absence of a solution solely on the basis of Article 11 of the Regulation

II.IV.2.6. Locus regit actum

II.V. Contract concluded between persons who, or whose agents, are in different countries at the time when the contract is concluded (Article 11(2) of the Regulation)

II.V.1. The importance of updating the conflict rules incorporated in the Regulation compared to the Convention

II.V.2. Contracts concluded through the medium of agents

II.V.2.1. Agents in the same country/in different countries

II.V.2.2. The time perspective

II.V.2.3. A contract concluded through the medium of agents

II.VI. Unilateral act intending to have legal effect relating to an existing or contemplated contract (Article 11(3) of the Regulation)

II.VI.1. Comparison of certain selected language versions

II.VI.2. Material scope—unilateral acts intended to have legal effects on existing or contemplated contracts

II.VI.3. Habitual residence

II.VII. An exception concerning consumer contracts (Article 11(4) of the Regulation, Article 9(5) of the Convention)
11.VIII. Rights in rem in immovable property or tenancy of immovable property (Article 11(5) of the Regulation!Article 9(6) of the Convention) 1638

11.VIII.1. Comparison of certain selected language versions 1638
11.VIII.2. The law governing the determination of the formal requirements for validity of contracts 1638
11.VIII.3. Application of overriding mandatory provisions 1639
11.VIII.4. Material scope 1640
11.VIII.4.1. Acquisition of (ownership) title and tenancy rights 1640
11.VIII.4.2. Relationship to consumer contracts regulating rights in immovable properties 1640
11.VIII.4.3. Immovable properties from the perspective of Community law 1641
11.VIII.4.3.1. Immovable properties as the subject matter of Community law 1641
11.VIII.4.3.2. The TEC in connection with rights in immovable properties 1642
11.VIII.5. Observance of the form as a condition and prerequisite for the purpose of the contract and for protecting property rights 1643
11.VIII.6. The use of electronic media in concluding contracts and contracts relating to immovable properties 1643

11.IX. Case Law of Member States 1645
11.IX.1. (A) Austria 1645
11.IX.2. (B) Belgium 1647
11.IX.3. (CZ) Czech Republic 1648
11.IX.4. (D) Germany 1654
11.IX.5. (F) France 1657
11.IX.6. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN) 1658

11.X. Case Law of Non-Member States 1658
11.X.1. (CND) Canada 1658

Literature 1658

Article 12 of the Regulation!Article 10 of the Convention 1663

12.1. The importance, material scope and the place of the conflict rules in Article 12 of the Regulation!Article 10 of the Convention in their respective regimes 1664
12.1.1. Conceptual definition of the rules vis-a-vis other conflict rules incorporated in the Regulation/Convention 1664
12.1.2. Adoption of the Convention standard 1665
12.11. Scope of the law (Article 12(1) of the Regulation/Article 10(1) of the Convention)—material scope 1665
12.11.1. Comparison of the language versions 1665
12.11.2. The concept of the rules—examples of the effects of the law applicable to a contract (contractual obligation—relationship) 1665
12.11.3. Material scope 1665
12.11.4. Limitation of the effects of the applicable law 1666
12.11.4.1. The difference between the Convention (Article 10(1)) and the Regulation (Article 12(1))—Limitation of the material scope of Article 12(1) of the Convention to the law chosen by the parties and the law applicable to [individual] employment contracts 1666

LX
Exclusion of pre-contractual obligations from the material scope of the [entire] Regulation 1666
Limitation of the effects of the law in terms of Article 12(1) of the Regulation as well as Article 10(1) of the Convention 1666
Interpretation [of a contract, a contractual obligation, an (obligation) relationship] Article 12(a) of the Regulation/Article 10(l)(a) of the Convention 1666
Performance (Article 12(l)(b) of the Regulation!Article 10(l)(b) of the Convention) 1668
Positive definition of the scope 1668
Negative definition of the scope 1671
Importance of the influence of certain legal cultures and the multifaceted scope of performance—the example of habitual diligence 1671
Powers granted to the court by the applicable procedural law (Article 12(l)(c) of the Regulation!Article 10(l)(c) of the Convention) 1672
Consequences of a total or partial breach (Article 12(l)(c) of the Regulation!Article 10(l)(c) of the Convention) 1672
Damage (Article 12(l)(c) of the Regulation!Article 10(l)(c) of the Convention): question of fact v. question of law 1673
Scope 1673
Damage under the substantive law 1674
Other claims arising from a breach of contract and their qualification (classification/resiiviuio in integrum 1675
Ways of extinguishing obligations (Article 12(l)(d) of the Regulation!Article 10(l)(d) of the Convention) 1675
Nullity (Article 12(l)(e) of the Regulation!Article 10(l)(e) of the Convention) 1676
Broad scope of the consequences of nullity 1676
Reservation of the (UK) to Article 10 of the Convention (Article 22(2)(b) of the Convention) 1676
Parallel to Regulation 864/2007 1677
Manner of performance and defective performance (Article 12(2) of the Regulation!Article 10(2) of the Convention) 1677
Comparison of the language versions 1677
The concept of the rules 1677
Regard shall be had 1678
The state (country) in which performance takes place/place of performance as a requirement for the determination of the state in which performance takes place 1679
Scope of the words country in which performance takes place .. 1679
Case law of the ECJ (Tessili case) 1679
Manner of performance 1679
Autonomous interpretation 1679
The difference between the manner of performance and performance illustrated on the example of the currency in which payment is made versus the currency in which the account is denominated 1680
Special methods of performance 1680
12.III.4.3.4. Other special cases 1681
12.111.4.4. Set-off (connection to Article 17 of the Regulation) 1681
12.III.4.5. Right of retention 1681

12.IV. Modification of the contents of obligations as a result of the introduction (change) of a new currency unit in the country 1682
12.IV.1. Change of the currency unit as a technical change 1682
12.IV.2. Adoption of EUR in the individual Member States 1682

12.V. Case law 1687
12.V.1. ECJ—The Court of Justice of the European Communities 1687
12.V.2. Case law of Member States 1688
12.V.2.1. (A) Austria 1688
12.V.2.2. (CZ) Czech Republic 1691
12.V.2.3. (D) Germany 1698
12.V.2.4. (F) France 1698
12.V.2.5. (I) Italy 1699
12.V.2.6. (NL) The Netherlands 1701
12.V.2.7. (SK) Slovakia 1701
12.V.2.9. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN) 1704
12.V.3. Case law of Non-Member states 1705
12.V.3.1. (CH) Switzerland 1705
12.V.4. Arbitration 1706
12.V.4.1. (CZ) Czech Republic 1706
12.V.4.2. (ICC) 1706

12.V.4.2. Literature 1707

Article 13 of the Regulation!Article 11 of the Convention 1711
13.1. Comparison between the Regulation and the Convention .... 1712
13.11. Comparison of language versions and the contentual qualification of the term capacity/incapacity 1712
13.111. The material scope of capacity as defined by the Regulation 1712
13.IV. The conception of the conflict of law 1712
13.V. Conditions for the application of Art. 13 of the Regulation 1713
13.V.1. Accumulative conditions 1713
13.V.2. Physical presence of parties when concluding a contract 1714
13.V.3. Good faith 1714
13.V11. Relation to similar concepts of the regulation of international private law of national origin 1715
13.VIII. Case law 1715
13.VIII.1. (CZ) Czech Republic 1715
13.VIII.2. (UK) The United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN) 1716

13.VIII.2. Literature 1716

LXII
14.1. Purpose of the provisions

14.11. Relationship between assignor and assignee: law governing contract of assignment—under Article 14(1) of the Regulation

14.11.1. Comparison of different language versions

14.11.2. Assignability and the relationship between the assignor and the debtor: the law applicable to assigned or subrogated claims—under Article 14(2) of the Regulation

14.11.2.1. Assignability and opposability, material scope

14.11.2.2. Law applicable to the relationship to third parties


14.111.1. Convention on assignment, its purpose and object

14.111.2. Object and purpose of the Convention on Assignment

14.111.3. International element under the Convention on Assignment (the international character of the receivable and the international character of the assignment)

14.111.4. Comparison with the concept of the Convention, the Regulation and the UNIDROIT contractual arrangements

14.111.5. Assignment under UNIDROIT

14.111.5.1. Binding and non-binding provisions contained in UNIDROIT

14.111.5.2. UNIDROIT Principles

14.IV. International factoring

14.IV.1. Factoring as a business model and as a legal institute

14.IV.2. Qualification of factoring under private international law


14.IV.4. Elements of substantive definition of factoring under the Convention on factoring (obligations of the parties)

14.IV.5. Financing in the field of services

14.IV.6. Conditions and scope of application of the Convention on Factoring

14.IV.7. Other important legal aspects of the Convention on factoring ...

14.V. Case law of Member States

14.V.1. (A) Austria

14.V.2. (B) Belgium

14.V.3. (CZ) Czech Republic

14.V.4. (D) Germany

14.V.5. (F) France

14.V.6. (NL) The Netherlands

14.V.7. UK) United Kingdom of Great Britain and Northern Ireland

Literature
Article 15 of the Regulation! Article 13 (1) of the Convention

15.1. Relations between the Convention and the Regulation
1781

15.11. Comparison of language versions
1752

15.111. Applicability of Article 15 of the Regulation
1752

15.IV. Applicable law
1754

15.V. Case law
1755

15.V.1. EC|—The Court of Justice of the European Communities
1755

15.V.2. Case law of Member States
1756

15.V.2.1. (CZ) Czech Republic
1756

Literature
1756

Article 16 of the Regulation! Article 13 (2) of the Convention

16.1. Subjective scope
1787

16.11. Material scope
1758

16.111. The language issue of the Czech version
1758

16.IV. Unity or plurality of the status of a fulfilled obligation
1759

16.V. The concept of the provisions of Article 16 of the Regulation and Article 13(2) of the Convention
1759

Literature
1760

Article 17 of the Regulation! Article 10(1) b) and Article 10(2) of the Convention

17.1. Material scope of the conflict of law status of the set-off: qualification
1562

17.11. Pre-requisites for the solution of the set-off conflict status
1763

17.111. Determination of the international element in relation to the set-off
1764

17.IV. Concept of determination of the conflict of law status for the set-off
1765

17.V. Conflict of law solution under the Convention
1766

17.V.1. Absence of special regulations
1766

17.V.2. The ECJ approach to the set-off
1767

17.VI. Genesis of Article 17 of the Regulation
1768

17.VII. Applicable law under the Regulation
1769

17.VIII. Material scope of Article 17 of the Regulation
1770

17.VIII.1. Scope of applicability
1770

17.VIII.2. Set-off and booking
1773

17.VIII.3. Set-off of contractual and non-contractual obligations
1775

17.VIII.4. Effect of the law applicable to the set-off under Article 17 of the Regulation
1778

17.VIII.5. Exclusive conflict effect of Article 17 of the Regulation
1778

17.IX. Novation and set-off through settlement
1779

17.X. Law applicable for certain recourse claims
1783

17.XI. Monetary expression of financial obligations/diversity of currencies as a possible obstacle to the set-off
1783

LXIV
Monetary expression as a qualitative determinator of the claim

Approach of some countries to the solution of the monetary compatibility of offset claims

(A) Austria

(CH) Switzerland

(CZ) Czech Republic

(D) Germany

(PL) Poland

Set-off according to certain legal systems

(A) Austria

(D) Germany

(CH) Switzerland

Set-off concept under Swiss law

Set-off according to certain legal systems

Reciprocity

Type compatibility of claims

Maturity

Enforceability

Exclusion of eligibility

Conflict of law rules regulating the set-off under Swiss private international law

Unilateral set-off

Consensual set-off (agreement on the set-off)

(CZ) Czech Republic

(PL) Poland

Effects of the set-off

Conditions for the set-off on the basis of unilateral declaration

Consequences of the set-off

Limitation of the set-off (exclusion of eligibility)

Claim secured by a lien

Exclusion of some other categories of claims

Conflict of law rules for set-off in Polish private international law

Set-off from the viewpoint of the Roman Law legal systems

Concept of the set-off

Conditions of eligibility

Set-off from the Common Law perspective

(UK/EN)—United Kingdom of Great Britain and Northern Ireland/law of England and Wales

Concept in English law

Types of set-off in English law

Legal set-off

Equitable Set-off

Set-off in the case of insolvency

Contractual set-off

Law applicable to the set-off under English law

(US) United States of America/legal systems (US)
17.XIII. Set-off under the Vienna Convention 1818
17.XIV. Procedural context of the substantive set-off from a conflict of law perspective 1821
17.XV. Case law 1825
17.XV.1. ECJ—The Court of Justice of the European Communities 1825
17.XV.2. Case law of Member States 1826
17.XV.2.1. (A) Austria 1826
17.XV.2.2. (CZ) Czech Republic 1826
17.XV.2.3. (D) Germany 1827
17.XV.3. From arbitration 1828
17.XV.3.1. (CZ) Czech Republic 1828

Literature 1828

18. Article 18 of the Regulation 1831

18.1. Genesis of the regulatory framework and comparison with Article 18 of the Regulation and Article 14 of the Convention: identity of content 1857
18.11. Material scope 1832
18.111. Conflict of law rule 1832
18.IV. In regard to Article 18(1) of the Regulation!Article 14 of the Convention 1832
18.V. The conflict between substantive and procedural status 1833
18.VI. In regard to Article 18(2) of the Regulation!Article 14 of the Convention 1836
18.VII. Establishment of the content of applicable law 1837
18.VII.1. Establishment of the applicable law as a prerequisite of its application 1837
18.VII.2. Court procedure in conflict of law situations 1837
18.VII.3. A comparison to determine and establish the applicable law in overseas forms of the common law (comparison with the (US)) 1838
18.VIII. Case law of the courts of Member States (including judgments related to the establishment of applicable law) 1839
18.VIII.1. (A) Austria 1839
18.VIII.2. (CZ) Czech Republic 1843
18.VIII.3. (F) France 1845
18.VIII.4. (I) Italy 1845
18.VIII.5. (SK) Slovakia 1846
18.VIII.6. (UK) United Kingdom of Great Britain and Northern Ireland/law of England and Wales (UK/EN) 1846

Literature 1847

19. Article 19 of the Regulation 1849

19.1. Scope and comparison to the Convention 1850
19.11. Definition of the term habitual residence 1850
19.II.1. Residence and similar qualification (connection) factors in other conflict of law rules 1850
19.11.2. Residence, stay (permanent and habitual) under the HCCH conventions

19.11.3. Czech concept of *habitual residence* as an example of the prevailing state and absent legal tradition concerning *habitual residence* ...

19.11. Resolution of the Committee of Ministers 72(1) of 19 January 1972

19.11.2. Residence

19.11.3. Domicile

19.IV. Term *habitual residence* in English law

19.V. Conflict of law regulations of the Community secondary law

19.VI. Other ECJ case law

19.VII. The term *habitual residence* in the *Regulation*

19.VII.1. Autonomous interpretation

19.VII.2. Habitual residence in the ECJ case law

19.VIII. Habitual residence of a legal entity: Status of legal entities from the private international law perspective (*incorporation theory versus real seat theory*)

19.VIII.1. Significance of the status of legal entities within legal relationships with an international element

19.VIII.2. Citizenship of legal entities

19.VIII.3. Statutory theory versus the purpose of the Community conflict of law regimes including the Regulation and the Convention

19.VIII.4. Determination of the seat of the legal entity

19.VIII.4.1. Methods for the qualified determination of the seat of the legal entity

19.VIII.4.2. Incorporation principle

19.VIII.4.3. Statutory theory of the real seat theory and link-up to real residence

19.VIII.4.3.1. Principle of the seat

19.VIII.4.3.2. Relationship of the real seat theory to habitual residence and other conflict of law criteria in European private international law

19.VIII.4.4. Combined systems

19.VIII.4.5. Approach of some Member States when determining the seat

19.IX. Establishment of legal entities and entrepreneurs in contractual obligation relationships with an international element

19.IX.1. Meaning of the term establishment for contractual obligation relationships

19.IX.2. Types of establishment

19.IX.2.1. Establishment, principal establishment and other establishment

19.IX.2.2. Branch, agency and other establishment

19.IX.2.3. Central administration and main establishment

19.IX.3. Establishment in the mode of *the Regulation 1346/2000 v. establishment* in other legislation of European private international law
19.X. Habitual residence of companies and other bodies, corporate or unincorporated in the regime of Article 19(1) and (2) of the Regulation 1878
19.XI. Habitual residence of natural persons acting in the course of the business activities (Article 19(1) of the Regulation) 1879
19.XII. Time perspective under Article 19(3) of the Regulation and relation to the mode of application of the Convention 1879
19.XIII. Member States' experiences with interpretation and application of the provision 1880
19.XIV. Some conflict (unclear) situations concerning ascertainment of habitual residence 1880
19.XIV.1. Habitual residence of the consumer and the entrepreneur 1880
19.XIV.2. Several residences or seasonal/alternating residence 1881
19.XIV.3. Ambiguity of habitual residence for business in the consumer's relationships 1881
19.XIV.4. Case law 1883
19.XIV.4.1. ECJ—Court of Justice of the European Communities 1883
19.XIV.4.2. Member States courts case law 1886
19.XIV.4.2.1. (CZ) Czech Republic 1886
19.XIV.4.2.2. (D) Germany 1887
19.XIV.4.2.3. (UK) United Kingdom of Great Britain and Northern Ireland—law: England and Wales (UK/EN) 1888

Literature 1888

Article 20 of the Regulation/Article 15 of the Convention 1895

20.1. Definition of Renvoi 1901
20.11. Doctrinal solution of renvoi in selected legal systems and jurisdictions 1899
20.11.1. Continental approaches to renvoi 1899
20.11.1.1. Diversity of solutions and the fundamental admissibility of renvoi 1899
20.11.1.2. The approach of some [continental] legal systems to renvoi 1900
20.11.1.2.1. (A) Austria 1901
20.11.1.2.2. (CZ) Czech Republic 1901
20.11.1.2.2.1. Admissibility of renvoi under section 35 MPSaP (CZ) 1901
20.11.1.2.2.2. Evaluation of reasonable and equitable arrangements of a legal relationship 1901
20.11.1.2.2.3. Forum shopping versus misuse of law (fraus legis) 1901
20.11.1.2.2.4. Close relationship with the procedural rules of private international law 1902
20.11.1.2.2.5. Renvoi under the government draft for a new Act on private international law (CZ) 1903
20.11.1.2.3. (D) Germany 1905
20.11.1.2.4. (E) Spain 1905
20.11.1.2.5. (PL) Poland 1906
20.11.2. The approach under Common Law (especially from the perspective of English law) 1906

LXVIII
20.11.2.1. Domicile under *Common Law* as the basis for competency (jurisdiction), determination of the so-called *proper law* and the importance of renvoi 1906

20.11.2.2. Dependence of the possible use of renvoi on the analysis and evaluation of the facts of the case and the legal situation 1908

20.11.2.3. Doctrinal approach of the *Common Law* (English law) to renvoi 1909

20.11.2.4. Hidden renvoi in *Common Law* 1910

20.11.2.4.1. Hidden renvoi in English law 1910

20.11.2.4.2. Comparison with the hidden conflict of conflict of law rules 1911

20.111. Renvoi to the law of a state with multiple national legal systems (conditional upon territory or person) 1912

20.111.1. Renvoi to the law of a state with multiple national legal systems but with universal private international law 1912

20.111.2. Renvoi to a legal system without uniform private international law conflict of law rules 1912

20.1V. Genesis of the *Regulation* 1913

20.V. Exclusion of renvoi under the *Regulation* and under the *Convention* 1914

20.VI. Exception to the exclusion of renvoi and differences between the *Regulation* and the *Convention* 1914

20.VII. *Renvoi* to the law of a Member State as opposed to renvoi to the law of a non-Member State 1915

20.VIII. The influence of the choice of applicable law on the exclusion of renvoi 1915

20.VIII.1. The choice of the law of a Member State/Contracting State 1915

20.VIII.2. Choice of the law of a non-Member (Contracting) State 1917

20.IX. Renvoi in sources of international origin 1917

20.IX.1. The importance of sources of international origin for conflict of law rules, in light of some particular issues 1917

20.IX.2. The necessity to examine the impact of conflict of law rules of private international law on the conflict of law (scope, construction and methods of application) rules of the state to which renvoi is made 1918

20.IX.3. The special status of the Conventions of the Hague Conference on Private International Law (HCCH) 1918

20.IX.3.1. Conflict of law rules as the main subject of the normative outcomes of the HCCH 1918

20.IX.3.2. Regulation of renvoi in the HCCH Conventions 1919

20.IX.4. Bilateral conventions on legal cooperation (CZ) 1921

20.X. Case law 1922

20.X.1. Case law of Member States 1922

20.X.1.1. (A) Austria 1922

20.X.1.2. (CZ) Czech Republic 1922

20.X.1.3. (D) Germany 1923

20.X.1.4. (F) France 1925

20.X.1.5. (UK) United Kingdom of Great Britain and Northern Ireland—the law of England and Wales (UK/EN) 1926

20.X.2. Case law of Non-Member States 1929
Article 21 of the Regulation! Article 16 of the Convention 1935

21.1. Public policy as a universal instrument of private international law 1939

21.1.1. Sources of law 1936
21.1.1.1. Sources of domestic origin (CZ) 1936
21.1.1.1.1. Expression of the general security situation and foundations of the state system 1936
21.1.1.1.2. A collection of special relationships which are subject to intensive protection 1937
21.1.1.1.3. Conflict of law public policy 1937
21.1.1.2. Sources of international origin 1938
21.1.1.2.1.1. Public policy clauses in HCCH Conventions 1938
21.1.1.2.2. Sources of interpretation 1943
21.1.1.2.2.1. Case law of the courts 1943
21.1.1.2.2.2. Case law of the ECtHR 1943
21.1.1.3. Concept and purpose of a substantive (conflict of law) public policy 1944

21.1.1.4. Public policy, constitutional [fundamental] rights and constitutional order 1945

21.1.1.5. Public policy and application of/regard for domestic and foreign overriding mandatory provisions 1946
21.1.1.6. Public policy [substantive] from the perspective of certain national legal systems 1947
21.1.1.6.1. EU Member States 1947
21.1.1.6.2. Selected Non-Member States of the EU 1954
21.1.1.7. Differentiation between substantive and procedural public policy 1954


21.1.1.9. Negative and positive public policy versus the effect of domestic overriding mandatory provisions 1958
21.1.1.9.1. Qualified interest in the negative effect of rules 1958
21.1.1.9.2. The French doctrine of l’ordre public v lois de police et de surete 1959
21.1.1.9.3. The German doctrine of special connection 1960
21.1.1.9.4. The common basis of a public interest with a different intensity and mechanism of effects 1960
21.1.1.9.5. The Anglo-Saxon doctrine of public policy 1961

21.1.1.10. Application of public policy 1963
21.1.1.10.1. Method of application of public policy 1963
21.1.1.10.2. Substitute applicable law (handling the inapplicability of the applicable law as a consequence of the application of public policy) under the Convention and the Regulation 1963

LXX
21.X.3. Application of public policy in connection with the
determination of the applicable law 1967
21.X.4. The conflict of law regime under the *Convention* and the
Regulation 1967
21.X.4.1. The concept of the *Convention* 1967
21.X.4.2. The concept of the Regulation 1968
21.X.4.3. *Community* and international public policy according to the
concept of the *Convention*!Regulation 1969
21.X.4.3.1. *Community* public policy (conflict of law) 1969
21.X.4.3.2. International public policy (conflict of law) 1970
21.X.4.4. Assessment of the potential impossibility of future
enforcement due to a hypothetical incompatibility of a
judgment with public policy, executed already under way
in trial proceedings 1971
21.XI. From case law 1972
21.XI.1. ECJ—Court of Justice of the European Communities 1972
21.XI.2. Case law of Member States 1977
21.XI.2.1. (A) Austria 1977
21.XI.2.2. (B) Belgium 1978
21.XI.2.3. (CZ) Czech Republic 1979
21.XI.2.4. (D) Germany 1988
21.XI.2.5. (F) France 2002
21.XI.2.6. (I) Italy 2002
21.XI.2.7. (SE) Sweden 2003
21.XI.2.8. (SK)—Slovakia 2003
21.XI.2.9. (UK) United Kingdom of Great Britain and Northern Ireland—
law: England and Wales (UK/EN) 2005
21.XI.3. Case law of the courts of non-member states:
21.XI.3.1. (CH) Switzerland 2007
21.XI.4. From arbitration practice 2009
21.XI.4.1. (CZ) Czech Republic 2009
21.XI.4.2. ICC 2009
21.XI.5. Case law of the ECtHR 2010
Literature 2012

Article 22 of the *Regulation!*Article 19 of the *Convention* 2031

22.1. A comparison between the *Regulation* and the
*Convention* 2028 2032
22.11. The genesis of Art. 22 of the *Regulation* 2032
22.111. The conception of the conflict solution 2032
22.IV. Material and territorial scope 2033
22.IV.1. Territorial units with their own system of sources of law 2033
22.IV.1.1. A legal system from a formal perspective 2033
22.IV.1.2. The ambivalence of territorially disparate interpretation and
legal practice 2033
22.IV.2. Merging of the territorial and material scope in the example of the (UK) 2034
22.IV.3. The significance for countries with a federal system using the
example of (D) 2034

LXXI
22.IV.4. Special autonomous territories 2035
22.IV.5. The regulation for the conflict resolution of a relation to a state with more than one territorial units with their own legal regime pursuant to HCCH conventions 2035

Literature 2040

Article 23 of the Regulation! Article 20 of the Convention 2043

23.1. Systematics of sources of conflict of law rules of private international law from the perspective of Article 23 of the Regulation (Article 20 of the Convention) 2039 2044
23.1.1. Sources 2044
23.1.2. Significance of the characterisation of a source of conflict of law rules on the interpretation of a relation to other (or other Community) sources of private international law and the essential qualitative difference between Article 23 of the Regulation and Article 20 of the Convention 2047
23.1.3. Competition between provisions from a Community perspective 2048
23.1.3.1. Direct effect of Regulations as a basic starting point 2048
23.1.3.2. Principles of precedence of a directly applicable Community measure (Regulations) in relation to rules of national origin 2048
23.1.1. Difference between the rules laid down in the Convention (Article 20) and the Regulation (Article 23) 2050
23.1.1.1. Principal difference between the purposes of Article 20 of the Convention and Article 23 of the Regulation 2050
23.1.1.2. Difference in terms of concept and principle of the Regulation 2051
23.1.3. Relation to Community legislation of various types 2051
23.1.4. A language comparison between the Convention and the Regulation 2052
23.1.1. The Regulation 2052
23.1.1.1. Comparison between each language version of the Regulation 2052
23.1.1.2. Scope of Article 23 of the Regulation 2052
23.1.1.2.1. Material scope of Article 23 of the Regulation 2052
23.1.1.2.2. Application in time of Article 23 of the Regulation 2054
23.1.1.3. Concept of Article 23 of the Regulation 2054
23.IV. The genesis of Article 23 of the Regulation (Article 22 of the Proposal for a Regulation) 2055
23.IV.1. Concept of the Proposal for a Regulation 2055
23.IV.2. Proposals to extend the Regulation through establishing a provision derogating conflict-of-law rules in other sources of Community law 2057
23.V. Relationship between Regulations and Directives as sources of Community law 2058
23.V.1. Influence of effects of individual sources of secondary law on possible competition 2058

LXXII
23.V.2. Hierarchy between sources of secondary law and the assertion of the lex specialis derogat generali and lex posterior derogat legi priori principles

23.V.2.1. Factual hierarchy dependent on the purpose of a rule in relation to primary Community law

23.V.2.2. Application of basic principles

23.V.2.3. Application of the lex specialis derogat legi generali principle

23.V.2.4. Application of the lex posterior derogat legi priori principle

23.V.3. Qualification of a conflict of provisions found within various sources and the solution

23.V.3.1. Qualification of a possible conflict

23.V.3.2. Priority of other conflict of law rules before the Regulation as a solution for cases of competition of fully equal rules

23.VI. Provisions of Article 20 of the Convention

23.VI.1. The scope of Article 20 of the Convention

23.VI.1.1. Material scope

23.VI.1.2. Time applicability of the Convention

23.VI.2. Significance of Article 20 of the Convention in relation to non-Community sources and Article 21 of the Convention

23.VI.3. Relationship of the Convention with other Community provisions


23.VI.5. Declaratory significance of Article 20 of the Convention

23.VI.6. Conflict of the Convention and Community law

23.VI.6.1. Precedence of Community law

23.VI.6.2. Conflict with national law with only partial support in Community law

23.VI.6.3. A conflict with other than Community law versus the universal effect of the Convention

23.VI.6.3.1. A conflict and the universal effect of the Convention

23.VI.6.3.2. Other cases of conflicts with the Convention

23.VI.6.3.3. Conflict of conflict of law provisions from the viewpoint of international, constitutional and primary European law

23.VII. Case law

23.VII.1. ECJ—The Court of Justice of the European Communities

23.VII.2. Case law of Member States

23.VII.2.1. (A) Austria

23.VII.2.2. (B) Belgium

23.VII.2.3. (CZ) Czech Republic

23.VII.2.4. (D) Germany

23.VII.2.5. (F) France

23.VII.2.6. (SK) Slovakia

Literature

Article 24 of the Regulation

24.1. Replacing the Convention by the Regulation—ad Art. 24 (1) of the Regulation
24.11. The continuity of the Regulation—ad Article 24(2) of the Regulation 2086
24.11.1. Continuity as a rule 2086
24.11.2. References to the Convention 2086
24.11.2.1. Adoption of the references as an expression of the evolution of European international private law 2086
24.11.2.2. Adopting normative references 2086
24.11.2.3. Doctrinal and adjudicated opinions 2087
24.11.2.4. Conditions for the transfer of references 2087
24.11.2.5. The actual utilisation of the new solution pursuant to the Regulation in cases of the application of the Convention 2088
24.11. ECJ Case law—The Court of Justice of the European Communities 2090
Literature 2093

Article 25 of the Regulation/Article 21 and Article 23 of the Convention .... 2095

A: Convention and Regulation: the regime which is in conformity with the conception of European Private International Law .. 2096

25.1. The purpose of the regulation (the same purpose with Article 25 of the Regulation and Article 21 of the Convention) 1848 2096

25.11. International treaties (convention) 2096
25.11.1. Solution of the choice-of-law problem of international treaties according to the principles of international (public) law 2096
25.11.2. The concept of successively agreed conventions 2098
25.11.2.1. Ratione temporis as a qualifier 2098
25.11.2.2. Identity of the convention subject matter as an act of public international law 2100
25.11.2.3. The presumptions included in Article 30 VCLT 2100
25.11.2.4. Conclusion on [international] treaties and potential choice-of-law problem 2102
25.11.3. International treaties concluded by the Communities 2102
25.11.3.1. International conventions concluded by the Communities without Member States 2102
25.11.3.2. International treaties concluded by the Communities and member states 2102

25.111. Conception and interpretation of Article 21 of the Convention 2105
25.111.1. Scope and purpose 2105
25.111.2. Material scope of Art. 21 of the Convention 2106
25.111.3. Time, territorial and subjective scope of Art. 21 of the Convention 2107
25.111.3.1. Overlaps of all the conditions of application (effects) 2107
25.111.3.2. Special meaning of time scope of Art. 21 of the Convention and their connection with Art. 23 through Art. 25 of the Convention 2107
25.111.4. Relationship between the Convention and directly applicable substantive law regulation of international origin 2108

LXXIV
25.V. Genesis of art. 25 of the Regulation on the background of history of the Convention 2110

25.V. Conception and interpretation of Art. 25 of the Regulation (projected on the historical background of the Convention platform) 2111

25.V.1. The basic differences from the Regulation perspective 2111
25.V.2. Scope of applicability 2111
25.V.2.1. Subject-matter scope of Art. 25 of the Regulation compared to Art. 21 of the Convention 2111
25.V.2.2. Time applicability 2112
25.V.2.2.1. International obligations of the Member States prior to an adoption of the Regulation 2112
25.V.2.2.2. Future (prospective) international obligations 2112
25.V.2.2.2.1. Areas falling within the subject-matter scope of the Regulation 2112
25.V.2.2.2.2. Areas which are not regulated by the subject-matter scope of the Regulation 2112
25.V.3. Concept and principles of the relations of the choice-of-law regulation according to art. 25 of the Regulation: priority of other obligations of the member states in relation to third countries 2113
25.V.4. International conventions where at least one party is an EU non-member state (art. 25 section 1 of the Regulation) 2113
25.V.5. International conventions of which only member state are parties 2115
25.V.6. The meaning of definition of member state according to Art. 1 section 4 of the Regulation 2116
25.V.7. Experiences of contracting states of the Convention and member states of EU and prospective expectations regarding application of international obligations of member (contracting) states in the regime of the Regulation 2116
25.V.7.1. Areas of possibly concurring jurisdictions 2116
25.V.7.2. Attempts on termination of other (concurring) obligations in relation to a Non-Member state 2117

25.V. VII. Articles 23 through 25 of the Convention 2117

B: Relationships to other regulations: some important international treaties and groups of international treaties which bound the member states within the scope of Art. 25 of the Regulation 2118

25.VII. The Conventions adopted during the Hague Conferences on international private law (HCCH) and their relation to the EC 2118
25.VII.1. Character and description of HCCH 2118
25.VII.2. Structure of HCCH 2119
25.VII.3. Activity of HCCH 2119
25.VII.4. HCCH pro futuro and accession of the Communities to HCCH 2120
25.VII.5. Membership of the EC in HCCH 2124
25.VII.6. Correction of restriction arising for the Member States—the EC Regulation no. 664/2009 (the steps to be taken when the agreements on family and matrimonial matters are concluded) . 2127

25.VII.7. The overview of HCCH treaties and their [prospective] relationship with Regulation and Convention 2129

a. substantive-law area 2129

b. procedural law area 2136

25.VIII. International Commission on Civil Status 2142

25.VIII.1. Establishment and subject matter of ICCS 2142

25.VIII.2. Activity of ICCS 2143

25.VIII.3. Relation to HCCH Conventions 2143

25.VIII.4. Cooperation with other international organisations 2143

25.VIII.5. Relation to the mission and powers of the Communities and agreement on cooperation with EC 2144

25.VIII.6. Conventions concluded within the framework of ICCS activities and related to the problems of law of contractual obligations (choice-of-law regulation) 2144

25.VIII.7. Relations to Regulation I Convention and to HCCH conventions 2145

25.VIII.8. Bibliography of ICCS 2146

25.IX. Vienna Convention and its direct relation to the choice-of-law regulation of Convention and Regulation 2146

25.IX.1. Part of community, pan-European and international system of important normatives for contractual obligations 2146

25.IX.2. Nature of Regulation 2148

25.IX.3. Scope of application 2149

25.IX.4. Limitation of subject matter scope of Vienna Convention 2152

25.IX.4.1. Matters excluded from subject matter scope of Vienna Convention (art. 2) 2152

25.IX.4.2. Matters which are not expressly regulated by Vienna Convention 2152

25.IX.5. Interpretation of Vienna Convention (art. 7) and questions not expressly regulated 2153

25.IX.5.1. General principles of application 2153

25.IX.5.2. Unity and principle of good will 2153

25.IX.5.3. Unity and international nature of Vienna Convention 2154

25.IX.5.4. Complying with good faith in international business contact.... 2154

25.IX.6. Customs 2156

25.IX.7. Place of business (Vienna Convention) versus ordinary residence (Convention/Regulation) 2156

25.X. Conflicting regulation in Czech law and its relationship to international and Community obligations 2158

25.X.1. Czech regulation of private international law and its relationship to obligations arising from international contracts 2158

25.X.2. Choice of law regulation in bilateral treaties on legal aid 2159

25.X.2.1. Significance of bilateral contractual regulation for determination of choice of law status 2159

25.X.2.2. The relationship of bilateral treaties on legal aid and any other commitments relating to Community contracting states and Community regime of choice of law regulation 2161
The regime to determine applicable law under some bilateral international treaties on legal aid

Treaty on legal aid with (HU)

The Treaty on legal aid with (Mongolia)

The Treaty on legal aid with (PL)

The Treaty on legal aid with (RO)

Treaty on legal aid with (UA)

Analogous legislation in Regulation 864/2007

Case Law

ECJ—The Court of Justice of the European Communities

Case law of Member States

(A) Austria

(B) Belgium

(CZ) Czech Republic

(D) Germany

(F) France

(I) Italy

(NL) Netherlands

(SK) Slovakia

Case law of ECHR

Article 26 of the Regulation!Articles 23—25 of the Convention

Rules regulating horizontal duties between the EC and the Member States regarding their existing obligations vis-a-vis non-member states and their obligations pro futuro.

The importance of Article 26 of the Regulation

Existing obligations of Member States vis-a-vis non-member states and their obligations pro futuro—regarding Article 26(1) of the Regulation

Obligations of Member States (and the EC) pro futuro—regarding Article 26(2) of the Regulation

Unclear extent of the obligation to notify

Types of rules subject to notification

The importance of qualification (classification) of conflict rules as a condition for notification under Article 26 of the Regulation

Definition of conflict rules from the general perspective and for the purposes of Article 26 of the Regulation

Classification of private international law rules

Rules different from conflict rules of private international law

Direct substantive law rules

Rules of international civil procedural law

Combination of conflict rules and rules of international civil procedure

Combination of conflict rules and procedural rules in a single regulation and manifestation of modern tendencies

Combination of conflict and procedural rules at the national level
The approach adopted under Community law (Article 65(b) of the TEC) 2213

The importance of the MPSaP (CZ) as a progressive norm of international private law and the combination of conflict and substantive law rules in the MPSaP (CZ) 2213

Conflict rules 2214

Purpose and effects of conflict rules 2214

Determination of the applicable substantive law as the primary purpose of a conflict rule 2214

Public law effects of conflict rules and of their purpose 2215

Practical importance of the public-law assessment of the effects of conflict rules incorporated in Community law on the autonomous qualification (classification) of contractual obligations under the Regulation 2215

Identification of conflict rules and definition of conflict rules vis-à-vis other rules 2216

Classification of private international law rules and conflict rules 2216

Factual situation as the scope of the conflict rule according to a narrower and a broader definition 2216

A correct conflict of law solution as the purpose and the identifier of a conflict of law regulation 2217

Purpose of conflict rules and definition of the difference between a conflict rule and a substantive law rule 2218

Function of conflict rules 2219

Designation of conflict rules 2220

Conflict rules as rules of behaviour 2221

Conflict rules of national origin and fulfilment of their purpose together with substantive law rules 2221

Conflict rules of international origin 2221

Conflict rules of Community origin 2221

Structure of conflict rules and their legislative formulation 2222

Recipients of conflict rules 2222

Legislative technical structure of a conflict rule 2222

Classification of conflict rules 2223

Uniformity and diversity of the types of conflict rules 2223

Bilateral and unilateral conflict rules 2223

Bilateral conflict rules 2223

Unilateral conflict rules 2223

Influence of the statutory theory on the wording of conflict rules 2225

Conflict rules with a modern wording 2225

Conflict rules formulated under the influence of the statutory theory 2225

Independent and dependent conflict rules 2226

Non-mandatory and mandatory conflict rules 2226

Other types of conflict rules 2226

Extending (excluding, exclusionary) conflict rules and subsidiary conflict rules 2226

Conflict rules connected with substantive law rules 2228
Conflict rules for the determination of the subsidiary law 2228
Conflict rules of national origin and internationally unified conflict rules 2228
Rules connecting delimitation of the jurisdiction (competence) of domestic authorities with application of the domestic law 2229
The *common law* doctrine (from the perspective of the UK) 2229
**Notification under Regulation 864/2007 (common issues)** 2229
The approach of certain countries to the performance of their obligations of notification and opinions presented by law schools in certain selected Member States 2230
**Amendments and termination of international treaties from the EC perspective and from the perspective of international (public) law** 2232
The 1969 Vienna Convention on the Law of Treaties 2232
Amendment of international treaties 2232
Fundamental prerequisites for amendments of bilateral international treaties 2232
Fundamental prerequisites for amendments of multilateral international treaties 2232
The principle of sovereign equality 2232
The cascading system as an expression of the identity of the contracting parties 2233
The general mechanism of concurrence between the membership of an individual contracting state and the membership of supranational regional associations as collective high contracting parties to international treaties and organisations 2233
Partial amendments (modifications) of multilateral treaties—*inter partes* modifications 2233
Termination of international treaties 2234
Agreement of the parties 2234
Contractus posterior (replacement by a later treaty) 2234
Material breach of a treaty 2235
Supervening impossibility of performance 2236
*Clausula rebus sic stantibus*: fundamental change of circumstances v. *pacta sunt servanda* 2237
Other grounds for terminating a treaty under the VCLT 2238
Status of the *Community* from the perspective of the international law of contracts 2238
Regime of the international (public) law 2240
The approach of the EC (internal regulation) 2240
Agreements concluded by the *Community* 2241
Mixed agreements the contracting parties to which include both states and the Community 2241
International agreements concluded by Member States 2243
International agreements concluded after the TEC entered into force 2243
International agreements concluded before the TEC entered into force 2243

LXXIX
26.VI.10. Conflicting obligations 2244
26.VI.11. The concept of negotiating future obligations in the field of private international law 2245
26.VI.13. Proposal for a Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements covering applicable law in contractual and non-contractual obligations 2248
26.VII. Case law 2250
26.VII.1. ECJ—The Court of Justice of the European Communities 2250
Literature 2253

Article 27 of the Regulation

Literature 2257

Article 28 of the Regulation! Article 28 of the Convention 2259

28.1. Purpose and subject matter of the rules2238 2259
28.11. Genesis of the Regulation according to the Proposal for the Regulation 2259
28.111. Determination of the moment of conclusion of the contract 2261
28.IV. Application in time of the Convention vis-a-vis the individual countries 2261
28.IV.1. Genesis of the Convention 2261
28.IV.2. The regime of the Convention—entry into force, applicability 2262
28.IV.3. Information about the entry into force in connection with the Convention regarding the individual countries 2263
28.V. The regime of the Regulation 2264
28.VI. Case law 2265
28.VI.1. ECJ—The Court of Justice of the European Communities 2265
28.VI.2. Case law of Member States 2265
28.VI.2.1. (CZ) Czech Republic 2265
28.VI.2.2. (D) Germany 2266
28.VI.2.3. (SK) Slovakia 2266
Literature 2267

Article 29 of the Regulation! Article 28 and 30 of the Convention 2269

29.1. The concept of entry into force and effect 2251 2270
29.11. The regime of the Convention 2270
29.111. Case law 2271
29.111.1. ECJ—The Court of Justice of the European Communities 2271
29.111.2. Case law of Member States 2271
29.111.2.1. (CZ) Czech Republic 2271
29.111.2.2. (D) Germany 2271
29.111.2.3. (SK) Slovakia 2272
Literature 2272

LXXX

D.01. First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version)

D.02. Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version)

E: Report on the Convention (Giuliano—Lagarde)

E.01. Table of assignment of the scope of the Report to each provision of the Convention and analogously to the provisions of the Regulation

E.02. Text of the Report

F: Selected conventions concluded within the activity of the Hague Conference on Private International Law (HCCH)


F.03. Convention on the law applicable to agency

F.04. Convention on the law applicable to trusts and on their recognition

G: Selected conventions concluded within the activity of UNIDROIT

G.01. UNIDROIT Convention on International Factoring

G.02. UNIDROIT Convention on International Financial Leasing

H: Translation of the Selected Provisions for Private International Law selected European countries—conflict of laws rules for contractual obligations

H.02. (B) Belgium

H.02.01. Act on Private International Law of 16 July 2006 (selected provisions)

H.02.02. Civil Code (selected provisions)

H.03. (BG) Bulgaria

H.03.01. Act on Private International Law of 17 May 2005 (selected provisions)

H.03.02. Commercial Code (selected provisions)

H.04. Czech Republic (CZ) and Slovak Republic (SK)

H.04. Act on Private International and Procedural Law a cross-comparison between the regulations (Selected provisions) ....

H.05. (D) Germany

H.05. Introductory Act to the Civil Code (selected provisions)

H.06. (GR) Greece

H.06. Act on Private International Law (Selected provisions)

H.07. (HU) Hungary

2275

2276

2284

2289

2290

2292

2345

2346

2349

2356

2362

2369

2370

2377

2385

2387

2387

2400

2401

2401

2415

2417

2440

2449

2449

2452

LXXXI
Statutory Decree No. 13. of 1979
Providing for Private International Law (Selected Provisions) ...

H.08. (I) Italy
The reform of the Italian system of Private International Law
(Selected provisions)

H.09. (N) Norway
Private International Law Act
Movable Property Acquisition Regulations of 3 April 1964,
No. 01

H.10. (NL) Netherlands
Act Regulating Conflict Rules Applicable to Property
Relationships

H.11. (P) Portugal
Statutory Rule No. 47344/66, of 25 November 1966
Civil Code (Selected provisions)

H.12. (PL) Poland
H.12.01. Private International Law of 12 November 1965
H.12.02. The proposal of the new Private International Law Act

H.13. (RO) Romania
Law No. 105 of 22 September 1992 on the Regulation of Private
International Law (Selected provisions)

H.14. Selected Provisions for Private International Law
The United Kingdom of Great Britain and Northern
Ireland: England and Wales (effective for Northern Ireland)
(UK/EN)

H.14.02. 2004 No. 3448 (Chapter 160)—CONTRACTS The Contracts
(Applicable Law) Act 1990 (Commencement No.2) Order
2004
(final provisions)—1995 CHAPTER 42 [selected provisions]

I: Overview of Literature

I.I. Monographs
I.II. Contributions to periodicals and collections
I.III. Literature available as electronic sources

J: INDEX

J.I. Introductory notes
J.II. Keyword index
J.III. Index of references to certain significant decisions issued in
arbitration and general court proceedings
J.III.1. Sorted by states and then by individual general or arbitration
courts
J.III.2. List according to indication of participants
J.IV. References to sources of law—legal regulations (of national/
domestic, Community, international and other origin) and
other rules and sources

LXXXII
J.IV.1. Regulations of national origin (sorted by the country of origin) 2898
J.IV.2. Community Legislation 2903
J.IV.3. Regulations of international origin 2906