EUROPEAN PRIVATE INTERNATIONAL LAW:
EMBRACING NEW HORIZONS OR MOURNING THE PAST?

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“A complete set of rules on jurisdiction within the European Union determines the courts of which Member State are competent.”

“One day the courts in all the Member States of the European Union will apply the law of the same country to a given international situation.”

A. INTRODUCTION

The year 1957 marks a significant turning point in the history of English private international law. Indeed, more provocatively, it can be said to mark the beginning of the end for the subject of Professor A.V. Dicey’s seminal work. The significance of this year lies not in the three decisions of the House of Lords which addressed matters of interest to those studying and practising the subject in England, but in events several hundred miles away on 25th March. On that date, in Rome, representatives of six European states committed themselves to establishing the European Economic Community (EEC).

This event was not, however, considered to be sufficiently important to merit

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1 European Judicial Network website. The European Judicial Network was established by Council Decision No 2001/470/EC “in order to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters”. Its website: http://europa.eu.int/comm/justice_home/ejn/index_en.htm (as at 29 June 2005) is managed by the European Commission.

2 Ibid.


a mention by Dr J.H.C. Morris in his introduction to the 7th edition of *Dicey’s Conflict of Laws* (the second under his general editorship) the following year. For that omission, the learned editor cannot be criticised in any way. Not only was the United Kingdom not one of the original contracting states to the Rome Treaty, but the contents of the Treaty did not suggest that it required a radical overhaul of the rules of private international law in any of the Member States of the EEC. While it was undoubtedly more than a simple free trade agreement, the focus of the Treaty was on the progressive abolition of restrictions on trade between the Member States and on the movement of goods, persons, services and capital across their borders. So far as possible, rules that discriminated according to nationality or origin were to be eliminated. It is, however, to be noted that although rules of private international law (by definition) apply to situations connected with more than one legal system, they do not (at least directly) regulate cross-border activity. Such effect as they may have upon trade is indirect. Further, while some procedural rules applicable to international situations do confer or exclude a benefit or disbenefit on grounds of nationality, so offending the principle of non-discrimination, rules of private international law generally do not. Finally, of the 248 articles of the original Rome Treaty, only one (Art 220) referred directly to subject matter falling within the traditional compass of private international law; and only then by requiring Member States to negotiate with each other outside the treaty framework to secure, *inter alia*, (a) the mutual recognition of companies and firms, and (b) the simplification of formalities governing the reciprocal recognition and enforcement of judgments and arbitral awards.

An overview of the 7th edition of Dicey reveals a subject dominated by judge-made law. The table of cases covered 85 pages; the table of statutes only 12 (including a little more than a page of Commonwealth statutes and five “foreign” statutes). A few pieces of primary legislation contained rules of jurisdiction or rules for the recognition and enforcement of foreign judgments. In addition, statutory rules of court governing the service of originating process were a central feature of the rules governing jurisdiction over persons outside the

5 The distinguished panel of co-editors included Otto Kahn-Freund, Kurt Lipstein and Guenther Treitel.
6 Cf the survey by U Drobnig, “Conflict of Laws and the European Economic Community” (1967) 15 American Journal of Comparative Law 204.
8 Now EC Treaty, Art 293.
9 See, eg, *Dicey* (7th edn, 1958), 179–81 discussing the Carriage by Air Act 1932 and the Administration of Justice Act 1956, s 4; also 297–301 discussing Matrimonial Causes Act 1950, s 18.
jurisdiction. Rules of applicable law were, with notable exceptions, almost exclusively the product of the common law. While not architecturally perfect, the method of development by case law with limited statutory intervention had given the subject area not only a lively history but also a doctrinal coherence and flexibility denied to areas dominated by legislation. The subject had already shown itself capable of responding to new challenges resulting from increased cross-border commerce.

Parts of the traditional architecture of English private international law are still visible today, but much has been replaced, either by revised judicial reasoning or, with increasing frequency, by legislation. The table of statutes in the current (13th) edition of (what is now) Dicey & Morris stretches to 42 pages, with a further 11 pages of statutory instruments and civil procedure rules. The table of cases now covers 142 pages. Notably, much of the legislative change in the period after 1982 is attributable to the United Kingdom’s international commitments following its accession to the EEC (now the European Community (EC)) in 1973. In an increasing number of situations, the constituent legal systems of the United Kingdom now share their rules of private international law with some or all of the 24 other Member States of the EC.

These changes, however, may only mark the beginnings of a more radical shift. The organs of the EC, fortified by extensions of their legislative competence and driven by the political agenda of Member States, have advanced proposals which, if implemented in full, would create a European system of private international law extending well beyond the existing framework. Some elements of that system are already in place. Work on others is well advanced. The remaining elements have yet to advance beyond conception. If, however, the current work programme is completed, the architecture of private international

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11 Ibid, 182–212. The principal source of these rules was Order 11, rule 1 of the former Rules of the Supreme Court.
13 The clearest example being the emergence of party autonomy as the unquestionable dominant factor in determining the law applicable to contractual obligations (see P Nygh, Autonomy in International Contracts (Oxford University Press, 1998), 8–14).
15 For example, the doctrine of forum conveniens established in England in its modern form by Spiliada Maritime Corporation v Cassulux (1987) AC 460 (HL), but itself now emasculated by the Court of Justice (see Owusu v Jackson (Case C–281/02) [2005] ECR I–0000; [2005] 2 WLR 942, Judgment of 1 March 2005).
16 For example, the rules governing the applicable law for torts in Part III of the Private International Law (Miscellaneous Provisions) Act 1999. The common law rules had also developed considerably between 1957 and the time of their abolition by the 1995 Act (see esp Boys v Chaplin [1971] AC 356 (HL); Red Sea Insurance Co. Ltd v Bouygues S.A. [1995] 1 AC 190 (PC)).
17 See North, supra n 14, 485–89.
18 The goals of this programme are not modest, see supra text to nn 1 and 2.
law in England\textsuperscript{19} would be unrecognisable from that existing in 1957 (or, for that matter, 1987\textsuperscript{20}). Most of the rules described by Dr Morris and his colleagues in the 7th edition of Dicey would have been demolished, and replaced by new rules and concepts, applicable uniformly across the Member States. The ultimate authority on matters of interpretation of those rules would be the European Court of Justice not the House of Lords. Arguably, private international law would no longer exist as an independent subject area but would be a mere sub-category of the ever-expanding province of European Community law.

This development has not been wholeheartedly embraced by the legal profession and academic commentators in the United Kingdom, particularly those whose training and practice lies in the field of private international law rather than EC law. Many in the legal community have questioned whether the new order is really necessary. But, politically at least,\textsuperscript{21} it may now be too late to stop the bulldozers. As one of the current editors of Dicey & Morris has lamented:

> “[T]he concreting over of the common law conflict of laws is the one activity which never seems to require an environmental impact assessment.”\textsuperscript{22}

This article seeks to trace (in outline) the history of the “Europeanization” (or “Communitarization”\textsuperscript{23}) of private international law in England. It then considers in detail the relationship between EC law and private international law, focusing on the competence of the EC to legislate in this area. Finally, it turns to the question whether the creation of a European system of private international law constitutes an appropriate and useful exercise of the EC’s legislative powers.

\textbf{B. The “Europeanization” of Private International Law in England: An Outline History\textsuperscript{24}}

In essence, private international law consists of (1) rules concerning the jurisdiction of national courts and tribunals; (2) rules concerning the recognition and enforcement of foreign judgments and awards; (3) rules concerning the law applicable to issues falling to be determined by national courts and tribunals; and (4) other procedural rules of an international character. This section considers the influence of EC law in each category.

\textsuperscript{19} The description “English private international law” would no longer seem apposite.

\textsuperscript{20} When the Brussels Convention came into force in the United Kingdom.

\textsuperscript{21} For discussion of legal aspects, see section C below.


\textsuperscript{23} For terminology, see B von Hoffmann, ch 1 in European Private International Law (Nijmegen, Ars Aequi Libri, 1998).

\textsuperscript{24} For further information, see the timeline in the Annex to this article. For convenience, the full titles of legislation and international instruments are given in the Annex and shorthand references (defined in the Annex) are used in the following paragraphs.
1. Jurisdiction and Foreign Judgments

In the categories of jurisdiction and the enforcement of foreign judgments, English law became closely aligned with the law of the other Member States in 1987 on the coming into force of the Brussels Convention. That Convention applied to all “civil or commercial matters”, subject to a number of specific exclusions, considered below. In 2002, the Brussels Convention was largely superseded by a Community instrument, the “Brussels I Regulation” (No 44/2001(EC)), with identical subject matter scope. Within the body of the Regulation and the Convention, the principal exception to the uniform rules on jurisdiction is contained in Art 4, which delegates to local law the question whether a Member State court is competent in proceedings against a person not domiciled in a Member State. In England, the so-called “common law rules” of jurisdiction continue to apply in these circumstances. The uniform rules on enforcement of other Member State judgments apply even to cases where jurisdiction was taken by reference to local rules in accordance with Art 4. Neither the Regulation nor the Convention applies, however, to non-Member State judgments and the pre-existing English law (common law and statutory) continues to apply for now.

Among the fields excluded from the subject matter scope of the Regulation and the Convention, two (matrimonial matters and parental responsibility, and insolvency) have been the object of Community legislation addressing questions of jurisdiction and the recognition and enforcement of judgments. In the case of the former, the “Brussels II bis Regulation” (No 2201/2003(EC)) has very recently replaced its more confined predecessor (No 1347/2000(EC)). In the case of the latter, Art 3 of the Insolvency Regulation (No 1346/2000(EC)) contains rules governing the jurisdiction of Member State courts in insolvency proceedings where the debtor’s centre of main interests (COMI) is in the EU.

By extending Council Directive No 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other matters in

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25 In fact, contained principally in the statutory rules of court governing service of claim forms (Civil Procedure Rules (SI 1998/3132) (as amended), Part 6).
26 Subject, of course, to the 1988 Lugano Convention applicable to persons domiciled in Iceland, Norway or Switzerland.
27 Again, subject to the Lugano Convention (see supra n 26). In January 2005, the Commission held a public meeting for the purposes of considering the proposal Convention on Exclusive Choice of Court Agreements. The European Commission participated in the negotiations of this Convention on behalf of the European Community. Those negotiations concluded successfully on 30 June 2005.
28 The Regulation does not, however, apply to insolvency proceedings concerning insurance undertakings, credit institutions, certain undertakings performing custody functions or collective investment undertakings (Art 1.2). In the case of insurance undertakings, see Directive 2001/17 (EC) on the reorganization and winding-up of insurance undertakings ([24.04.2001] OJ L110, 28). In the case of credit institutions, see Directive 2001/24 (EC) on the reorganization and winding-up of credit institutions ([5.5.2001] OJ L125, 15). For UK implementing measures, see Insurers (Reorganisation and Winding Up) Regulations (SI 2004/353); Credit Institutions (Reorganisation and Winding Up) Regulations (SI 2004/1043); Insurers (Reorganising and Winding Up) (Lloyd’s) Regulations (SI 2003/1996).
2002\textsuperscript{29} to include claims relating to value added tax and taxes on income and capital, the EC has made a significant inroad on the principle that a State will not enforce the revenue laws of another State\textsuperscript{30} and has decreased in significance the express exclusion of “revenue” and “customs” matters from the scope of the Brussels Convention and the Brussels I Regulation.\textsuperscript{31} There is, at present, no EC legislative measure or treaty which is binding on the United Kingdom by virtue of its membership of the EC in the other fields excluded from the subject matter scope of the Regulation and the Convention, ie matrimonial property rights, wills and succession, social security and arbitration.\textsuperscript{32} In the latter field, the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards retains a dominant influence, and the author is aware of no EC led proposal to regulate arbitration. The field of wills and succession is, however, the subject of a current Commission Green Paper\textsuperscript{33} and a Green Paper is also expected in the area of matrimonial property rights.

2. Applicable law

The stranglehold of EC law on the category of applicable law has taken longer to establish, but its grip is slowly tightening. For the UK, the first significant inroad was in 1991 when the Rome Convention on the law applicable to contractual obligations came into force. The Convention, which had been substantially incorporated into UK law by the Contracts (Applicable Law) Act 1990, replaced the existing common law choice of law rules.

As its title suggests, the rules of applicable law contained in the Rome Convention do not extend to obligations not arising \textit{ex contractu} or to matters of property.\textsuperscript{34} In addition, certain fields were specifically excluded from its scope.\textsuperscript{35} Of these, only contracts of insurance concerning risks situated within the EC\textsuperscript{36} have been the object of Community legislative action affecting rules of applicable law;\textsuperscript{17} There are, however, plans for development of Community rules (to be completed by 2011 on the current timetable) by regulations in the fields of wills


\textsuperscript{30} Dicey & Morris, rule 3 and commentary.

\textsuperscript{31} For the relationship in English law between the Brussels Convention and the traditional “no enforcement” rule, see \textit{QRS I ApS v Frandsen} [1999] 1 WLR 2169.

\textsuperscript{32} See also developments with respect to the enforcement of decisions in criminal cases: Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties ([22.3.2005] OJ L76, 16); European Commission Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM (2005) 195 final).

\textsuperscript{33} COM (2005) 65 final.

\textsuperscript{34} See the Report of Professors Giuliano and Lagarde ([31.10.1980] OJ C282, 7, 10).

\textsuperscript{35} Rome Convention, Arts 1.2, 1.3.

\textsuperscript{36} \textit{Ibid}. Art 1.3.

and succession, divorce and matrimonial property rights. Of the other areas excluded from the scope of the Rome Convention:

- The Brussels I Regulation and Brussels Convention are thought to lay down autonomous rules governing, at least, consent to a choice of court agreement.39
- The Court of Justice has held that application of the law of a company’s “real seat” to questions of its creation and existence is incompatible with the right to establishment in Art 43 (ex Art 52).40 This development has not directly affected English private international law, which applies the law of a company’s place of incorporation to these issues.41
- The field of agency is currently excluded from the applicable law rules for contractual obligations contained in the Rome Convention.42 It is understood, however, that the Commission proposal for a Regulation on the law applicable to contractual obligations (the so-called “Rome I Regulation”), on which consultation has taken place, may contain suggested harmonised rules governing questions of agency.43
- There is, at least so far at this writer is aware, no proposal for Community wide applicable law rules in the fields of bills of exchange, cheques and promissory notes44 or trusts.45

More significantly, work on the proposed “Rome II Regulation” on the law applicable to non-contractual obligations is well advanced.46 Under the terms of the Commission’s proposal,47 the Regulation would impose uniform rules of applicable law for “non-contractual obligations in civil and commercial matters”, subject to certain exceptions.48

38 See COM (2005) 65 final (wills and succession); COM (2005) 82 final (divorce). The Council has requested that the Commission prepare a Green Paper on matrimonial property rights.
41 Dicey & Morris, rule 153.
42 Rome Convention, Art 1.2(f). See the Hague Convention of 14 March 1978 on the law applicable to agency, to which France, The Netherlands and Portugal are parties (but not the UK).
43 This possibility was raised in a discussion paper presented to a panel of experts in Brussels on 17 February 2005. It does not appear to have been addressed in the Commission’s Green Paper on the proposed Regulation (COM (2002) 654 final).
44 Rome Convention, Art 1.2(g). This subject appears to have been regarded as too complicated for harmonisation at the time of the Rome Convention (see [31.10.1980] OJ C282, 11).
45 Rome Convention, Art 1.2(g). See the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition, to which Italy, Luxembourg, Malta, The Netherlands and the UK are parties. The Convention has force of law in the UK under the Recognition of Trusts Act 1987.
46 The proposal is currently being considered by the Council and the Parliament.
48 Ibid, Art 1.2. The excluded fields are: (a) non-contractual obligations arising out of family or "equivalent" relationships, (b) non-contractual obligations arising out of matrimonial property
This controversial proposal is discussed in further detail below.

In a landscape littered with proposals and Green Papers, the “green belt” of European private international law (at least for the time being) appears to be the rules of applicable law for questions involving the law of property. Aside from rules in the Rome Convention governing the assignment of contractual obligations⁴⁹ and specific rules for book entry securities collateral⁵₀ and cultural objects,⁵¹ the writer is aware of no EC-led applicable law rules in matters of property. There are current Commission proposals to accede to the Cape Town Convention on international interests in mobile equipment⁵² (which contains rules of applicable law) and to the Hague Convention on the law applicable to certain interests in respect of securities held with an intermediary,⁵³ but otherwise the scarcity of proposals in this area is notable.⁵⁴ Early hints of a desire for uniformity in the law applicable to dealings in corporeal and non-corporeal chattels⁵⁵ and a more recent interest in harmonisation of the law applicable to the acquisition of moveables in good faith⁵⁶ appear no longer to be priorities.

One reason for this apparent reticence may well be Art 295 (ex Art 222) of the EC Treaty whereby:

“This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”

⁴⁹ Rome Convention, Art 12. In the writer’s view, these issues are correctly regarded as matters of contractual obligation, not “property” (see Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] QB 825 (CA)).


⁵¹ Directive 1993/7/EC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state, Art 12. The rule (“Ownership of the cultural object after return shall be governed by the law of that [sic] requesting member State”) does not appear to have been expressly translated in the UK implementing regulations (see Return of Cultural Objects Regulations (SI 1994/501) (as amended)), perhaps because this was thought to be consistent with the lex situs rule of the common law.


⁵⁴ See, however, the Commission’s Green Paper on Mortgage Credit in the EU (COM [xxx] 2005 [17.6.2005]), para (29) addressing the question of the law applicable to the collateral for mortgage credit. The Commission supports the application of the law of the country in which the property is situated.


Although the Court of Justice has held that this provision does not exclude Community competence relating to the exercise of national property rights, the power of Member States to define the rules governing the system of property ownership is unqualified.\(^57\) It is submitted that rules of applicable law, at least insofar as they relate to the acquisition of title, are an integral part of that system and are similarly protected. Even if that argument does not prevail, it seems that rules of applicable law in matters of property may currently enjoy a political immunity, at least until the existing work programme has been addressed.

Finally, it is necessary to refer briefly to the controversy surrounding the effect of so-called “country of origin” provisions by the EC in recent legislation and proposed legislation, both sectoral\(^58\) and of more general application.\(^59\) On one view, subject to the stated exceptions on their application,\(^60\) these provisions override existing rules of applicable law within the co-ordinated fields and effectively create a new rule of applicable law designating the law of the “country of origin”. In the writer’s opinion, however, this view goes too far (at least in relation to the E-Commerce Directive on which much of the debate has centred\(^61\)):

- Art 1.4 of the E-Commerce Directive specifically provides that it “does not establish additional rules on private international law”, although Recital (23) recognises that “provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive”. It appears, therefore, that Art 3 of the E-Commerce Directive cannot modify existing rules of private international law, but may effectively counteract their operation insofar as the designated rules of substantive law constitute “restrictions”\(^62\) on the freedom to provide services within the co-ordinated field.

- The text of Art 4 of the proposed Directive on Unfair Commercial Practices was modified in May 2004 to exclude the requirement in the former Art 4.1 that:

\(^{57}\) Consten and Grundig v Commission (Cases 56/64 and 58/64) ECR 299, at p 345; R v Secretary of State for Health, ex parte British American Tobacco (Case C–491/01) [2002] ECR I–11453, para 147.


\(^{60}\) See Art 3.4 and Annex to E-Commerce Directive; Arts 17 to 19 of the proposed Services Directive.


\(^{62}\) Having regard to the case law of the ECJ on Art 49 (ex Art 59) of the EC Treaty; see C Barnard, The Substantive Law of the EU: The Four Freedoms (Oxford University Press, 2004), ch. 13 (“Freedom to provide and receive services”).
“Traders shall comply only with the national provisions, falling within the field approximated by this directive, of the Member State in which they are established.”

This provision had been criticised as unduly prejudicing rules of applicable law for non-contractual obligations, and the attempt to harmonise those rules by the proposed Rome II Regulation. Some Member State delegations, however, expressed concern that the deletion of Art 4.1 would “undermine certainty with regard to the applicable law and risk affecting the good functioning of the internal market”. Those concerns notwithstanding, Art 4.1 of the proposal was not reintroduced into the Directive in its final form.

It appears from the Commission’s original proposal for the Services Directive that it took the view that the application of the “country of origin” principle would trump existing rules of applicable law within the co-ordinated field (including any future Community instruments), subject to specific derogations. That approach was, however, strongly criticised and it remains to be seen whether more specific provision will be made in the Directive in its final form, if indeed it survives its current political troubles.

3. Rules of International Procedure

In this area, Community-wide rules have been introduced in the areas of service of documents and mutual assistance in the taking of evidence in civil and commercial matters. While not wishing to underplay the individual significance of these developments, for reasons of space, no further mention will be made of them in the following sections.

4. Conclusion

It can be seen therefore that, (a) in the area of jurisdiction and judgments, EC legislative measures exert a dominant influence, although some Member State

63 See the opinions of the Committee on Civil Law Matters in Council Documents 5668/04 (28 January 2004) and 7799/04 (25 March 2004).
67 See esp the opinion of the Committee on Civil Law Matters (Council Document 12655/04 (24 September 2004); the opinion of the Single Market Section of the European Economic and Social Committee (Document INT/228, para 3.5.8) and the view of the European Group for Private International Law (www.drt.ucl.ac.be/gedip/documents/DirBolkestein/Development.html (as at 6 June 2005)).
69 Evidence Regulation (No 1206/2001/EC).
rules have been allowed to survive as part of the new architecture, and (b) although the “Europeanization” of private international law in the area of applicable law is currently limited, a rapid development is threatened; only in the area of property rights does the movement towards a single set of applicable law rules operating across the EC appear to have been put on hold.

C. EC LAW AND PRIVATE INTERNATIONAL LAW

The relationship between EC law and private international law is a complex one. This section focuses on the question of legislative competence, but will touch upon other aspects of the relationship.

The starting point, perhaps too obvious to state, is that the European Community is an international organisation established by treaty, the Treaty Establishing the European Community (“EC Treaty”) (1957, as amended). As such, it has only the competences assigned to it by its Member States by treaty.\(^70\) That relationship is confirmed by Art 5 of the EC Treaty which provides:

“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”

The Community’s power to legislate in the field of private international law is to be found in Art 61 of the EC Treaty\(^71\), introduced with effect from 1 January 1999 by the Treaty of Amsterdam, whereby:

“In order to establish progressively an area of freedom, security and justice,\(^72\) the Council shall adopt:

…(c) measures in the field of judicial cooperation in civil matters as provided for in Art 65.”

The power to legislate in the field of judicial cooperation in civil matters is, therefore, expressly tied to the provisions of Art 65.\(^73\) Art 65 itself provides:

“Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Art 67 and insofar as necessary for the proper functioning of the internal market, shall include:


\(^71\) See, however, infra text to nn 125–30.

\(^72\) The concept of an "area of freedom, security and justice" does not appear elsewhere in the EC Treaty but is frequently invoked as a justification for legislative measures (see, eg, the Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom Security and Justice ([23.1.1999] OJ C19, 1) and the Presidency Conclusions of the Tampere European Council (15 and 16 November 1999)). See also Treaty on European Union, Art 2.

\(^73\) The effect of those provisions cannot, therefore, be avoided by omitting reference to Art 65 in the recitals to a Community legislative instrument (see, for example, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).
(a) improving and simplifying:
– the system for cross-border service of judicial and extrajudicial documents;
– cooperation in the taking of evidence;
– the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the Member States.75

By Art 67.5, introduced in 2003 by the Treaty of Nice, measures falling within the scope of Art 65 (other than family law measures) are subject to the “co-decision” procedure prescribed by EC Treaty, Art 251, including qualified majority voting in Council.

It will be immediately apparent that Art 65 contains a number of potential restrictions on the legislative competence of the EC to legislate upon matters of private international law. These restrictions were not part of the initial proposal for a Community competence in this subject area, itself introduced at a relatively late stage of discussions for the Treaty of Amsterdam.74 As one commentator notes:75

“The idea to also include the provisions of Art K.3 [of the Treaty of European Union] dealing with cooperation in civil justice matters came late in the negotiations and encountered some misgivings by a number of Member States. This may explain the somewhat awkward and ambiguous language of Art 65.”

For present purposes, three substantive restrictions appear on the face of Art 65. First, the measures adopted must have cross-border implications. Secondly, measures may be taken only “insofar as necessary for the proper functioning of the internal market”. Thirdly, measures concerning the conflict of laws and jurisdiction must be measures aimed at “promoting the compatibility” of the rules applicable in Member States. In addition, other more general restrictions on the Community’s competence to legislate apply here, in particular the requirements of subsidiarity and proportionality76 and that of legal certainty.77

74 See C Kohler, “Interrogations sur les source du droit international privé européen après le traité d’Amsterdam” (1999) 88 Revue critique de droit internationale privé 1, 9–14, esp footnote 20 setting out the text of the proposal of the Netherlands Presidency for an article creating Community competence in the field of civil justice. See also Council Documents CONF/4000-4002/97.
76 EC Treaty, Art 5 and Protocol No 30.
77 Salumi (Joined Cases 212 to 217/80) [1981] ECR 2735, para 10 referring to “the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it”.

The following paragraphs consider the potential application of each of these restrictions to measures which seek to create uniform rules of private international law across the Community.

1. “Cross-border implications”

In the present context, the requirement of “cross-border implications” probably adds little, if anything. By definition, measures harmonising rules of private international law would have cross-border implications, as the object of such rules is to deal with situations that are connected with more than one legal system.\(^{78}\) Even if, by adopting a contextual interpretation, the expression “cross-border” in Art 65 were understood to mean “across Member State borders”,\(^ {79}\) this requirement would still impose a less rigorous standard than the internal market requirement, discussed in the following paragraphs.

2. “Insofar as necessary for the proper functioning of the internal market”

This requirement (referred to below as the “internal market requirement”) has given rise to more discussion than any other, particularly in the examination of the proposed Rome II Regulation on the law applicable to non-contractual obligations.\(^ {80}\) Thus the current general editor of Dicey & Morris, Sir Lawrence Collins, has stated forcefully:\(^ {81}\)

“[I]t is fanciful to suppose…that a regulation to harmonise private international rules for non-contractual obligations is ‘necessary for the proper functioning of the internal market’.”

Similarly, the European Union Committee of the House of Lords concluded in April 2004:\(^ {82}\)

\(^ {78}\) C Kohler, supra n 74, 17, footnote 26. It is, of course, possible that the situation requiring application of rules of private international law may be connected with more than one legal system within a particular State (eg England and Scotland) so that there would be no “cross-border implications” for this purpose. The text of the proposed Rome II Regulation makes clear, however, that “[a] State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units” (Art 21.2). The possible “internal” effect of the proposed Regulation is, therefore, excluded.


\(^ {80}\) The requirement appears for the first time in Council Document CONF/4000/97 ADD 1, which was circulated by the Presidency to delegations during the last session of the IGC in Amsterdam on 17 June 1997.

\(^ {81}\) Evidence to House of Lords’ European Union Committee examining the proposed Regulation (see HL Paper (Session 2003–2004) 66, Evidence, 46).

“The Commission has not shown a convincing case of ‘necessity’ within the meaning of Art 65.”

In contrast, the European Commission has asserted that the creation of uniform rules of applicable law, in particular rules relating to non-contractual obligations, is “necessary” in this sense. Further, the European Economic and Social Committee has said of the Rome II proposal:

“The purpose of the regulation is the unification of the rules on conflict of laws regarding non-contractual obligations. The harmonisation of conflict rules falls under Art 65(b) [of the EC Treaty]. This means that the Commission is empowered to act where this is necessary for the smooth operation of the internal market. In the Committee’s view, this is the case, as harmonisation will help to ensure equal treatment of economic operations in the Community in cross-border cases, increase legal certainty, simplify application of the law and thus promote willingness to enter into cross-border business, as well as promote the mutual recognition of legal acts of the Member States by making it easier for nationals of other Member States to check that they are legally correct.”

The difficulty with such statements is that they generally provide no indication of the legal test which the author considers should be applied to establish that a measure meets the internal market requirement laid down by Art 65. They also appear to make unstated assumptions as to the type of evidence required to establish that legal test. These questions merit further consideration. In particular, (a) what is the “internal market” and what, from a legal viewpoint, is needed for it to function properly, and (b) how strict is the requirement of “necessity”?

3. The Internal Market and its Proper Functioning

By Art 3.1 of the EC Treaty, the activities of the Community “shall include, as provided in this Treaty”:...

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital...

(g) a system ensuring that competition in the internal market is not distorted...”

See also, in a different context, the statement by the Court of Justice (without supporting material) in Owusu v Jackson (Case C–281/02) [2005] ECR I–0000; [2005] 2 WLR 942, Judgment of 1 March 2005, para 33 (“In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market”).

85 See also the evidence of Mr Mario Tenreiro and Ms Claudia Hahn (JHA) to the House of Lords’ European Union Committee (HL Paper (Session 2003–2004) 66, Evidence, 1–6).

86 Opinion of the EESC on the proposed Rome II Regulation ([28.9.2004] OJ C241, 1), para 3.1. See also the EESC’s opinion on the proposed conversion of the Rome Convention into a Community instrument ([30.4.2004] OJ C168, 1), paras 1.2 and 1.10 (“If the internal market is to function properly, and particularly freedom of movement and of establishment for natural or legal persons, legal certainty must be increased. Since this involves the stability of legal relations, such relations must receive equal treatment in all the EU Member States...”).

86 The writer admits his own prior culpability on both counts (see HL Paper (Session 2003–2004) 66, Evidence, 34–35).
By Art 14.1, the EC was required to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. By Art 14.2:

“The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty [emphasis added].”

The Treaty contains separate sections on the free movement of goods (Arts 23–31), workers (Arts 39–42), services (Arts 49–55) and capital (Arts 56–60) and on freedom of establishment (Arts 43–48).

4. The Internal Market Requirement: Possible Meanings

Possible interpretations of the internal market requirement include the following:

(1) That the legislator need only establish (by objective criteria amenable to judicial review88) some connection between the proposed measure and the cross-border movement within the EC of persons, goods, services or capital (for convenience, this possible interpretation is referred to below as the “low threshold”).

(2) That the legislator must establish (again by reviewable objective criteria) that the proposed measure removes “restrictions” on the cross-border movement of persons, goods, services or capital within the meaning of EC Treaty, Arts 28 to 29 (ex-Arts 30 and 34) (goods), Art 39 (ex-Art 48) (workers), Art 43 (ex-Art 52) (establishment), Art 49 (ex-Art 59) (services) and Art 56 (ex-Art 73b) (capital) (“high threshold”).89

(3) That the legislator must establish (again by reviewable objective criteria) either that the proposed measure removes “restrictions” (in the sense described in the previous paragraph) or that it removes distortions of competition in the internal market for goods, persons, services or capital (“medium threshold”).

The number of possible interpretations doubles if one recognises that, in each case, the required connection with the internal market may be applied strictly (so that the Community has no competence to legislate for situations in which the connection does not exist) or with greater latitude (so that the Community may legislate for situations in which the connection does not exist, as an incidental consequence of legislating for situations in which the connection does exist).

87 There may be other possible variations, but the following illustrate the range of possible views.
88 R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd (Case C–491/01) [2002] ECR I–11453, para 93.
89 It is not relevant for this purpose whether such restrictions are capable of being justified, so as to escape the conclusion that they are incompatible with the Treaty.
It will be readily apparent that, if a low threshold is adopted, the EC’s competence under Art 65 to legislate in matters of private international law is unlikely to be materially hindered by the internal market requirement.

Conversely, if a high threshold is adopted, the internal market requirement would constitute a potentially significant obstacle to Community legislation laying down uniform rules of private international law. Although rules of private international law are capable of constituting a restriction on the free movement of goods, persons, services and capital under the EC Treaty, it is submitted that this is unlikely to be true in most cases. Thus:

(a) Many rules operating in cross-border situations are of a procedural character, being inextricably linked with the process of litigation, and their effect can be strongly argued to be too uncertain and indirect to be regarded as liable to hinder trade between Member States. It is submitted that rules of jurisdiction, which define the circumstances under which national courts may determine legal rights and obligations in accordance with national law, fall into this category. That is not to cast them as being unimportant (for that would plainly be absurd, given the dominant role which they play in modern private international law), but simply to assert that they do not directly regulate cross-border trade.

(b) Rules of applicable law raise more complex considerations. They are not rules of procedure; instead, they define (positively or negatively) the content of national rules which regulate legal status of, and relationships between, natural and legal persons in a cross-border context. They do not themselves regulate cross-border activity, but they do play a central role in identifying the substantive rules regulating civil aspects of cross-border activity. It is submitted, however, that it is normally those substantive rules (and not the rules of applicable law leading to their application) which are the proper subject matter of enquiry when it comes to assessing whether there is a restriction on free movement prohibited by the EC Treaty. Only if, as in Überseering, a rule of applicable law automatically or inevitably restricts or hinders cross-border movement of goods, persons, services or capital will it be correct to focus on that rule as constituting the objectionable restriction. Otherwise, the content of the substantive rules must be examined.

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90 A notable example being the “real seat” rule of applicable law considered by the Court of Justice in Überseering (see supra text to n 40).

91 Unless the rule in question is directly or indirectly discriminatory on grounds of nationality contrary to EC Treaty, Art 12 (ex-Art 6) (see, eg, Hayes v Kronenberger GmbH [1997] ECR I–1711; see also Toz’s SpA v Heyraud [2005] ECR I–0000, Judgment of 30 June 2005 concerning the compatibility with the EC Treaty of the Berne Convention for the Protection of Literary and Artistic Works, although the particular rule in question was not one of private international law). See also M Wilderspin and X Lewis “Les relations entre le droit communautaire et les règles de conflits de lois des États membres” (2002) 91 Revue critique de droit internationale privé 1.


93 Cf Johannes v Johannes (Case C–430/97) [1999] ECR I–3475, para 27 (“Neither the national pro-
(c) An example may help to illustrate this point. Assume that X, a law firm based in Member State A, is asked by its client to provide an opinion to Y AG, a company based in Member State B. Subsequently, Y AG asserts that X was negligent in preparing its opinion and thereby committed a tort. Assuming, for present purposes, that Y AG may sue X in the courts of either Member State A or Member State B, a question arises as to the law applicable to X’s non-contractual obligation. Depending on their respective rules of applicable law, the courts of the two Member States may each apply the same law (most likely, that of A or B) or a different law to determine the existence and scope of that obligation. Public policy and mandatory rules of the forum or of another state may also influence the content of the substantive rules applied in each Member State. It is, however, only once those rules have been identified that a conclusion can be reached as to whether the regulation of the situation by Member State A and/or Member State B constitutes a restriction on X’s freedom to provide services. The fact that the existence of different rules of applicable law in different Member States may result in a disparity of treatment of the situation in two or more Member States does not of itself lead automatically to the conclusion that there is a potentially unlawful restriction.

(d) It should, however, be recognised that the existence of divergent rules of applicable law among the Member States leading to disparity of substantive treatment is liable to increase the risk that cross-border commerce will be impeded by the phenomenon of “double regulation”. Further, by the nature of the connecting factors which they employ, some rules of applicable law may inevitably result in different substantive treatment within a legal system either (i) between goods/services for domestic consumption and exported goods/services (i.e. according to country of destination) or (ii) between domestically sourced goods/services and imported goods/services (i.e. according to country of origin). Even if such differences do not themselves constitute potentially unlawful restrictions under the EC Treaty, it may be argued that their impact is to distort competition in the internal market by subjecting different manufacturers/service providers to different rules. If a low or medium threshold were to be adopted, removal of such distortions (if appreciable) would be sufficient to justify legislative intervention.

(c) That said, the adoption of uniform applicable law rules would be inapposite visions of private international law determining the substantive national law applicable to the effects of a divorce nor the national provisions of civil law substantively regulating those effects fall within the scope of the Treaty”.

94 Brussels I Regulation (No 44/2001(EC)), Arts 2 and 5.3.
95 Ie whether “it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services” (Säger (Case C–76/90) [1991] ECR I–4221, para 12).
to remove differences in treatment between different operators before the courts of a single Member State which result from the connecting factors pointing to the applicable law; indeed (unless the lex fori were to be applied in all situations) harmonisation of applicable law rules would be likely to give Community sanction to distinct treatment by reason of the choice of connecting factors. Nevertheless, by reducing disparities in substantive treatment by different Member State courts of the same situation, the creation of uniform rules of applicable law might arguably have the effect of removing genuine restrictions on cross-border trade or distortions in competition resulting from “double regulation” even though the Member State rules of applicable law which are overridden do not, viewed individually, constitute potentially unlawful restrictions.

(f) Rules concerning the recognition and enforcement of foreign judgments and awards are (essentially) rules of applicable law in that they define the circumstances under which national law will be prepared to impose obligations upon natural or legal persons mirroring those imposed by foreign courts or arbitral tribunals. Arguably, however, a judgment or arbitral award should itself be treated as goods or capital for the purposes of the EC Treaty provisions on free movement. If that argument were to be accepted, the proposition that harmonisation measures which seek to remove obstacles to the “movement” between Member States of judgments or arbitral awards satisfy the internal market requirement (however defined) would appear to be unanswerable.

5. What Is the Correct Legal Test for the Internal Market Requirement?

A number of commentators appear to support a low threshold for Art 65, treating the internal market requirement as having little or no significance. This view appears, however, difficult to reconcile with the apparent desire of the

97 The effect of public policy and mandatory rules would mean that disparities could not be eliminated.
98 The need to support the case for legislation by evidence or other materials capable of being reviewed judicially must be respected.
100 Goods have been defined as products which “can be valued in money and which are capable, as such, of forming the subject matter of commercial transactions” (Barnard, supra n 62, 27 citing Commission v Italy (Case 7/68) [1968] ECR 423, 428–429). As a matter of English law (at least), judgment debts are capable of being assigned for valuable consideration.
101 See Herzog, supra n 75, para 65.02 (“Commentators are, however, generally agreed that this requirement should not receive a narrow interpretation.”); Basedow, supra n 79, 703 (treating Art 65(b) as an “implicit recognition…that the compatibility of conflict rules is necessary for the proper functioning of the internal market”); Kohler, supra n 74, footnote 26.
As is well known, the Tobacco Advertising Directive (No 98/43/EC) was adopted under Art 100a (now Art 95) of the EC Treaty. Like Art 65, Art 95 contains an internal market requirement:

“The Council shall...adopt the measures for the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market [emphasis added].”

The Directive banned all forms of tobacco advertising and sponsorship in the EC. Germany, which had voted against the measure, successfully challenged its validity. The opinions of the Court of Justice and of the Advocate-General (Fennelly) with regard to the nature and scope of Art 95 apply, it is submitted, equally to Art 65. In summary, the position is as follows:

(a) The selection and evaluation of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure.\(^\text{105}\)

(b) Art 95 (ex-Art 100a) of the EC Treaty does not vest in the Community legislature a general power to regulate the internal market.\(^\text{106}\) By parallel reasoning, Art 65 EC does not create a general competence to regulate the area of civil justice.

(c) If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Art 95 as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.\(^\text{107}\) A low threshold was, therefore, expressly rejected.

(d) The competence under Art 95\(^\text{108}\) is conferred either to facilitate the exercise of the four freedoms (goods, persons, services and capital) or to equalise the conditions of competition.\(^\text{109}\) The limited competence contemplated by the

\(^{103}\) See supra nn 75–78.


\(^{105}\) Court, para 59; Adv-Gen, para 61. See also R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd (Case C–491/01) [2002] ECR I–11453, para 93.

\(^{106}\) Court, para 83; Adv-Gen, para 82.

\(^{107}\) Court, para 84.

\(^{108}\) And, by parallel reasoning, Art 65.

\(^{109}\) Court, para 93; Adv-Gen, paras 83, 88. See also R (Alliance for Natural Health) v Secretary of State for Health (Case C–154/04) [2005] ECR I–0000, Judgment of 12 July 2005, paras 26–32.
high threshold, as defined above, was therefore also expressly rejected in
favour of a test in line with the suggested medium threshold.

(e) Measures may have as their object the prevention of future obstacles to trade
resulting from multifarious development of national laws. Such future
development must, however, be likely.110

(f) Distortions in competition which a measure seeks to remove must be
“appreciable”.111

By the same reasoning, it is submitted that the appropriate test for the internal
market requirement in Art. 65 is as follows:

“Has it been established (by objective criteria amenable to judicial review) either (a)
that the proposed measure removes appreciable existing restrictions on the cross-bor-
der movement of goods, persons, services or capital within the meaning of EC Treaty,
Arts 28 to 29, 39, 43, 49 or 56 (as applicable), (b) that the proposed measure prevents
likely future restrictions on the exercise of these fundamental freedoms, or (c) that the
proposed measure removes appreciable distortions on competition within the internal
market?”

Here, as elsewhere, when engaging in a review of complex legislative choices
affecting diverse economic and other interests, the Court must normally accept
the assessment of the legislator that a measure is effective to ensure the proper
functioning of the internal market.112 The Court of Justice will not lightly second
guess the legislator’s assessment of the need for a particular measure.

6. Does the Art 65 Competence Extend to Situations in Which There
Is No Connection with the Proper Functioning of the Internal
Market?

Turning to the question of the competence to legislate for situations which do
not have the required connection to the proper functioning of the internal
market, the Court of Justice has held that measures adopted under Art 95 may apply
(and, therefore, may be validly adopted) even in situations which have no link
with the exercise of the fundamental freedoms guaranteed by the EC Treaty.113
Perhaps significantly, this line of authority has been applied recently by the
Court of Justice in the case of Owusu v Jackson in order to reject a restricted con-
struction of the rules of jurisdiction contained in the Brussels Convention.114

110 Court, para 86. In the case of existing restrictions, it appears that, although a slight effect on
trade may be enough (see Adv-Gen, para 104; Dessouselle (Case R/74) [1974] ECR 837, para 5),
the effect must be appreciable and not abstract (see Court, para 84) or too uncertain and indirect
(Barnard, supra n 62, 498).

111 Court, paras 106–107; Adv-Gen, para 90.

112 Tobacco Advertising, Adv-Gen, para 98.

113 Rechnungshof v Österreichischer Rundfunk (Joined Cases C–465/00, C–138 to 139/01) [2003] ECR

114 Owusu v Jackson (Case C–281/02) [2003] ECR I–0000; [2003] 2 WLR 942, Judgment of 1 March
2005, para 35.
It will no doubt be suggested that the reasoning in Owusu provides a template for future decisions on the extent of the Community's competence to harmonise rules of private international law under Art 65. It is submitted, however, that there is a critical difference between the internal market wording in Art 95 and that in Art 65, and that Owusu (which concerned the construction of an international agreement not the validity of a measure adopted under Art 65) is not the final word on this issue. Whereas Art 95 refers only to “measures...which have as their object the establishment and functioning of the internal market” and appears to contemplate the possibility that a measure might have a wider effect, Art 65 (by using the words “insofar as necessary”) strongly suggests that the EC’s legislative competence goes no further than the proper functioning of the internal market requires. Nor is this simply a quirk of the English text of the EC Treaty. The same difference in language appears also, for example, in the French115 and German116 texts. Unlike Art 95, therefore, Art 65 imposes an internal substantive proportionality requirement: the measure must go no further than necessary to eliminate restrictions on the fundamental freedoms or remove distortions of competition in the internal market.117 In other words, it cannot apply to situations which have no connection with the internal market. The legal test for the internal market requirement set out above must be adjusted accordingly.

7. The Treaty Establishing a Constitution for Europe118

Art III-269 of the Treaty establishing a Constitution for Europe creates Community competence in the area of judicial co-operation in civil matters “based on the principle of mutual recognition of judgments and decisions in extrajudicial cases”. Insofar as it confers power to legislate in matters of private international law, the terms of Art III-269 are not dissimilar to those of Art 65. Significantly, however, Art III-269.2 refers to the adoption of measures “particularly when necessary for the proper functioning of the internal market”. As the UK Government has noted,119 this expands the scope of the Community's legislative competence in this area, by diluting the internal market requirement.120 If (as

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115 Art 95: “pour object l’establishissement et le fonctionnement du marché intérieur”; Art 65: “dans la mesure nécessaire au bon fonctionnement du marché intérieur”.
116 Art 95: “welche die Errichtung und das Funktionieren des Binnenmarktes zum Gegenstand haben”; Art 65: “soweit sie für das reibungslose Funktionieren des Binnenmarktes erforderlich sind”.
117 See infra text to nn 156–70 for practical application of this requirement.
120 The fate of the internal market requirement in the successor to Art 65 was uncertain throughout the negotiations for the draft Constitution. The Working Group (X) recommended its retention [see European Convention Document CONV 426/02]. It was, however, removed entirely from the draft Arts dealing with the “area of freedom security and justice” (see CONV 614/03, Art 14.
now seems unlikely) the Constitution is ratified by the Member States, the argument advanced in the preceding paragraph (ie that legislative measures in the field of judicial co-operation in civil matters cannot extend to situations which have no connection with the internal market) will no longer be sustainable.

8. “Promoting the Compatibility” of Rules on Conflict of Laws and Jurisdiction

It has been suggested that the rather curious language of Art 65(b),121 as contrasted with the more general language of Art 65(a), excludes the possibility of creating a uniform set of rules of applicable law (or, for that matter, jurisdiction122) by means of an EC Regulation.123 On a literal reading of Art 65(b), this carries some appeal. The verb “promoting” (in the French version, “favoriser”) and the noun “compatibility” suggest measures short of unification by directly applicable Community law. It seems unlikely, however, that so technical an argument would find favour with the Court of Justice, particular as it would possibly cast doubt on the validity of earlier instruments harmonising rules on jurisdiction.124 Further, even with the creation of Community private international law rules in particular fields, Member States will (at least for the foreseeable future) retain their own rules in other fields and questions of compatibility between them will continue to arise. Accordingly, although the EC may have no competence to create a comprehensive system of European private international law by means of a Regulation or a series of Regulations, that restriction is (for the time being at least) of theoretical importance only.

9. Relationship with Art 95

It has also been suggested that Art 65 applies only to measures concerning the free movement of persons, whereas Art 95 applies to measures concerning the free movement of goods and services.125 That argument is unpersuasive. Arts 61 and 65, although contained in a section of the EC Treaty entitled “Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons”,

and commentary). The UK representatives (and others) subsequently sought its reintroduction (see CONV 644/1/03 REV 1). There was no mention of the internal market requirement in the final draft of the Convention (CONV 850/03, Art III–170), but it appears to have been reintroduced in the modified form described above in inter-governmental negotiations.

121 See also Art 65(c).

122 Although uniform rules of jurisdiction in the Brussels I Regulation (Reg 44/2001(EC)) might be seen as an integral, and subordinate, part of a scheme to simplify rules on the cross-border enforcement of judgments within the Community and so justified by Art 65(a).


124 Including the Brussels I Regulation (No 44/2001(EC)). See, however, supra n 122.

125 Basedow, supra n 79, 697–99. See also Kohler, supra n 74, 15–17.
contain no suggestion that they are limited to measures concerned with the free movement of persons.\textsuperscript{126} As Art 61 provides a specific competence for measures, \textit{inter alia}, in the area of civil justice, it is submitted that it (as qualified by Art 65) provides the correct Treaty basis for measures adopted in this area. With the exception of aspects relating to family law,\textsuperscript{127} Art 61 is no less democratic than Art 95.\textsuperscript{128} Further, taken together with Art 65, Art 61 contains (in the writer’s submission\textsuperscript{129}) more extensive protections for the competence of Member States to legislate in this area. Those protections should be respected, and not subverted by recourse to Art 95.

Art 95 remains the appropriate Treaty basis in circumstances where creation or modification of rules of private international law is a subsidiary or incidental part of sectoral or general legislation affecting the internal market more broadly.\textsuperscript{130}

10. Other Restrictions on Legislative Competence: Proportionality, Subsidiarity and Legal Certainty

Art 5 of the EC Treaty, having confirmed that the Community’s competence is limited to the powers expressly conferred on it by the Treaty, states:\textsuperscript{131}

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”

The Court of Justice has confirmed that these limitations of subsidiarity and proportionality, particularly the former, are primarily political, and that the Community legislature has a broad discretion in these matters. A measure will only be reviewed on these grounds if it is manifestly inappropriate.\textsuperscript{132} Although each case must be considered on its merits, the prospects of a successful challenge to a Regulation adopted under Arts 61 and 65 on either of these grounds

\textsuperscript{126} There is no suggestion that the former Art K.3 of the former Treaty on European Union, which contained provisions for co-operation in the field of civil justice, was so limited.

\textsuperscript{127} See Art 67.5.

\textsuperscript{128} In any event, the reasoning based on democratic process in the \textit{Titanium Dioxide} decision (Commission v Council (Case C–300/89) [1991] ECR I–2867 has been heavily criticised (see Barnard, supra n 62, 500–02).

\textsuperscript{129} See esp supra text to nn 102–17.

\textsuperscript{130} Such as the Directives in the insurance sector (see supra text to n 37).

\textsuperscript{131} See also Protocol No 3 to the EC Treaty on Subsidiarity and Proportionality.


\textsuperscript{133} \textit{Supra} text to n 117.
seem fairly remote. Further, in the writer’s submission, the internal market requirement in Art 65 imposes an internal substantive test of proportionality, which prevents it from being used as a treaty base to regulate situations which have no connection with the proper functioning of the internal market. If that view is correct, the relevance of the general requirement of proportionality as a possible ground of challenge is likely to be further diminished in this context.

In accordance with the requirement of legal certainty, the effect of Community legislation must be clear and predictable for those who are subject to it. Not every difficulty in interpretation, however, leads to a breach of legal certainty. In complex areas, such as private international law, it will be sufficient that the sense and consequences of the application of provisions can be grasped by individuals and businesses, if necessary, with the benefit of legal advice.

11. Case Study – Legislative Competence to Adopt the Proposed Rome II Regulation

The question whether the EC has legislative competence to adopt the proposed Rome II Regulation on the law applicable to non-contractual obligations is properly the subject of a paper in its own right. As noted above, this question is a controversial one. In any event, the final form of the proposal (even assuming that political agreement can be reached) is unclear and it is likely to be much modified from the Commission’s original proposal. With these reservations in mind, the following observations are ventured:

(a) The recitals to the proposed Regulation and the Commission’s Explanatory Memorandum appear to fall short of satisfying the internal market requirement. While the Explanatory Memorandum briefly explores differences between the Member States’ current rules of applicable law in the area of non-contractual obligations, it contains no concrete evidence that those

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132 R v Minister for Agriculture, Fisheries and Food, ex parte National Farmers’ Union (Case C-354/95) [1997] ECR I-4559, para 58.
135 See text to nn 80–85. The Council has taken legal advice on questions of competence (see Council Document 7015/04 — redacted).
136 The revised text of the draft Regulation prepared by the joint Presidencies of the Netherlands and Luxembourg in December 2004 and circulated recently by the UK Department of Constitutional Affairs for consultation shows significant amendments. So too, the final report of the European Parliament’s Rapporteur, Diana Wallis MEP (see Parliament Documents A6-211/2005 FINAL (27.6.2005) and P6_TA-PROV (2005) 0284 (6.7.2005)).
divergences create either appreciable obstacles to the free movement of goods, persons, services or capital or appreciable distortions of competition. Instead, the Commission suggests (weakly):\textsuperscript{141}“Given that there are more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts would have different conflict rules applied to them, which could provoke a distortion of competition [emphasis added]. Such a distortion could also incite operators to go forum-shopping.”

It is submitted that this falls short of the requirement, established by the Tobacco Advertising Directive\textsuperscript{142}decision, that the legislator establish by objective factors amenable to judicial review an appreciable distortion of competition resulting from divergences between the laws of Member States.

(b) The Commission relies, both in its Explanatory Memorandum\textsuperscript{143}and in the draft recitals\textsuperscript{144}on the Vienna Action Plan of the Council, which required the Commission to draft an instrument on the law applicable to non-contractual obligations.\textsuperscript{145}The draft recitals also refer to the conclusions of the Tampere European Council approving the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area.\textsuperscript{146}The Commission expressly links the creation of uniform rules of applicable law to the achievement of legal certainty and the free movement of judgments.\textsuperscript{147}

With respect, these arguments are also unconvincing. The fact that a general political agreement may have been reached that harmonisation of rules of applicable law is a desirable goal cannot itself confer or confirm Community competence to adopt any particular harmonisation measure.\textsuperscript{148}Even if the Member States\textsuperscript{149}were unanimously to adopt the proposed Rome II Regulation, this would not override the obligation of the Court of Justice to ensure that “in the interpretation and application of [the EC] Treaty the law is observed”.\textsuperscript{150}

\textsuperscript{141}COM (2003) 427 final, 7.
\textsuperscript{142}See supra text to n 111.
\textsuperscript{143}COM (2003) 427 final, 6.
\textsuperscript{144}Recital (2).
\textsuperscript{145}23.1.1999 OJ C19, 10–11.
\textsuperscript{146}Recital (3).
\textsuperscript{147}COM (2003) 427 final, 7; Recital (4).
\textsuperscript{148}Cf Art 31.3 of the Vienna Convention on the law of treaties (“There shall be taken into account, together with the context:…(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).
\textsuperscript{149}Excluding Denmark, to which the Regulation will not apply.
\textsuperscript{150}EC Treaty, Art 220. See also Italian Republic v Council (Case 166/78) [1979] ECR 2575 (a country which has voted for a measure in the Council is not thereby precluded from challenging it within the applicable time limits). A private party could also challenge any Regulation (see Herzog, supra n 75, para 65.02).
Further, the suggested connection to the principle of mutual recognition appears tenuous.\(^{151}\) The requirement that “[u]nder no circumstances may a foreign judgment be reviewed as to its substance” is at the heart of the regime for intra-Community enforcement of civil judgments in the Brussels Convention\(^ {152}\) (and its successor, the Brussels I Regulation\(^ {153}\)). Indeed, the Court of Justice has reaffirmed that:\(^ {154}\)

“The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision.”

Thus, assuming that Member States are meeting their obligations under the Brussels Convention and the Brussels I Regulation, the link between the creation of uniform rules of applicable law and the recognition and enforcement of judgments within the Community would appear remote at best. If the Member States are not meeting those obligations, the appropriate step would seem to be for the Commission or another Member State to take action to remedy that non-compliance, rather than to shore up the failing system with further regulation.

Moreover, the argument that harmonisation of Member State rules of applicable law will improve legal certainty and therefore contribute to the proper functioning of the internal market also appears an inadequate justification. On this view, any harmonisation measure would contribute to the proper functioning of the internal market, by replacing 25 different sets of rules with a single Community rulebook. The internal market requirement, both in Art 65 and Art 95, would be deprived of all meaning.

(c) That is not to say that a case cannot be made out to support the *vires* of a Community instrument creating uniform rules of applicable law for non-contractual obligations. As yet, however, the case remains unproven. Nevertheless, any Member State or private party challenging the validity of the Rome II Regulation (if adopted) would undoubtedly face a difficult task in view of the Court of Justice’s inclination to defer to the legislator’s assessment of the existence of a legal basis for a Community measure.\(^ {155}\)

(d) If (as submitted above) the legislative competence under Art 65 does not extend to situations which have no connection with the proper functioning of the internal market, the proposed Rome II Regulation must contain some

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\(^{151}\) As representatives of the Commission appeared to recognise in evidence given to the House of Lords’ European Union Committee in 2004 (see HL Paper (Session 2003–2004) 66, Evidence, 6).

\(^{152}\) Brussels Convention, Art 29.

\(^{153}\) Brussels I Regulation (No 44/2001(EC)), Art 36.


\(^{155}\) See supra text to n 112.
express or implied restriction excluding its application to such situations. The Commission’s draft contains no express restriction. Indeed, Art 2 (entitled Universal Application) suggests that the Regulation has the broadest possible scope:

“Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.”

In contrast, Art 1 of a draft of the proposed Regulation prepared by the Council Presidency in December 2004 contains a number of suggested options concerning its sphere of operation. These include (1) excluding the operation of the Regulation if the only connection to the EC results from a choice of court agreement designating a Member State court (with the possible additional requirement that none of the parties to the dispute be domiciled in a Member State), (2) excluding the operation of the Regulation where a Member State court has assumed jurisdiction solely on the basis of its national law,156 (3) expressly applying the Regulation in all cases where a Member State court has jurisdiction (on whatever basis), and (4) making no express provision for the sphere of operation of the Regulation.

None of these provisions appears to resolve the difficulty presented by the exclusionary effect of the internal market requirement. The first appears to be specifically tailored to meet the concern expressed by the United Kingdom Government that there is no conceivable connection with the operation of the internal market in a situation in which two non-EC nationals157 confer jurisdiction on a Member State court as a neutral forum in respect of disputes (whether in contract or otherwise) arising between them. As the UK Government has rightly observed, “[t]he link between such a case and the European Union, let alone the proper functioning of the internal market, would appear to be highly tenuous”. It is submitted, however, that there are other situations which equally have, at best, only a tenuous connection with the functioning of the internal market and which would not be excluded from the scope of the proposed Regulation by the first option advanced by the Presidency. These situations essentially involve the activities of EC nationals in non-Member States. For example:

(i) A situation in which a tort claim arises from the provision of an opinion by a law firm established in a Member State to a company incorporated and carrying on business exclusively in a non-Member State.

(ii) A situation in which a parent company established in a Member State is

156 I.e. in accordance with Art 4 of the Brussels I Regulation.
157 The UK Department of Constitutional Affairs uses South Korean nationals in its example (see Response of the United Kingdom Government to Commission Consultation on Preliminary Draft Proposal for Rome II Regulation, para 5).
sued in respect of asbestos related injuries caused to employees of one of its subsidiaries in a non-Member State.\textsuperscript{158}

(iii) A situation in which an EC national causes a car accident in a non-Member State through his negligence.

The non-contractual obligation in each of these cases cannot in any sense be said to arise out of or in connection with the exercise of one of the fundamental freedoms guaranteed by the EC Treaty. Conceivably, the point might be taken in response that, in each of these situations, the putative defendant (it might equally be a putative claimant) is based in the Community and might be hindered in the future exercise of his freedom of movement between Member States by the prospect of different rules of applicable law being applied to the claim in different Member States.\textsuperscript{159} In the context of rules of applicable law for non-contractual obligations, however, the suggestion that such considerations might be influential appears fanciful.\textsuperscript{160} While the existence of divergent Member State rules of applicable law for non-contractual obligations arising out of or in connection with the exercise by Community nationals of fundamental freedoms might be argued to create restrictions to such exercise or distort competition within the EC, the suggestion that those same divergences appreciably hinder the exercise of fundamental freedoms which have no connection with the non-contractual obligation in question ventures, in the writer’s submission, too far into the realm of creative (or wishful) thinking.\textsuperscript{161}

From this viewpoint, none of the remaining options presented by the Presidency appears acceptable either. The third amounts effectively to a flat denial that the internal market requirement imposes any limitation on the sphere of operation of the proposed Regulation. It seems likely to maximise the prospects of a successful challenge on \textit{vires} grounds. The fourth leaves open the question whether any implied limitation should be recognised upon the Regulation’s sphere of operation.\textsuperscript{162} The second, considered in further detail below, is (as will be seen) both under and over inclusive.

Can a better solution be found? It is suggested that three options merit further consideration. First, to amend Art 2 (\textit{Universal application}) so that the Regulation applies only if the system of law designated is that of a Member State.\textsuperscript{163} This solution has an instinctive attraction that the Regulation will

\textsuperscript{158} See Lubbe v Cape plc [2000] 1 WLR 1545.

\textsuperscript{159} For a similar argument, see Basedow, supra n 79, 74. See, however, the response of Remien, supra n 102, 75–76.

\textsuperscript{160} It might have a greater resonance in family law matters or wills and succession.

\textsuperscript{161} Nor, it is submitted, does the fact that the parties might be insured by EC-based undertakings exercising their own fundamental freedoms provide a sufficient connection to the internal market.

\textsuperscript{162} Ie re-running, in relation to Art 65, the question which the Court addressed for Art 95 in the \textit{Österreichischer Rundfunk} and \textit{Lindqvist} cases (see supra text to n 113).

\textsuperscript{163} It may be necessary to modify the test slightly to exclude reference for this purpose, for example, to a choice by the parties of the law governing the non-contractual obligation (see Art 3A of the Presidency draft).
only apply when the determinative connecting factor (in the case of a tort, usually “damage”\textsuperscript{164}) shows a connection to the Community. Its obvious disadvantage is that it would introduce a new layer of complexity by requiring that the rules of applicable law contained in the Regulation be employed in all cases to determine whether the law applicable to a non-contractual obligation should be identified by reference to those rules or to the forum state’s residual (ie non-harmonised) rules of applicable law. A court might, therefore, be required to apply two sets of rules, giving rise to potentially conflicting results. That complexity would be avoided only if Member States were to extend the Regulation rules voluntarily so that they had universal application. This solution is also imperfect as the rules contained in the proposed Regulation as it stands may result in the application of the law of a Member State to a situation which has no connection to the internal market\textsuperscript{165} as well as to the application of the law of a non-Member State to a situation which has an obvious connection to the functioning of the internal market.\textsuperscript{166} It must therefore be rejected.

Secondly, to develop the first option advanced by the Presidency so that it is more sensitive to connections with the internal market. For example, the following formulation (influenced by Art 3.3 of the Rome Convention) might be suggested:

“This Regulation shall apply only if (excluding the nationality and habitual residence of the parties and any choice of court agreement) the facts giving rise to the non-contractual obligation are connected with more than one Member State.”

Although this formulation is more sensitive to situations in which there is a genuine cross-border element within the Community, it does seem likely to promote uncertainty as to the sphere of application of the Regulation. Further, it is by no means reliable, as it would not exclude the operation of the Regulation in a situation (eg a libel in a newspaper published and primarily, but not exclusively, distributed in a non-Member State) where the allegedly harmful acts had no connection to the EC, but resulted in damage\textsuperscript{167} in more than one Member State. Again, this solution must be rejected.

Thirdly, to develop the second option advanced by the Presidency so that it is more sensitive to connections with internal market. The principal difficulty with this option as it stands is that the proposed link to national rules of jurisdiction means that the application of the Regulation would

\textsuperscript{164} See Art 3.1 of the proposed Regulation.

\textsuperscript{165} Eg a US publisher libels a French citizen in a publication which has a limited distribution in France and other member states.

\textsuperscript{166} Eg if litigating parties agree (after a dispute arises between them) that claims based on non-contractual obligations should be governed by New York law.

\textsuperscript{167} In the example, by distribution of a (limited) number of copies of the newspaper.
depend predominantly upon the “domicile” of the defendant168 alone and not upon any objective assessment as to whether the situation has any connection to the functioning of the internal market. As a result, it is both over and under inclusive:

(i) It would bring within the scope of the Regulation situations which have no connection whatsoever with the internal market (e.g. a French domiciled party causes a motor accident in Australia, injuring an Australian citizen who sues in France).

(ii) It would, however, exclude from the scope of the Regulation situations which, on their face, have an obvious internal market connection (e.g. a US incorporated bank, operating through a branch in England, markets English listed securities to French nationals in France using misleading statements).

It is submitted, however, that these problems can be satisfactorily addressed by the following steps. First, the link in the present draft to rules of jurisdiction is unnecessary and unhelpful; the connecting factor (be it domicile of the defendant or otherwise) should be expressly stated. Secondly, the concept of habitual residence is to be preferred to that of domicile, as it is more sensitive to a party’s connections with the EC with respect to the subject matter of the action.169 Thirdly, the test should be stated in terms of the habitual residence of both claimant and defendant and should require they be habitually resident in different Member States; thereby establishing the necessary cross-border link.170 Finally, the test should be made more sensitive by excluding the operation of the Regulation if the only factual connection of the situation to the territory of the EC is the nationality or habitual residence of one or more of the parties. Otherwise, the Regulation would apply, for example, to a situation in which a French and German citizen are involved in a motor accident in a non-Member State, a situation which (it is submitted) does not have a sufficient connection to the functioning of the internal market.

The effect of these suggested changes is to produce a restriction upon the sphere of operation of the proposed Regulation along the following lines:

168 As noted above (see section A of this article), the principal role accorded to national rules of jurisdiction in the framework established by the Brussels Convention and the Brussels I Regulation is (subject to other provisions of the Convention/Regulation) to determine questions of jurisdiction over persons not domiciled in a member state (see Art 4 of both the Convention and the Regulation).

169 See Art 19 of the Commission’s proposal.

170 For a similar approach, see the Presidency compromise proposal concerning the scope of the Regulation creating a European order for payment procedure (Council Document 12899/04). That proposal, which followed advice from the Council’s legal service (see Council Document 10107/04 – redacted), appears to have been adopted by member state representatives at the recent meeting of the Justice and Home Affairs Council (see Council Document 7721/05).
“This Regulation shall apply only if the parties are habitually resident in different Member States, provided that this Regulation shall not apply if the only connection between the facts giving rise to a non-contractual obligation and the territories of the Member States consists of the nationality, domicile or habitual residence of one or both of the parties.”

e) The effect of including a limitation upon the sphere of operation of the Regulation, such as that described above, will be to create two separate sets of rules of applicable law in the field of non-contractual obligations (harmonised and non-harmonised), unless Member States voluntarily apply the new rules in all situations. Admittedly, that outcome may cause inconvenience. Such inconvenience does not, however, justify disregarding the stated limitations upon the Community’s legislative competence contained in Art 65 of the EC Treaty. The situations which fall outside the scope of the Regulation do not have the requisite connection with the operation of the internal market.

f) Finally, certain options for rules in specific areas in the December 2004 Presidency draft appear to create additional regulatory burdens for business and to infringe the principle of legal certainty, by giving the claimant the right to elect between two or three possible legal systems at the time proceedings are brought. The concept of “claimant choice” appears in option 1 for Art 5 (Product liability) and option 2 for Art 7 (Violation of the environment) of the Presidency draft. To a common lawyer, such choice appears inimical to the nature of rules of applicable law.171 In effect, businesses will be forced to comply with the most onerous of the potentially applicable regimes, thereby creating a situation in which new obstacles to the exercise of fundamental freedoms are likely to be created.

D. IS A EUROPEAN SYSTEM OF PRIVATE INTERNATIONAL LAW NECESSARY OR DESIRABLE?

1. Introduction

At this point, it seems appropriate to put questions of competence to one side and to stand back to ask the question: “Is the creation of uniform rules of private international law across the EC a good thing?” That question cannot, however, be given a single answer as each proposal must be considered on its merits. In the case of some of the existing EC instruments, the answer (in the writer’s opinion) is a qualified “yes”. Neither the Brussels Convention nor the Rome Convention is perfect (and, in the case of the former, the jurisprudence of

171 Some civil systems do, however, recognise this possibility (see, eg, Art 40 of the German Introductory Law of the Bürgerliches Gesetzbuch (EGBGB)).
the Court of Justice has on occasion created unnecessary certainty) but each has had a generally positive impact; the former in liberalising rules on the enforcement of judgments between Member States and the latter in enhancing party autonomy for contractual obligations across the Community. Further, in the writer’s initial view, the Commission’s proposals for uniform rules of private international law in the fields of wills and succession and divorce merit further consideration, as cross-border issues in these fields appear increasingly likely to affect the daily lives of Community nationals.

The line, however, must be drawn somewhere. Art 65 does not give the Community a carte blanche to create a European private international law code; nor (in the writer’s view) would this be a desirable outcome. In each case where reform is suggested, the positive and negative impact of reform must be carefully assessed and balanced through consultation and an impact assessment. These include (a) the likely effect on intra-Community trade, (b) the likely uncertainty and additional costs for business resulting in the short to medium term from the introduction of new rules, (c) the likely reaction of business and consumer interests judged by their views on consultation, and (d) the potentially adverse impact of Community led rules upon legal tradition and beneficial effects of diversity in Member States’ legal systems.

2. Case Study – The Proposed Rome II Regulation: A Measure in the Balance?

It is by no means certain that the potential advantages of the proposed Rome II Regulation outweigh the disadvantages:

(a) While it is conceivable that the creation of uniform rules of applicable law for non-contractual obligations will ultimately have a positive effect on trade, the Commission has not (at least so far as the writer is aware) produced any specific evidence to that effect. In the writer’s experience, parties to cross-border commercial transactions generally focus exclusively on the enforcement of contractual obligations, and the rules of applicable law for such obligations. Further, the existing rules of applicable law for torts have given rise to comparatively little case law, particularly in a commercial context, before the English Courts, adding further weight to the argument that commercially they are of little significance.

(b) While some uncertainty and legal cost from the introduction of new rules in any field is inevitable, it is likely to be many years before the Court of Justice

\[\text{172 See the Commission’s Action Plan “Simplifying and improving the regulatory environment” (COM (2002) 278 final) and the Communication on impact assessment (COM (2002) 276 final).}\]
has developed case law concerning the meaning of key terms (such as “damage” in Art 3.1) and the relationship between the proposed “Regulation” and the Rome Convention (or a Community instrument on the law applicable to non-contractual obligations). The historical precedent is not encouraging. More than 30-years since the Brussels Convention came into force, the important dividing line between competence in “matters relating to contract” (Art 5.1) and “matters relating to tort” etc. (Art 5.3) remains unclear. Unhelpfully, the Court of Justice has defined the scope of the former only in negative terms, and the scope of the latter as the inverse of the former. The time delay in establishing the efficient functioning of the Rome II Regulation (if adopted) is likely to be further hindered by the current restriction of the right of reference in Art 68.1 of the EC Treaty to final courts of appeal.

(c) If the proposed Regulation is to meet its objective of improving legal certainty, one would have thought it essential to give commercial parties the ability to choose the law governing non-contractual obligations arising out of a particular relationship. Nothing in this field would appear more likely to promote business confidence and to enhance the prospects for intra-Community trade. The primacy given to the principle of party autonomy in the Rome Convention is undoubtedly the principal reason for the success of that instrument and, although party autonomy has yet to be widely accepted in relation to non-contractual obligations, it is submitted that there is no obvious reason why parties negotiating on an equal footing should be denied the opportunity to select in advance the law that will govern non-contractual claims arising between them. It is, therefore, unfortunate that the Commission, which had contemplated allowing party choice in its consultation draft, has now proposed allowing an agreement on applicable law only after a dispute has arisen. That is of little practical commercial use. More encouragingly, however, the December 2004 Presidency draft contains two possible options on this issue, one of which will

174 Soc. Jakob Handte v Traitements Micano-chimiques des Surfaces (Case C–26/91) [1992] ECR I–3967, para 15 (“the phrase ‘matters relating to a contract’ [in Brussels Convention, Art. 5.1] is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another”).

175 Kalfelis v Bankhaus Schroder Munchner Hengst & Co. (Case C–189/87) [1988] ECR 5565, para 17 (“matters relating to tort” etc in Brussels Convention, Art 5.3 encompasses “all actions which seek to establish the liability of a defendant and are not related to a contract within the meaning of Art 5.1”).

176 Recognising the need to protect consumers and other groups in a weaker bargaining position.

177 See Rome Convention, Art 3.

178 Preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations, Art 11 (see http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm, as at 6 June 2005).

allow an *ex ante* choice of law.\textsuperscript{180} It is to be hoped that commercial common sense prevails if the Regulation proceeds.\textsuperscript{181}

(d) At least in England, legal tradition has a limited role to play in this field. The rules of applicable law for torts are contained principally in a recent statute.\textsuperscript{182} Although it has not created too many difficulties in its application, one doubts whether its passing would be unduly mourned.\textsuperscript{183} There has been little judicial development of rules of applicable law for other non-contractual obligations, although there has been considerable recent academic analysis.

3. Mourning the Past?

Private international law in Europe, particularly on the continent, has a long and distinguished history.\textsuperscript{184} In England, its development during the nineteenth and twentieth centuries has given rise to a mix, of longstanding fascination to students of the subject, of early and modern case law and statute. English private international law has influenced the development of the subject in other Commonwealth jurisdictions, and the courts of those jurisdictions have in turn recently shown the ability to lead the way and encourage refinement of the law in England.\textsuperscript{185} With the developments described in this article, however, that link is being slowly eroded. The continuing influence of scholars such as Dicey, Story and Savigny will also decline as the pace of change gathers and legislation predominates. Traditional learning and centuries of jurisprudence will move from current law to legal history. Instead, the future of private international law in England (and elsewhere in Europe) is, it would appear, tied increasingly to the UK’s membership of the EC.

Many would welcome this development as an obvious staging post on the road towards integration of Member States’ legal systems. Others\textsuperscript{186} lament the growing legislative intervention and the loss of legal heritage. There is little doubt that, since 1987, private international law in England (and, one suspects, elsewhere in Europe) has lost much of its colour and, as a result, its attraction to students and practitioners. Regulation in Europe is but one cause. Domestic legislation and the predominance of issues of jurisdiction in commercial matters have also contributed. Nevertheless, it is undeniable that modern students and practitioners of private international law now spend much of their time consider-

\textsuperscript{180} See also the final report of the European Parliament’s Rapporteur (see *supra* n 139).

\textsuperscript{181} Recognising party autonomy would also reduce the significance of the delineation between “contractual” and “non-contractual” obligations, one of the principal issues which the Court of Justice will need to address if the Regulation is adopted.


\textsuperscript{183} A case perhaps of replacing one concrete structure with another.


\textsuperscript{185} See, eg, *Harding v Wealands* [2005] 1 All ER 415 (CA).

\textsuperscript{186} Including the present writer.
E. Conclusions

The debate surrounding Community competence to create new rules of private international law is likely to continue, at least until the Court of Justice has had the opportunity to consider, in particular, the meaning and effect of the internal market requirement in Art 65.\(^{187}\) For the time being, it remains doubtful whether EC measures harmonising rules of private international law and, in particular, the proposed Rome II Regulation will satisfy that requirement. In the writer’s personal view, it is also questionable whether the proposed “Europeanization” of private international law is a useful or desirable development. Even if planning permission has been granted by the Member States, it should be exercised with caution and with respect for the existing landscape.


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<tr>
<th>Year</th>
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<tbody>
<tr>
<td>1957</td>
<td>Treaty of Rome</td>
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<td>1960</td>
<td>Committee of experts established to consider possible measures to facilitate free movement of judgments under EC Treaty, Art 220.</td>
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<tr>
<td>1967</td>
<td>Proposal by Governments of the Benelux countries with a view to unifying the rules of private international law of the existing Member States. Group of experts established to consider proposal.</td>
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<tr>
<td>1968</td>
<td>Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded between existing Member States (coming into force in 1973).(^{188})</td>
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<tr>
<td>1969</td>
<td>Group of experts proposed harmonisation of rules concerning (1) the law applicable to corporeal and non-corporeal chattels, (2) the law applicable to contractual and non-contractual obligations, (3) the law applicable to the form of juridical acts and evident, (4) general matters (renvoi, characterisation, application of foreign law, acquired rights, public policy, capacity, representation).</td>
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\(^{187}\) Or, which seems a remote prospect, the EU Constitution is ratified by the member states.  
\(^{188}\) A Convention was also concluded on the mutual recognition of companies and legal persons, which has never come into force.
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<th>Year</th>
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<tr>
<td>1970</td>
<td>Group of experts instructed by Member States to continue its work, giving priority to the four sectors identified above.</td>
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<td>1972</td>
<td>UK, Denmark and Ireland agree to join the EEC. Working party established to consider accession of new Member States to Brussels Convention, as required by Art 3(2) of the Act of Accession. Group of experts completes preliminary draft convention on the law applicable to contractual and non-contractual obligations.¹⁸⁹</td>
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<td>1974</td>
<td>Law Commission and Scottish Law Commission consult on draft applicable law convention.</td>
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<td>1975</td>
<td>UK membership of EEC confirmed by referendum. Group of experts resumes work on applicable law issues.</td>
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<tr>
<td>1978</td>
<td>Group of experts decides to separate treatment contractual and non-contractual obligations and to proceed first with a draft convention dealing only with the former “for reasons of time”. Convention for accession of UK, Ireland and Denmark to Brussels Convention signed at Luxembourg on 9 October.¹⁹⁰</td>
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<tr>
<td>1980</td>
<td>Convention on the law applicable to contractual obligations opened for signature in Rome on 9 June.¹⁹¹</td>
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<tr>
<td>1982</td>
<td>UK adopts legislation to enable it to give effect to Brussels Convention (Civil Jurisdiction and Judgments Act 1982).</td>
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<td>1987</td>
<td>Brussels Convention enters into force in UK on 1 January.¹⁹²</td>
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<td>1988</td>
<td>Second Non-Life Directive lays down choice of law rules for non-life insurance policies covering risks situated in Member States.¹⁹³ EC/EFTA convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Lugano, 16 September.¹⁹⁴</td>
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<tr>
<td>1990</td>
<td>UK adopts legislation to enable it to give effect to Rome Convention (Contracts (Applicable Law) Act 1990). Second Life Directive lays down choice of law rules for life insurance policies covering risks situated in Member States.¹⁹⁵</td>
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¹⁹² [Civil Jurisdiction and Judgments Act 1982 (Commencement No 3) Order (SI 1986/204)].
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<th>Year</th>
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<tr>
<td>1991</td>
<td>Rome Convention enters into force in UK on 1 April. UK adopts legislation to enable it to give effect to Lugano Convention (Civil Jurisdiction and Judgments Act 1991).</td>
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<td>1992</td>
<td>Lugano Convention enters into force in UK on 1 May.</td>
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<td>1993</td>
<td>Treaty on European Union enters into force on 1 November. Art K.3(2)(c) authorises Council to draw up conventions dealing with, <em>inter alia</em>, judicial co-operation in civil matters.</td>
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<td>1996</td>
<td>Deadline for signature of Insolvency Convention passes without UK accession. Council Resolution laying down priorities for co-operation in the field of justice and home affairs identifies a convention on the law applicable to non-contractual obligations as being among its priorities.</td>
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<td>1997</td>
<td>Amsterdam Treaty amending EC Treaty and Treaty on European Union. EC Treaty, new Art 73m (now Art 65) creates EC competence in field of judicial co-operation in civil matters having cross-border implications including “promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction. UK and Ireland negotiate “opt in”.</td>
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<tr>
<td>1998</td>
<td>Commission and Council re-start work on proposed convention on law applicable to non-contractual obligations. “Brussels II” Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters adopted by Council Act under Art K.3 of TEU. Action Plan of the Council and Commission on implementing the provisions of the Treaty of Amsterdam on freedom, security and justice identifies as priorities (within 2 years) (1) finalising revision of the Brussels and Lugano Conventions, (2) a legal instrument on the law applicable to non-contractual obligations, (3) begin revision of the Rome Convention, (within 5 years) (4) a legal instrument on the law applicable to divorce, (5) work on a legal instrument on international jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes and those relating to succession, (6) examine the possibility of creating uniform private international law applicable to the acquisition in good faith of corporeal moveables. Vienna European Council endorses Action Plan.</td>
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198 Treaty of Amsterdam, Protocol No 4. The provisions of Title IV (of which Art 73m formed part) are not binding on Denmark (see Protocol No 5).


203 1998 EU Bull No 12, point I.12.84.
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<tr>
<td>1999</td>
<td>Treaty of Amsterdam enters into force on 1 May.</td>
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<td>Commission proposes Regulation under EC, Art 65 to replace Brussels</td>
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<td>Convention.</td>
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<td>Presidency Conclusions of Tampere European Council endorses the principle of mutual recognition as “the cornerstone of judicial co-operation in both civil and criminal matters within the Union.”</td>
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<td>Council Regulation No 1348/2000 on service in the Member States of judicial and extra-judicial documents in civil and commercial matters (“Service Regulation”) adopted on 29 May under EC Art 65. UK and Ireland opt in.</td>
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<td>Council adopts programme of measures for implantation of the principle of mutual recognition.</td>
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<td>2001</td>
<td>Council Regulation No 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil and commercial matters (“Evidence Regulation”) adopted on 28 May under EC Art 65.</td>
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<td>Service Regulation enters into force on 31 May.</td>
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<td>Evidence Regulation enters into force (in part) on 1 July.</td>
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<td>2002</td>
<td>Jurisdiction Regulation and Brussels II Regulation enter into force on 1 March.</td>
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<td>Commission launches consultation on preliminary draft proposal for Regulation on law applicable to non-contractual obligations (“Rome II”).</td>
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<td>EUIR enters into force on 31 May.</td>
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205 Presidency Conclusions, 15 and 16 October 1999, para 33.
207 Ibid., 19.
208 Ibid., 37.
212 Ibid., 25.
214 The consultation was followed by a public hearing in Brussels on 7 January 2003.
By amendment to EC Treaty introduced by the Treaty of Nice (coming into force on 1 February) qualified majority voting by the co-decision procedure (EC Treaty, Art 251) is introduced for measures provided for by Art 65 (including those relating to conflict of laws and jurisdiction).

Commission publishes proposed Rome II Regulation.


2004 Remaining provisions of Evidence Regulation enter into force on 1 January.

House of Lords’ European Committee publishes (critical) report on proposed Rome II Regulation.

Commission publishes Green Paper on maintenance obligations, addressing harmonisation of rules of private international law.

ECJ decision in Turner v. Grovit holds grant of anti-suit injunction to restrain conduct of proceedings before another Member State to be incompatible with Brussels Convention.

Treaty Establishing a Constitution for Europe agreed by Member States on 18 June. Legislative competence in relation to judicial co-operation in civil matters set out in Art III-170.

Presidency conclusions of Brussels European Council (4/5 November 2004) requires Rome I and Rome II proposals to be “actively pursued”. Commission invited to submit proposals on (1) draft instrument on recognition and enforcement of decisions on maintenance, (2) a green paper on conflict of laws in matters of succession, (3) a green paper on the conflict of laws in matters concerning matrimonial property regimes, (4) a green paper on the conflict of laws in matters relating to divorce (“Rome III”). Instruments in these areas “should be completed by 2011.”

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216 Treaty of Nice (2001/C 80/01), Art 2.4 introducing EC Treaty, Art 67.5.
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