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Convergence between the European Regulations Brussels I & Rome I on the Example of Consumer Contracts

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Abstract

In the European Union, both the Brussels I Regulation and the Rome I Regulation have reached a status of paramount importance; the Brussels I Regulation provides rules on jurisdiction, recognition, and enforcement of judgments in civil and commercial law matters, and the Rome I Regulations sets forth provisions that determine which country's law applies to contractual obligations. This paper analyzes the relationship between these European legal instruments and detects a parallelism of their systems and principles, which leads to a general congruence in terminology. In addition, an example of certain consumer contract provisions shows how this abstract congruence can apply in practice, proving that a mutual transfer of results of interpretation across boundaries is possible. Thus, this paper shows that such congruence leads to comprehensive consumer protection.

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I. Introduction

In recent times, international civil procedure, as well as private international law[1], is facing the challenge of keeping up with the increasing dynamics of transnational business transactions. In the European Union, two regulations hold an important legal status: 1) the **Brussels I Regulation**, which interlinks national procedures in matters of civil and commercial law through harmonized provisions of community law on jurisdiction, pendency and recognition, and 2) the **Rome I Regulation**, which creates a unified set of conflict of laws rules in the area of contract law. Together, these regulations answer the vital questions of: 1) the most appropriate court before which a claim should be brought, and 2) the relevant law that should apply to a claim.

Both legal acts contain **provisions designed to protect consumers**. While the Brussels I Regulation gives the consumer the right to choose to bring an action either where he is domiciled or where the defendant is domiciled[2], the Rome I Regulation calls for application of the law of the country in which the consumer has his habitual residence.[3] In the most advantageous case, the consumer may rely on the application of domestic law before the court of his domicile. Since the **European Court of Justice** (ECJ) has substantiated the **term of a consumer contract** in the context of the Brussels I Regulation, it seems obvious to question the extent to which this judicature can serve as a basis when interpreting the Rome I Regulation. In the event that there is a congruence of terms, legal certainty and a

[1] Understood here as the entirety of legal rules, which determine the applicable national private law for the respective case. *See generally* GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT: EIN STUDIENBUCH (9th ed. 2004); KARL FIRSCHING, EINFÜHRUNG IN DAS INTERNATIONALE PRIVATRECHT (3th ed. 1987); JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT: EINSCHLIEßLICH DER GRUNDBEGRIFFE DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS (6th ed. 2006).

[2] Where the roles are reversed, the other party of a contract can only institute proceedings against the consumer in the consumer's country of domicile.

[3] This is in the event that no choice of law has been made. Doing so may not, however, have the result of depriving the consumer of the consumer protection rules afforded to him by his country of residence.

synchronization of *forum* and *ius* could be attained; thus, coherent consumer protection would be granted.[4]

In this context, a question about the relationship between "Brussels and Rome" arises. **Part I** of this paper will outline the legal system in which these legal acts are embedded in order to clarify their position and significance. Specifically, the area of freedom, security and justice, which is shaped by the concept of gradual integration, will be discussed. **Part II** will outline the two legal acts *in concreto* and will investigate existing parallels through the use of a consumer contracts example.

[4] Of course, numerous sources of law, dealing with European norms on conflict of laws, contain provisions on consumer protection. For reasons of brevity and context, those will not be discussed here.

PART I

II. The Treaty of Amsterdam

2.1. The basis in primary law of the Brussels I and Rome I Regulations

May 1, 1999 signified a turning point in European cooperation in civil matters. The Treaty of Amsterdam[5] took effect on this day, triggering a revolution of competencies[6] in the area of international civil procedure and private international law. In order to grant a gradual improvement of the "**area of freedom, security and justice"** (AFSJ), a new **Title IV**[7] was introduced in the third part of the EC Treaty (EC)[8]. This also included "measures in the field of judicial cooperation in civil matters."[9] The Community's competence for the Brussels I and Rome I Regulations was thus created.[10]

[5] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. *See generally* Rudolf Streinz, *Der Vertrag von Amsterdam*, 1998 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 137; Waldemar Hummer et al., *Die Europäische Union nach dem Vertrag von Amsterdam*, 1999 Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht (ZfRV) 132; THE EUROPEAN UNION AFTER THE TREATY OF AMSTERDAM (Jörg Monar & Wolfgang Wessels eds., 2001).

[6] HEINZ-PETER MANSEL, *VERGEMEINSCHAFTUNG DES EUROPÄISCHEN KOLLISIONSRECHTS* 3 (2001).

[7] Treaty Establishing the European Community, art. 61, 1997 O.J. (C 340) (as in effect 1999) (now TFEU art. 67) [hereinafter EC Treaty].

[8] Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C 325) 33.

[9] EC Treaty art. 61(c).

[10] The primary law framework for the area of freedom, security and justice had, of course, already been created by the Treaty on European Union (TEU). *See* Maastricht Treaty, Feb. 7, 1992, 1992 O.J. (C 191) 1. *See also* Peter-Christian Müller-Graff, *Der Raum der Freiheit, der Sicherheit und des Rechts*, 51 SCHRIFTENREIHE DES ARBEITSKREISES EUROPÄISCHE INTEGRATION 11, 13 (2005); Martin Kraus-Vonjahr, *Der Aufbau eines Raums der Freiheit, der Sicherheit und des Rechts in Europa*, 3495 EUROPÄISCHE HOCHSCHULSCHRIFTEN 16 (2002).

2.2. Change of pillar

The Treaty of Amsterdam transferred the area of judicial cooperation in civil matters from the third to the first pillar, allowing the European legislator to make use of all instruments under Community law, namely, all instruments under Article 249 EC. This article determines the possible forms of Community action, including: regulations, directives, decisions, recommendations and opinions.

Due to the change of the legal basis of competence, the prerequisite for unanimity, and, consequently, the ability to block legal acts by Member states[11] was abolished. Subsequent to a five-year transition period[12] that followed the adoption of the Treaty, the so-called '**Community Method'** was to become the norm. This method ensures that the Commission possesses a monopoly right of initiative and that the European Parliament, with a substantial majority, and the Council, with a qualified majority, must decide jointly.[13]

The change of pillars also strengthened the **position of the European Court of Justice** (ECJ) in the area of judicial cooperation in civil matters. This is because the ECJ was assigned the broad task of ensuring the coherence of Community law by interpreting the application of the Treaty. However, **EC Article 68(1) restricts**[14] the competence to submit a reference for a **preliminary ruling** to the ECJ under Article 234 EC to tribunals of final instance. This compromise, triggered by the fear of a flood of requests for preliminary rulings in asylum

[11] *Cf.* Peter Gottwald, *Zum Stand des Internationalen Zivilprozessrechts*, 22 RITSUMEIKAN L. REV. 69, 77 (2005) (stating that national interests cannot be enforced at the same degree).

[12] Meanwhile, the Council acts unanimously on a proposal from the Commission, or upon the initiative of a Member State, after consulting the European Parliament. *See* EC Treaty art. 67(1).

[13] Procedure according to EC Treaty art. 251. The Treaty of Nice anticipated a respective decision by the Council and replaced for all measures, except family aspects, the prerequisite for unanimity with the co-decision procedure in accordance with EC Treaty art. 251.

[14] EC Treaty art. 68(1) ("Article 234 shall apply to this title […] where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State *against whose decisions there is no judicial remedy under national law*."); *Cf.* Andreas Knapp, *Die Garantie des effektiven Rechtsschutzes durch den EuGH im "Raum der Freiheit, der Sicherheit und des Rechts,"* DIE ÖFFENTLICHE VERWALTUNG (DOV) 12 (2001) (noting, that this restriction did not result in any restriction of the ECJ's monopoly of decision-making).

cases[15], implies a substantial delay of decisions. This could lead to negative consequences,[16] especially with respect to conflicts among jurisdictions. Indeed, legal certainty and uniform application would be much more easily achieved with a relatively prompt build up of a body of case law.[17]

2.3. Options for action

Article 65 EC enumerates - though non-exhaustively[18] - the measures for actions in the area of judicial cooperation in civil and criminal matters in accordance with EC Article 61(c)[19]. For instance, lit.a explicitly mentions improvement and simplification of the **recognition and enforcement of decisions;** thus, it provides a constitutional base for the Brussels I Regulation.[20] In addition, the competence to promote compatibility **of the applicable rules in Member States concerning conflict of laws,** as mentioned in lit.b, opens a range of action for adoption of the Rome I Regulation. Finally, the even broader competence for action under lit.c allows for **elimination of obstacles to the good functioning of civil proceedings** by promoting "compatibility of the rules on civil procedure." Thus, independent European procedural acts become possible.

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[15] *See* Burkhard Hess, *Die "Europäisierung" des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2000 23, 28; Ansgar Staudinger & Stefan Leible, *Art. 65* EC *im System der EG-Kompetenzen,* 4-2000/2001 EUROPEAN LEGAL FORUM (EuLF) 225, 227.

[16] *But see* the Institution of the "Urgent Preliminary Ruling Procedure," 2008 O.J. (L 24) 39 (formed especially to grant legal protection in the areas of matrimonial and family law).

[17] *See* EVA STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered, in* OXFORD STUDIES IN EUROPEAN LAW, 152 (2008).

[18] EC Treaty art. 65: "Measures in the field of judicial cooperation in civil matters having cross-border implications […] *shall include*".

[19] As a *lex specialis*, EC Treaty art. 61(c) deserves priority over EC Treaty arts. 94-95. For more on these provisions of competence, *see* Staudinger & Leible, *supra* note 15, at 231. *See also* Anja Weber, DIE VERGEMEINSCHAFTUNG DES INTERNATIONALEN PRIVATRECHTS 161 (2004).

[20] The field of jurisdiction is included. This can be deduced from the introductory phrase "cross-border implications," as well as from 61(b), which covers "conflicts of jurisdiction," and, on the other hand, from the subject matter of international civil procedure itself. *See* BURKHARD HESS, EUROPÄISCHES ZIVILPROZESSRECHT, IUS COMMUNITATIS 33 § 9 (2010).

The Community powers are, however, restricted by the introductory sentence of EC Article 65[21] that demands both a cross-border implication as well as a link to the Internal Market.[22] The required **international character** is to be judged, due to different areas of applicability, by an assessment of the specific subject matter.[23] The exact criteria necessary to ensure a **proper functioning of the Internal Market** have, however been contested. Ultimately, though, it was sufficient for the measure to simply be perceived as having a positive effect on the Internal Market to prevail.[24] In addition, the principles of **subsidiarity** and **proportionality,** under Article 5 EC, restrict the competence to create legislation on a community basis in this area.

The legal competence in primary law under Article 65 EC is constructed in an abstract way; its subject matter merely indicates the scope of possible legislative activities. In essence, Article 65 EC advances cooperation, allows for comprehensive measures for the harmonization of international civil procedure and private international law and, finally, enables the creation of specific European procedures.

2.4. The Creation of an Area of Freedom, Security and Justice

The third part of the Treaty of the European Community mentions in Article 61 the progressive establishment of an "area of freedom, security and justice." However, Article 61 does not circumscribe specific characteristics.[25] The **lack of an exact definition** of the AFSJ may seem regrettable, but it is nevertheless understandable due to the phrase's almost notional

[21] Arg. "Measures […] having cross-border implications […] and in so far as necessary for the proper functioning of the internal market."
[22] *See* Gerrit Betlem & Ewoud Hondius, *European Private Law after the Treaty of Amsterdam*, 1 EUROPEAN REVIEW OF PRIVATE LAW (ERPL) 3, 20 (2001) (stating that this restriction was made in the course of last minute negotiations of the heads of State and Government due to British insistance).
[23] *See* Rolf Wagner, *Zur Kompetenz der EU in der justiziellen Zusammenarbeit in Zivilsachen*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 292 (2007).
[24] *See* Staudinger & Leible, *supra* note 15, at 229.
[25] The AFJS was anchored as a new aim of art. 2 of the Treaty on European Union by the Treaty of Amsterdam.

wording. Neither can the meaning or range of these public goods be easily realized.[26] The content of this neologism may, however, be determined on the one hand by the listing of groups of measures to be taken and on the other by a synopsis of other relevant Treaty articles of the EC and TEU. The phrase "area of freedom, security and justice" is basically characterized by a variety of measures that grant **the freedom and security of its citizens**. Apart from the cooperation of national authorities, this comprises measures that permit the recognition of court decisions, the harmonization of laws and the realization of a free access to justice.[27]

The so-called "**Vienna Action-Plan**"[28] also speaks of the "European judicial area which will bring tangible benefits for every Union citizen." The Action-Plan mentions an unproblematic identification of the competent jurisdiction, a clear designation of the applicable law, and speedy and fair proceedings, as well as their effective enforcement, as exemplifications of this principle.

In comparison to the region that makes up the European Internal Market, the **AFSJ is limited territorially** by protocols[29] from the Treaty of Amsterdam, which restrict the compulsory participation of **Great Britain, Denmark and Ireland**. This structural deficiency was the result of the classification of judicial cooperation in civil matters under Title IV of the EC, because it contains "delicate" matters like asylum and immigration policy. While Great Britain and Ireland could participate through an "opt-in"-clause, Denmark remains

[26] *See* Jörg Monar, *Die politische Konzeption des Raumes der Freiheit, der Sicherheit und des Rechts: Vom Amsterdamer Vertrag zum Verfassungsentwurf des Konvents*, 51 SCHRIFTENREIHE DES ARBEITSKREISES EUROPÄISCHE INTEGRATION 29 (2005). *Cf.* Charles Elsen, *Die Politik im Raum der Freiheit, der Sicherheit und des Rechts in der sich erweiternden Europäischen Union,* 51 SCHRIFTENREIHE DES ARBEITSKREISES EUROPÄISCHE INTEGRATION 43 (2005) (stating that the exact terminology was based on a coincidence).
[27] *See* Weber, *supra* note 19, at 36; RUDOLF STREINZ, *EUROPARECHT* § 958 (8th ed., 2008).
[28] 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, 1999 O.J. (C 19) 1, 4.
[29] Protocol on the Position of the United Kingdom and Ireland, 1997 O.J. (C 340) 99; Protocol on the Position of Denmark, 1997 O.J. (C 340) 101 [hereinafter the Denmark Protocol].

principally[30] excluded from the new Community policy and could, at best, join the judicial cooperation only through a parallel international treaty.

III. The Development of the Area of Freedom, Security and Justice in the Field of Judicial Cooperation in Civil Matters

3.1. The Conclusions of Tampere

The newly created **Community policy**[31] merely established an institutional framework for accomplishing defined goals. The heads of state and government of the EU member states, united in the European Council, initially took up this task at the special summit in the Finnish town of **Tampere**. At the summit, the European Council: 1) adopted conclusions[32] that were dedicated to establishing an area of justice, and 2) expressed its determination to "develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam."

The crucial goal was to create a "**genuine European Area of Justice**" in which an "enhanced mutual recognition of judicial decisions and an approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights." Moreover, the European Council noted that "access to justice"[33] would need to be improved.

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[30] This is true as long Denmark doesn't inform other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will fully apply all relevant measures then in force and taken within the framework of the European Union. *See* Denmark Protocol, *supra* note 29, art. 7. Furthermore, Denmark has the possibility to implement concrete measures into national law within the following six months *id*. art. 5. Such a decision establishes an international obligation to other member states. *See* Weber, *supra* note 19, at 46.

[31] The heading of Title IV speaks of "*Policies* Related to Free Movement of Persons."

[32] *See Conclusions of the Presidency of the European Council*, No. 10/1999 Bulletin of the European Union.

[33] To find this key-word, *see* Burkhard Hess, *The Integrating Effect of European Civil Procedure Law*, 4 EUROPEAN JOURNAL OF LAW REFORM (EJLR) 3, 6 (2002).

In this context, the European Council called for the **abolition of the exequatur procedure** as the maxim of mutual recognition had become a corner stone of judicial cooperation in civil and criminal matters within the European Union. Thus, the **principle of origin**, developed in connection with the principle of free movement of goods, found its way into European civil procedure law.

3.2. Mutual Recognition Program

Soon afterwards, the European Council adopted a specific draft program[34] to implement these conclusions. In four defined "areas of action"[35] the European Council framed stages for a gradual abolition of obstacles for the unhindered movement of judgments, the last step of which would allow for the **abolishment of the exequatur procedure**.[36] The program also took into account several "ancillary measures"[37] to guarantee minimum procedural standards and to strengthen mutual confidence in the legal systems of Member States.

3.3. The Hague Program

The Hague Program was developed[38] as a successor to the Mutual Recognition Program, which was limited to five years, and it will determine the direction for judicial policy in the

[34] Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, 2001 O.J. (C 12) 1 [hereinafter Mutual Recognition Program].
[35] (1) Areas covered by the Brussels I Regulation, (2) area of Family Law, (3) dissolution of rights in property arising out of a matrimonial relationship and the property consequences of the separation of unmarried couples, and (4) wills and succession.
[36] According to the synoptical table at the end of the program.
[37] Mutual Recognition Program, 9.
[38] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 O.J. (C 53) 1. *See* Rolf Wagner, *Die Aussagen zur justiziellen Zusammenarbeit in Zivilsachen im Haager Programm*, 2005 IPRAX 66.

area of judicial cooperation for the following years.[39] This program builds on the conclusions of Tampere and ascribes significant importance to the areas of freedom, security and justice.

The program emphasizes the **importance of mutual recognition and harmonization of private international law** throughout the Union. Essentially, the program's mission statement is that Members States' borders should not constitute an obstacle to the movement of judgments, and projects - like the creation of rules in the area of conflict of laws with respect to non-contractual and contractual obligations - should be rapidly developed.

3.4. The Treaty of Lisbon

The Treaty of Lisbon[40] amended both the Treaty on European Union and the Treaty Establishing the European Community, and it renamed the latter the **Treaty on the Functioning of the European Union (TFEU)[41]**.

While the AFSJ was still understood as flowing from the concept of the Internal Market[42] under the Amsterdam Treaty, **the Lisbon Reform Treaty prompted the European Area of Justice to deviate further from the prerequisites of the European Internal Market**. By dedicating Title V in the TFEU to the AFSJ, the Lisbon Reform Treaty codified in Chapter 3 the "judicial cooperation in civil matters" of the prior EC Article 65 into a newly created TFEU Article 81. The significance of making such terms independent is also evident in TEU Article 3(2), which mentions the "area of freedom, security and justice without internal

[39] *See* Rolf Wagner, *Zur Vereinheitlichung des Internationalen Privat- und Zivilverfahrensrechts sechs Jahre nach In-Kraft-Treten des Amsterdamer Vertrags*, NJW 1754 (2005).
[40] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. (Unifying the policy areas of justice and home affairs in TEU art. 3(2) and TFEU art. 67–89). For more information on these modifications, *see* Heinz-Peter Mansel et al., *Europäisches Kollisionsrecht 2009*, IPRAX 1, 24 (2010); Aude Fiorini, *The Evolution of European Private International Law*, 57 ICLQ 969, 975 (2008).
[41] Treaty on the Functioning of the European Union, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].
[42] *See* Peter-Christian Müller-Graff, *Der Raum der Freiheit, der Sicherheit und des Rechts in der Lissabonner Reform*, 1/2009 EUR-BEIHEFT 110.

frontiers" as a **primary operative aim**. In addition, the subject matters remaining under the third pillar in the Treaty of Amsterdam are now substantially supranational under the general jurisdiction of the ECJ.

While EC Article 65 provided that measures in the area of judicial cooperation had to be **"necessary" for the proper functioning of the Internal Market**, this prerequisite is omitted in TFEU Article 81; the connection to the Internal Market is solely mentioned as a general rule.[43] Nevertheless, the necessity of a "cross-border implication" remains.

At this time, it was significant that fundamental rights were strengthened[44] through the establishment of the **Charta of Fundamental Rights**[45] under European primary law. However, the reservations that the British and the Polish governments declared with respect to these rights stand out negatively. Furthermore, the abolition of restrictions for requests for a preliminary ruling[46] under Article 68(1) EC led to an enhanced role for the ECJ.

The effects of the changes made to other details, such as the differentiation of the catalogue of measures in TFEU Article 81(2) or the programmatic accentuation of the principle of mutual recognition are still difficult to assess. Of note, however, is the fact that the Treaty of Lisbon **advanced the AFSJ** from a mere "sub-concept for the implementation of an area of the Internal Market without border controls"[47] to an **independent legal policy.**

[43] TFEU art. 81 (arg. "particularly when necessary").
[44] *See also* TFEU art. 67(1) ("The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States").
[45] Charta of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.
[46] TFEU art. 267 (formerly EC Treaty art. 234).
[47] [Integrationspolitisches Subkonzept zur Verwirklichung des binnenmarktlichen Raums ohne Binnenmarktgrenzkontrollen]. Müller-Graff, *Der Raum der Freiheit, der Sicherheit und des Rechts*, *supra* note 10, at 16.

3.5. The Stockholm Program

The Stockholm Program[48], created by the European Council on December 10 and 11, 2009, once again serves the purpose of enhancing the AFSJ; for this purpose, the program exhibits part of the European Union's priorities for the period of 2010 to 2014. Based on the "achievements of the Tampere and Hague Programs," the focus of the program centers on Union citizenship and the **consolidation of the European legal area**.

In the area of judicial cooperation in civil matters, the program aims for expansion of the principle of mutual recognition to further areas. At the same time, "safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules" should strengthen mutual confidence. Furthermore, emphasis should be put on the **coherence** of legal acts, **and harmonization** in the field of conflict of laws should be continued in other areas where necessary.

IV. Appraisal

4.1. On the formation of the European Judicial Area

With respect to European judicial cooperation in civil matters, the enactment of the Treaty of Amsterdam and the summit of Tampere indicates a **paradigm shift**; the creation of a **European Area of Justice** has become a Community objective and the conventional procedure of law-making through international treaties has been replaced by more efficient instruments of Community law.

[48] The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J. (C 115) 1.

However, considering how the European Union has evolved in the past, this development denotes a **consequential continuation** of the process of integration, which now includes the areas of international civil procedure and private international law. This gradual progress is in accordance with the **concept of functional integration**, which has at its core the conferment of further assignments to the Union and, consequently, the enhancement of Community competences.[49] The "creation of an ever closer union among the peoples of Europe"[50] also takes place in the European Area of Justice. Unfortunately, due to its territorial limitation, this area is also part of a "two-tiered Europe."

If one regards the effort of the European Community to achieve the goals[51] of EC Article 2 by means of creating a common market, then the implementation of a Community competence to create an area of justice without borders seems consistent.

The Union wishes to create an **internal market** that will provide free movement of goods, services, capital and people.[52] The differences between the legal systems of the Member States are detrimental to these aims, because they impede cross-border-enforcement of legal decisions. Since no economic region is capable of realizing these endeavors set forth under primary law without a correlating legal framework, flanking measures through secondary law, which focuses on mutual recognition and harmonization of laws and standards, are required. For the purpose of creating a **genuine area of justice,** where legal decisions are free to circulate without restraint, the "country of origin-principle," initially aimed at avoiding the detrimental effects of diverse national product standards, attains substantial importance in the **principle of mutual recognition**; the effects that a legal judgment has in its state of origin are to be recognized without restriction in the European Union and the declaration of

[49] *Cf.* Hess, *supra* note 20, § 3 at 4.
[50] TEU art. 67.
[51] Examples include: harmonious, balanced and sustainable development of economic activities, high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion or solidarity among Member States.
[52] *See* EC Treaty art. 3(c).

enforceability, namely the "exequatur," is to be abolished. The **principle of mutual confidence** in Member states' judicial systems serves as both a justification and, at the same time, a concept for legal enhancement.

Even though the principle of mutual recognition may be convenient to implement the freedoms of the Internal Market, it nevertheless causes **distortive effects** on the market elsewhere; as a consequence of the duty to recognize a decision without possibility of corrective or supervisory measures under the law of conflict of laws, the national conflict of laws system gradually loses its meaning and, thus, nations compete with each other as "law providers." The resulting disharmonious decisions and the attractiveness of **"forum shopping"**[53] undermine **reciprocal confidence** in the legal system, which is a necessary premise[54] for mutual recognition. In order to guarantee the functioning of the European Area of Justice, a harmonization of private international law is necessary.

In order to avoid distortions of competition[55] and to meet the standards of legal certainty and predictability, it is necessary to have harmonization of laws in the areas of international civil procedure law as well[56] as private international law. This concept urges European legislators to enhance the enforcement of the Treaty of Amsterdam in the area of judicial cooperation in civil matters.

The **Treaty of Lisbon** moves even further down the path of legal integration; due to the reorganization of the AFSJ in primary law, the basis of competence for judicial cooperation has expanded, mutual recognition of legal decisions as a concept of integration has been

[53] This is the utilization of coexistent jurisdictions to take advantage of the differences between norms on conflict of laws and substantive law of the Member States.
[54] *See* Christian Kohler, *Europäisches Kollisionsrecht zwischen Amsterdam und Nizza*, 9 LUDWIG BOLTZMANN INSTITUT FÜR EUROPARECHT – VORLESUNGEN UND VORTRÄGE 17 (2001).
[55] It is also conceivable that a market-oriented competition regime could exist, in which the nations supply their advocacy and procedural services in an attractive way. *See* Gottwald, *supra* note 11, at 69.
[56] The necessity of uniform rules of private international law could be, of course, avoided by a system of exclusive jurisdictions. However, this system could not satisfy procedural purposes. *See* Thomas Pfeiffer, *Die Vergemeinschaftung des Internationalen Privat- und Zivilverfahrensrechts*, 51 SCHRIFTENREIHE DES ARBEITSKREISES EUROPÄISCHE INTEGRATION 78 (2005).

reinforced, and the European Area of Justice has taken shape. Thus, the concept of an AFSJ detached from the European Internal Market has become a European reality.

4.2. Implications for Consumer Protection

Market participants are confronted with a variety of distinct civil laws and competent courts when engaging in transnational legal transactions. While businesses may operate their product- and financing strategy under various laws, consumers face substantial difficulties when leaving their familiar legal system due to their economic inferiority. Even though harmonized rules on jurisdiction and norms on conflict of laws are consumer-friendly, as they specifically benefit the weaker market participant, a predictable jurisdiction and a predictable applicable law may not alter the **"unlevel playing field"**[57] between businesses and consumers.

The increasing participation of consumers in the international market necessitates the establishment of particular protective norms in the area of conflict of laws that grant a consumer involved in foreign legal proceedings the same amount of protection he or she would receive under the domestic standards of his substantive law. If one assumes, adhering to the often proclaimed **equality of Member State jurisdictions**, that domestic law may properly be applied by a foreign court, then the existence of a norm that provides for a special consumer jurisdiction is much more difficult to justify. In this instance, "factual as well as psychological access barriers"[58] tip the scales to grant the consumer domestic jurisdiction and to facilitate the access to law that the European area of justice aims to achieve.

[57] [Waffenungleichheit]. *See* Kathrin Sachse, *Der Verbrauchervertrag im Internationalen Privat- und Prozessrecht, in* 166 STUDIEN ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT, 11, 290 (2006).
[58] *See* GRALF-PETER CALLIESS, GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE 119 (2006).

Part II

V. The Brussels I & Rome I Regulations as Achievements of the Treaty of Amsterdam in Secondary Law

European legislators used the newly established legal basis of judicial cooperation extensively to **deepen integration in the area of international civil procedure law**. Thus, various legal acts were enforced in judicial coordination[59] and judicial cooperation.[60] With the creation of a European enforcement order for uncontested claims,[61] the exequatur concept was abolished and the "country-of-origin principle," promulgated at Tampere, was implemented.

The **Brussels I Regulation**[62] is the most notable achievement of this legal development and the most formative example of this legal basis in EC law; it interlinks national procedural rules in civil and commercial matters through unified provisions of community law on jurisdiction, pendency, and recognition of judicial acts and, consequently, has become the core norm of European civil procedure law.[63] As European procedural history was shaped by the establishment of a European system of jurisdiction and enforcement under the **Brussels**

[59] Regulation 1346/2000, of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (160) 1; Regulation 1347/2000, of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, 2000 O.J. (L 160) 19 (repealed by Regulation 2201/2003, 2003 O.J. (L 338) 1); Regulation 44/2001, of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

[60] Regulation 1348/2000, of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2000 O.J. (L 160) 37 (repealed by Regulation 1393/2007, 2007 O.J. (324) 79); Regulation 1206/2001, of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174) 1.

[61] Regulation 805/2004, of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims, 2004 O.J. (L 143) 15.

[62] Regulation 44/2001, of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I].

[63] *Cf.* Dietmar Czernich & Stefan Tiefenthaler, in EUROPÄISCHES GERICHTSSTANDS- UND VOLLSTRECKUNGSRECHT, INTRODUCTION § 43 (Dietmar Czernich et al. eds., 3th ed., 2009).

Convention,[64] the Regulation also serves as an engine for further European integration. As an instrument of the new Community policy, the Regulation, due to its function as a role-model, paves the way for a common procedural law of the Internal Market. By adopting this legal act in the form of a regulation, it is directly applicable in all Member States and does not require transformation into national law.

While European procedural law was promoted emphatically and a further step towards integration was attained through the creation of independent European procedures for particular sectors,[65] the **European harmonization of private international law** was relatively slow in development. This **legislative inactivity** may be explained by the fact that the summit of Tampere, which was dedicated to the principle of mutual acceptance of legal judgments, focused mainly on international procedural law at the expense of private international law.[66] This is why the objective to harmonize conflict of laws rules is only found at the very bottom of the catalogue of ancillary measures in the Mutual Recognition Program. For the same reason, the European Council speaks of these ancillary measures as merely "helping" to facilitate the mutual recognition of judgments.

The original exclusion of private international law from the Community process of legislation changed with the enactment of the **Rome II**[67] and **Rome I Regulation,**[68] which establishes a uniform set of conflict of laws rules for contractual and non-contractual obligations.

The **Rome Convention**[69] flanked both, the Brussels Convention and the Brussels Regulation to prevent "forum shopping" in contract law. This remit was subsequently assumed by the

[64] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32.
[65] Regulation 1896/2006, of the European Parliament and of the Council of 12 December 2006 Creating a European Order for Payment Procedure, 2006 O.J. (L 399) 1; Regulation 861/2007, of the European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1.
[66] *See* Kohler, *supra* note 54, at 10.
[67] Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) 40 [hereinafter Rome II].
[68] Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 [hereinafter Rome I].

Rome I Regulation; it was guided by the principle of party autonomy and the principle of the closest connection, a unified system of conflict rules and opt-out clauses will determine the applicable law.

The **renunciation of the cumbersome ratification of international conventions,**[70] necessary under the inter-governmental procedure, and the resulting use of more efficient legislative competences under Community law avoids the long-winded process of implementation and guarantees the direct applicability of legal acts in the Member States of the European Union. In addition, the monopoly of the ECJ to interpret and enhance Community law, anchored in the Treaty, ensures a unified application.

5.1. Brussels I Regulation: the Central Body of European Civil Procedure

5.1.1. Introduction

The Brussels I Regulation is the leading achievement of European civil procedural law in the area of secondary law. The Regulation facilitates access to justice and free circulation of judgments through a self-contained system of jurisdiction of Member State courts and through unified provisions on recognition and enforcement. Contradictory judgments are prevented by rules on pendency. The **Brussels Convention**[71] was widely replaced by the Brussels I

[69] Convention on the Law Applicable to Contractual Obligations, 80/934/EEC, June 19, 1980, 1980 O.J. (L 266) 1.
[70] *See* Hess, *supra* note 20, § 20 at 39.
[71] For more information on the so-called Lugano Convention that had been established as a parallel instrument of the Brussels Convention for the EFTA-States, *see* 1988 O.J. (L 319) 9. For the revised official version, see 2007 O.J. (L 339) 3; *see also* Ansgar Staudinger, *Introduction LugÜbk 2007,* EUZPR/EUIPR 1 (2011); Rolf Wagner & Ulrike Janzen, *Das Lugano-Übereinkommen vom 30.10.2007*, 2010 IPRAX 298.

Regulation. The former had been signed on the basis of Article 220 of the EEC Treaty[72], in which the Contracting States[73] of the Treaty declared that they would ensure "the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards." As a *convention double,* the Convention took place to not only ensure the recognition and enforcement of legal judgments, but also to establish a system of international jurisdiction in all Contracting states. Consistent interpretation was to be ensured by the **Luxembourg Protocol,**[74] which conferred the authority of interpreting the Treaty on the ECJ; as a result, the Luxembourg Protocol was heavily involved in making the resolutions of the Convention a "successful model."[75]

In essence, the Brussels I Regulation adopted the system of the Brussels Convention, but – as a European regulation – it required neither ratification nor implementation by national legislators. As secondary Community law, it enjoys primacy[76] over national procedural law. According to Article 71, conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (**specialized conventions**), take precedence over the Brussels I Regulation.

5.1.2. Range of Application

The Brussels I Regulation is applicable to **civil and commercial matters** regardless of the nature of the court or tribunal before which a matter is brought.[77] However, it is not applicable

[72] Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3.
[73] Belgium, Germany, France, Italy, Luxembourg, and the Netherlands.
[74] Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971, 1975 O.J. (L 204) 28.
[75] Reinhold Geimer, *The Brussels Convention - Successful Model and Old-Timer*, 4 EJLR 19, 33 (2002).
[76] Case 288/82, Ferdinand M.J.J. Duijnstee v. Lodewijk Goderbauer, 1983 E.C.R. 3663; Czernich & Tiefenthaler in Czernich et al., *supra* note 63, § 53.
[77] Art. 1.

to revenue, customs or administrative matters.[78] According to Article 2, the following are exempted from the range of the regulation's application: issues of legal status, the areas of inheritance, insolvency and social security law, questions of legal capacity, and arbitration procedures (**substantive scope of application**). According to Article 66(1), the rules of the regulation are only applicable to legal proceedings instituted, and to documents formally drawn up or registered as authentic instruments after its entry into force (March 1, 2002, **temporal scope of application**).

The Brussels I Regulation is applicable to cases with a relevant link to a Member State.[79] In principle, no further connection to a Member State is required.[80] However, the existence of an international element[81] remains an unwritten prerequisite (**personal-territorial scope of application).**

The **territorial scope of application** follows from Article 299 EC[82] and is comprised of the area of all EU Member States, including their continental shelf.[83] In Denmark, which has expressed reservations to the Treaty of Amsterdam, the Regulation has been applicable since

[78] On the term "civil and commercial issues," *see* Pippa Rogerson, *Brussels I Regulation, in* European Commentaries on Private International Law, Article 1 § 12 (Ulrich Magnus & Peter Mankowski eds., 2007); Georg Eckert, *Internationale Zuständigkeit bei Kapitalgesellschaften nach der EuGVVO*, 2003 ECOLEX 76; Jan Kropholler, *Europäisches* Zivilprozessrecht, in EUROPÄISCHES GERICHTSSTANDS- UND VOLLSTRECKUNGS (EUGVVO), Art. 1 (8th ed., 2005); Case 266/01, TIARD SA v. Staat der Nederlanden, 2003 E.C.R. I-4867, para. 28; Case 814/79, Netherlands State v. Reinhold Rüffer, 1980 E.C.R. 3807; Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 1517.

[79] *See* Dietmar Czernich, *Gerichtsstandsvereinbarung und Auslandsbezug*, 2004 WBI 458.

[80] *See* Case 281/02, Andrew Owusu v. N. B. Jackson, 2005 E.C.R. I-1383, para. 38.

[81] For more on the international element and the difficulties with cases involving third-party states, *see* Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, 1979 O.J. (C 59) 71 para. 21; *see also* Kropholler, *supra* note 78, art. 1 § 5; Georg E. Kodek, *Kommentar zu den Zivilprozessgesetzen, in* 1 EuGVVO § 18, Art. 1 (Hans W. Fasching & Andreas Konecny eds., 2th ed., 2010); Czernich in Czernich et al., *supra* note 63, art. 1 § 4; Case 281/02, Andrew Owusu v. N. B. Jackson, 2005 E.C.R. I-1383 (discussed in 2005 IPRAX 224); *Introduction Brussels I Regulation, in* EUZPR/EUIPR § 19 (Stefan Leible in Rauscher ed., 2011).

[82] Now TEU art. 52(1).

[83] *See* Case 37/00, Herbert Weber v. Universal Ogden Services Ltd., 2002 E.C.R. I-2013, para. 36.

July 1, 2007, as it acceded to Brussels I by means of an independent convention.[84] **Great Britain** and **Ireland** have made use of their opting-in clause.

5.1.3. The System of Jurisdiction of the Brussels I Regulation

By adopting the Brussels I Regulation, a consistent system of jurisdiction was established on a **Community basis**, which does not allow for recourse to national law for analogy purposes. The Brussels I Regulation **system** of jurisdiction corresponds to that of the Brussels Convention and can be briefly described as follows: the general jurisdiction will be determined[85] according to which persons are to be sued principally in the courts of the respective Member State where they are domiciled;[86] next, the Regulation notes that jurisdiction is to be further narrowed by provisions on special jurisdiction[87], jurisdictions in matters relating to insurance, consumer contracts, and individual contracts of employment[88], and provisions on exclusive jurisdiction[89]; finally, the Regulation contains rules on the prorogation of jurisdiction and on the submission of the defendant.[90]

Apart from the **principle of defendant's domicile,** the system of the Brussels I Regulation is characterized by the **principle of party autonomy**. Thus, Article 23 allows prorogation of a court or the courts of a Member State, provided that at least one of the parties has its domicile in the territory of a Member State. No objective correlation has to exist between the agreed

[84] Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2005 O.J. (L 299) 62 . *See* Peter Arnt Nielsen, *Brussel I and Denmark*, 2007 IPRAX 506.
[85] Art. 2.
[86] Principle of "*actor sequitur forum rei.*"
[87] Art. 5-7. E.g art 5 provides, inter alia, special jurisdiction on matters relating to a contract (para.1) and matters relating to tort, delict or quasi-delict (para. 3).
[88] Art. 8-21.
[89] Art. 22.
[90] Art. 23-24.

upon court and the concrete legal dispute.[91] Unless the parties have agreed otherwise, the chosen court's jurisdiction is deemed to be exclusive. In order to protect insurants, consumers and employees, jurisdiction agreements are restricted in such a manner that they are permitted at the expense of the weaker party only after a legal dispute has arisen. With respect to exclusive jurisdictions under Article 22, choice of court agreements are invalid.

According to the rules on **submission**[92] a court that is not originally competent can obtain jurisdiction if the defendant enters an appearance without contesting the international jurisdiction. Conceptually developed as an implied jurisdiction clause,[93] the existence of exclusive jurisdiction, but not the presence of the provisions for insurants, consumers and employees, hinders the right to exert this option.[94]

To establish **exclusive jurisdiction** under Article 22, it is sufficient that the subject of litigation be situated in the territory of a Member State. Article 22 applies regardless of domicile. Where Article 22 allocates jurisdiction on a court, no other court has jurisdiction. In the event that a court of a Member State is appointed to examine a legal dispute in a subject matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, "[such court] shall declare of its own motion that it has no jurisdiction."[95]

The differentiation between general and special jurisdictions and the establishment of a **rule-exception relation in *favor defensoris*** complies with continental European traditions of litigation.[96] Appropriate links to special jurisdictions are to constitute a compensation for the abstractly held requirement to protect the defendant. Thus, alternative jurisdictions provide

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[91] *See* Tiefenthaler in Czernich et al., *supra* note 63, Art. 23 § 3. For more on the requirements of "internationality," *see* Luis de Lima Pinheiro in Magnus & Mankowski, *supra* note 78, Art. 23 § 23.
[92] Art. 24.
[93] *See* Hess, *supra* note 20, § 148 at 319.
[94] The submission only takes place after a legal dispute has arisen. However, different from the system of jurisdiction agreements of Art. 23, the submission of Art. 24 does not require a declaration. For more on additional counter-arguments, *see* Peter Mankowski, *Gerichtsstand der rügelosen Einlassung in europäischen Verbrauchersachen?,* 2001 IPRax, 310, 312.
[95] Art. 25.
[96] *See* Hess, *supra* note 20, § 32 at 263.

appellants with an additional forum linked to the subject of litigation. Equally important, Article 22 allocates exclusive jurisdiction in such a way that it cannot be overruled by deviating jurisdiction agreements.

The **jurisdiction over consumer contracts** under Article 16 is treated likewise.[97] This provision favors consumers by allowing them to bring proceedings against the other party to a contract[98] in the courts of either the Member State where that party is domiciled or the place where the consumers are domiciled. Consumers can, however, only be sued in their country of domicile.

5.1.4. Pendency and Related Actions

The 9th chapter of the Regulation serves to prevent parallel procedures and contradictory decisions.[99] Particularly critical is the **principle of priority**[100]; where proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, the court before which the cause of action is later brought will decline jurisdiction in favor of the court before which it is first brought. Furthermore, in the case of related actions, instruments for the stay or dismissal of proceedings are available.[101]

[97] Not the subject-matter, but, instead, the necessity of consumer protection serves as a justification here for the derogation from general jurisdiction; for more on the definition of „consumer contracts“ in Brussels I, *see* Peter Arnt Nielsen in Magnus & Mankowski, *supra* note 78, art. 15 § 12.
[98] On the requirement of a “concluded” contract using the example of prize notifications made to a consumer, *see* Christoph Schmon, *Gewinnzusagen im europäischen Zivilverfahrensrecht*, 19-2009/2010, JURISTISCHE AUSBILDUNG UND PRAXISVORBEREITUNG (JAP), 171.
[99] Jenard-Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 41.
[100] Art. 27, 29.
[101] Art. 28.

5.1.5. Recognition and Enforcement

An essential aspiration of the European Union is to establish a genuine European area of justice in which judicial decisions are able to circulate without restraint. The regime of mutual recognition and enforcement of decisions under the Brussels I Regulation widely[102] realizes the **principle of mutual confidence** in the judicial system; judgments issued in one Member State are principally recognized in all other Member States without the requirement of a special procedure (**recognition *ipso iure***).

In first instance proceedings, the court of the recognizing State verifies solely the applicability of the Regulation and the existence of a decision in accordance with Article 32. A substantive reexamination of the foreign decision is prohibited (**ban of '*revision au fond*'**).[103] The principle of mutual recognition and enforcement of judgments is only limited by the grounds for refusal under Article 34 and 35. These objections deal with essential procedural violations, questions of irreconcilability, and specific jurisdictional errors[104]. The **exequatur procedure** is initiated only on the application of the creditor. Apart from the recognition of the judgment, the precondition for a declaration of enforceability is merely the decision's enforceability in the state of origin[105]. The defendant can appeal against the declaration of enforceability only on the basis of the objections under Article 34 and 35.[106] The enforcement procedure itself has to occur in accordance with the domestic law of the enforcing state.

[102] *Contra* Eva Storskrubb, *supra* note 17, at 150. For more information on the European enforcement order for uncontested claims, comprising to a full extent the abolishment of the exequatur procedure, *see* Christian Kohler, *Herkunftslandprinzip und Anerkennung gerichtlicher Entscheidungen im europäischen Justizraum*, 14 SCHRIFTENREIHE DES LUDWIG BOLTZMANN INSTITUTES FÜR EUROPARECHT 71 (2006).
[103] Art. 36 and 45(2): "Under no circumstances may a foreign judgment be reviewed as to its substance".
[104] *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 124 (2th ed. 2008).
[105] Art. 38.
[106] Art. 43 and 45(1).

5.1.6. Excursus: Revision of the Brussels I Regulation

Article 73 contains an obligation for the Commission to prepare a report on the application of the Regulation to the European Parliament, the Council and the Economic and Social Committee no later than five years after the Regulation's implementation. If so required, this report is to be accompanied by proposals for adaptations to the Regulation. The so-called **"Heidelberg Report,"**[107] a study prepared for this very reason by experts of European procedural law, contains a list of amendments. A **Green Paper**[108] published by the Commission in 2009 supplements this report and initiates the consultation process. The most striking proposals concern: the exequatur procedure, the scope of jurisdiction with respect to nationals from non-Member States, the preconditions for prorogations of choice of court agreements, provisional measures, and the relation to procedures in arbitrary law.[109] On December 14, 2010, the European Commission presented a **proposal**[110] for the reform of the Brussels I Regulation.[111]

[107] JLS/C4/2005/03 Report on the Application of Regulation Brussels I in the Member States, at 44 (Sept. 2007), *available at* http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (last visited Nov. 06, 2011).
[108] Green Paper on the review of Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175 final.
[109] *See* ROBERT FUCIK ET AL., JAHRBUCH ZIVILVERFAHRENSRECHT (2010); Peter Mankowski, *Die Brüssel I-Verordnung vor der Reform*, in 1 INTERDISCIPLINARY STUDIES OF COMPARATIVE AND PRIVATE INTERNATIONAL LAW, 31 (Bea Verschraegen ed., 2010).
[110] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2010) 748 final.
[111] *See* Burkhard Hess, *Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts*, 2011 IPRAX 125; Tomislav Borić et al., *Vorschlag für eine Neufassung der Brüssel I-VO*, 2011 EASTLEX 1.

5.2. Rome I Regulation: the Central Body of European Private International Law of Contractual Obligations

5.2.1. Introduction

After uniform conflict of laws rules for non-contractual obligations had been created by the adoption of the Rome II Regulation, Rome I shortly followed suit; in order to harmonize the various domestic conflict of laws rules for contractual obligations, Rome I established uniform rules for determining the applicable law in civil and commercial matters in the European Union. As a European regulation, Rome I has general application, is fully binding and is directly applicable in all Member States.

The Rome I Regulation supersedes the **Rome Convention**, converting a matter of the third, intergovernmental pillar to a matter of the first, Community Law pillar.[112] The Rome Convention was created on the basis of a draft agreement by the Benelux-States, which aimed to unify private international law in order to "eliminate the inconveniences arising from the diversity of the rules of conflict, notably in the field of contract law."[113] As an **international treaty**, this convention was tainted by the fact that the various incorporation techniques of the different contracting states did not entirely lead to the hoped for unification. Even though the ECJ was given the exclusive right of interpretation by two amending protocols[114] for the purpose of establishing a unified interpretation and application, no obligation to submit to the ECJ existed under the first protocol. Furthermore, a ratification of the first protocol by all Member States was required for the legal validity of both amending protocols, which is why

[112] *See* Helmut Heiss, *Die Vergemeinschaftung des internationalen Vertragsrechts durch 'Rom I' und ihre Auswirkungen auf das österreichische internationale Privatrecht*, 2006 JBl 750.
[113] *See* Giuliano/Lagarde-Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1, 4; DIETMAR CZERNICH & HELMUT HEISS, EVÜ DAS EUROPÄISCHE SCHULDVERTRAGSÜBEREINKOMMEN 1 (1999).
[114] The first protocol, 1989 O.J. (L 48) 1, follows the protocol on the interpretation of the Brussels Convention and provides rules for the procedure of interpretation, the second protocol, 1989 O.J. (L 48) 17, confers a monopoly of interpretation on the ECJ.

the protocols on the interpretation only came into effect after ratification by Belgian legislators in 2004.[115]

5.2.2. Scope of Application

The Rome I Regulation is applicable to **contractual obligations in civil and commercial matters** in situations that involve a conflict of laws. Beyond the scope of its application lie those contracts formed by organs of a sovereign state in exertion of their authoritative power.[116] The catalogue in Article 1(2) provides a list of contractual situations that are exempted from the scope of application. These contractual situations cover, among other things, questions involving the status or legal capacity of natural persons, obligations arising out of family relationships or matrimonial property regimes, questions governed by the law of companies and other bodies, and, finally, pre-contractual obligations[117] (**substantive scope of application**).

According to Article 28, Rome I is applicable to all contracts concluded after December 17, 2009 **(temporal scope of application**).

The date of the contract is, arguably, determined by the *lex causae* of the Rome I Regulation.[118] Due to the embodiment of the Regulation as a *loi uniforme*, any law specified by this Regulation is to be applied even if it is not the law of a Member State (**universal**

[115] LE MONITEUR BELGE, Aug. 18, 2004 at 62135; Anatol Dutta & Bart Volders, *Was lange währt wird endlich gut? Zur Auslegungskompetenz des EuGH für das EVÜ*, 2004 EUZW, 556.
[116] *See* Ulrich Magnus, *Die Rom I-Verordnung*, 2010 IPRAX, 27, 29; *see* Rome I, *supra* note 68, art. 1(1) ("[the regulation] shall not apply, in particular, to revenue, customs or administrative matters").
[117] The "culpa in contrahendo" is governed by the Rome II Regulation. The law that applies to the contract, or that would have been applicable to it had it been formed, is nevertheless decisive. *See* Rome II, *supra* note 67, art. 12.
[118] *See* Magnus, *supra* note 116, at 32.

scope of application[119]). This universal approach has the advantage of avoiding the "coexistence of two different sets of applicable conflict rules."[120]

The **territorial scope of application** can be deduced, as in the case for the Brussels I Regulation, from former EC Article 299, which is now TEU Article 52(1) TEU. While Great Britain and Ireland made use of their "opt-in" clause for the Rome I Regulation, the Rome Convention still remains in effect in Denmark.[121]

5.2.3. System

As a legislative act of the Savignian type on the conflict of laws, Rome I is governed with the purpose of determining the **"seat of a legal relationship"**[122] by means of conflict of laws rules. The aim is to achieve consistent decisions in conflict of laws cases in different states. A differentiated system of connecting factors is guided by the principle of **party autonomy**; essentially, the contracting parties have the ability to freely choose the law governing their contract.[123] No particular connection between the chosen law and the contractual relationship is required.

In **purely internal cases**, however, Article 3(3) limits the freedom of choice by giving effect to **mandatory rules**: "where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement." In order to protect the mandatory rules of

[119] Art. 2.
[120] Andrea Bonomi, *The Rome I Regulation on the Law Applicable to Contractual Obligations: Some General Remarks*, 10 YPIL 168 (2008).
[121] *But see* Rome I, *supra* note 68, art 2. (According to which the Regulation also becomes applicable with respect to Denmark.)
[122] *See* FRIEDRICH KARL V. SAVIGNY, VIII SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 28, 108 (1849).
[123] Art. 3.

Community law, a **corresponding internal-market clause** has been created in cases "where all other elements relevant to the situation at the time of the choice of law are located in one or more Member States."[124] Furthermore, the freedom of choice is subject to restrictions in cases of contracts of carriage, consumer contracts, contracts of insurance and contracts of employment.[125]

Where the parties have not chosen an applicable law, objective connecting factors, shaped by the **principle of the closest connection**, determine the applicable law.[126] If the applicable law cannot be determined by one of the **eight types of contractual relationships**[127] listed in Article 4(1), the law of the state where the party that is obliged to effect the "characteristic performance" has his habitual residence is relevant.[128] These connecting factors are, however, based on presumptions and are not of an unyielding nature. If a closer connection to the law of a different state is "manifest," the law of such state shall be applicable (**escape clause**[129]). In the event that the contract cannot be subsumed under the catalogue of contracts, and the characterizing feature cannot be determined, the contract shall "be governed by the law of the country with which it is most closely connected" (**default rule**[130]).

In the cases of contracts that cover carriage, consumer, insurance and individual employment issues[131] there is deviation from parity of law. The idiosyncrasy of these matters justifies special treatment. With respect to **consumer contracts**[132] the law of the country where the consumer has his habitual residence is relevant if no other law has been agreed upon. If the choice of the relevant law refers to the law of a different state, para. 2 nevertheless guarantees

[124] Art. 3(4).
[125] Art. 5-8.
[126] Art. 4.
[127] *See* RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 178 (3th ed., 2009).
[128] Art. 4(2).
[129] Art. 4(3).
[130] Art. 4 (4).
[131] Art. 5-8.
[132] Art. 6; for more on the definition of „consumer contracts" in Rome I, *see* PLENDER & WILDERSPIN, *supra* note 127, at 227.

the same level of protection as the mandatory rules of the state of residence (**principle of favorability)**.

The references are principally references to the domestic law of the respective state, except for the norms on conflict of laws[133] The law applicable to a contract by virtue of Rome I is also relevant for the interpretation, performance and the consequences of nullity of the contract.[134]

However, those norms of the *lex fori* for which an indispensable public interest exists concerning their application (**overriding mandatory provisions)**, are applicable regardless of the law determined by the Regulation.[135] Furthermore, the Regulation provides for a restricted ability to give effect to the overriding mandatory provisions of a foreign legal order "where the obligations arising out of the contract have to be or have been performed."[136] Finally, Article 21 provides that "the application of a provision of the law of any country specified by this Regulation may be refused if such application is manifestly incompatible with the public policy of the forum" **(ordre public)**.

With respect to the **relation of Rome I to other acts of Community law**, Article 23 declares other provisions of the conflict of laws relating to contractual obligations unaffected, except for issues on insurance law under Article 7.[137] Furthermore, the Regulation expressly states that it shall not take precedence over "competing" conventions in the event that they also consist of non-EU states.[138]

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[133] Art. 20.
[134] *Cf.* Rome I, *supra* note 68, art. 12 (describing the scope of the *lex contractus* through a demonstrative list).
[135] *Id*. art. 9 (defining, in opposition to Art. 7 of the Rome Convention, the term of an overriding mandatory provision). *See* JONATHAN HARRIS, ROME I REGULATION 269 (Franco Ferrari & Stefan Leible eds., 2009).
[136] *Id*. art. 9(3). *See also* Magnus, *supra* note 116, at 41.
[137] For more on the interrelationship of the Rome I Regulation with EC Directives on consumer contract law, *see infra* note 191.
[138] Art. 25.

5.3. Parallelism of Brussels I Regulation and Rome I Regulation

5.3.1. Introduction

A parallelism of the Brussels I and Rome I Regulations is evident insofar as an overall view of the legal basis, system, case law and other factors reveal a certain synchronization of these acts. Depending on the perspective, the result can be used for the **purpose of possible synergies**[139], namely, systematization and other enhancement to these areas of law. Furthermore, this congruence is of particular interest as it may lead to the development of a common terminology.

5.3.2. Scope of Application

The substantial **scope of application** of Brussels I and Rome I **is widely consistent**: both Brussels I and Rome I apply to civil and commercial matters and largely exclude the same issues from their scope. Together with the Rome II Regulation, these European legal instruments fully cover international civil procedure and private international law for the law of obligations.[140]

5.3.3. Interplay of Brussels I and Rome I in the Context of European Integration

The systemic correlation between the Brussels I and Rome I Regulations is already indicated by the **relationship between their precursors**. Since the Brussels Convention's

[139] *Cf.* Eva Lein, *The New Rome I/Rome II/Brussels I Synergy*, 10 YPIL 177 (2008).
[140] *See* Stefan Leible, *Rom I und Rom II: Neue Perspektiven im Europäischen Kollisionsrecht,* 173 SCHRIFTENREIHE DES ZENTRUMS FÜR EUROPÄISCHES WIRTSCHAFTSRECHT 43 (2009).

differentiated system of jurisdiction provided the possibility of suing the defendant at different *fora*, the plaintiff could, by choosing the most beneficial forum, choose the applicable law due to different national norms on the conflict of laws. The unified provisions of the Rome Convention were created to thwart this tactical maneuver, usually referred to as "**forum shopping**."[141] This concept was also emphasized by the **Giuliano/Lagarde-Report**, which advised the unification of conflict of laws norms in fields of particular economic importance in order to have the same law applied irrespective of the State in which the decision is rendered.[142] The coherence of the Regulations is also exhibited by the **Preamble of the Rome Convention**, which states that the commenced "work of unification of law" in the areas of jurisdiction and enforcement of judgments should be continued in private international law.

The interrelation between the law of international civil procedure and private international law experienced a consolidation by the **Treaty of Amsterdam**. The above mentioned legal areas became part of the Community policy of judicial cooperation in civil matters under the new legislative provision of EC Article 61(c). A newly created **area of freedom, security and justice** served as a frame of reference and interlocked the two legal acts.[143]

To implement this common legal basis, the **Brussels Convention** was – with modified content – transformed into the Brussels I Regulation. Thus, the **Convention of Rome** experienced a certain pressure to adapt, as it could employ its supplementary function only to a certain degree. As a result, the **requirement for substantive revision** in accordance with the Brussels I Regulation and transformation into a Community instrument became clear at this point. This is especially true for the latter issue, as the **different institutional situation** in

[141] *See* Kristin NEMETH, KOLLISIONSRECHTLICHER VERBRAUCHERSCHUTZ IN EUROPA 21 (2000); Czernich & Heiss, *supra* note 113, at 3.
[142] Giuliano/Lagarde-Report, *supra* note 113, at 5.
[143] *See* Magnus, *supra* note 116, at 28 (pointing out that the entire Corpus of Community law is to be comprehended as a comprehensive body of legislation and to be interpreted as consistently as possible).

which the legal acts were assembled – Brussels I as an act of secondary Community law and the Rome Convention as an international treaty – **complicated possible synergies**.

The differences in legislators and objectives, to be taken into consideration when interpreting the Rome Convention, should not disguise the strong **connection of the Rome Convention with Community law**; even though it was not adopted under Article 220 of the EEC Treaty, as the Brussels Convention was, it is strongly connected, genetically and substantively, to the European Community.[144] This connection is clarified, on the one hand, by the **Convention's preamble,** which apparently sees the Convention as a part of European legal harmonization.[145] What is more, this connection is emphasized by **Article 28 of the Rome Convention**, which states that only EC Member States may be a party to it. Additionally, for the purpose of a unified interpretation and application of the Convention, the ECJ was chosen to have exclusive jurisdiction to interpret the Rome Convention.

The **European judicial area** also aims at leveling the Brussels and Rome Conventions since it: 1) establishes, in close correlation to the concept of the Internal Market, the concept of mutual recognition, 2) calls for facilitation of access to justice, and 3) spells out greater convergence of legal provisions as an aim for the integration process. The harmonization of private international law and international civil procedure law in the form of Community legal acts, makes a worthy contribution[146] in this respect and reduces the risk of frictions resulting from the increasing conflicts of different legal instruments.

Similarly, the **Green Paper on the Rome I Regulation** emphasizes the unity of European procedural law and European private international law and urges the transformation of the

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[144] *See* KARL RIESENHUBER, SYSTEM UND PRINZIPIEN DES EUROPÄISCHEN VERTRAGSRECHTS, 40 (2003).

[145] Preamble to the 1980 Rome Convention, *supra* note 69: "[…] *to continue* in the field of private international law *the work of unification* of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments, [and] to establish uniform rules concerning the law applicable to contractual obligations."

[146] *See* Johan Meeusen, *Enforcement of International Contracts in the European Union – Convergence and divergence between Brussels I and Rome I, in* FIFTEEN THESES ON BRUSSELS I, ROME I AND THE EUROPEAN UNION'S INSTITUTIONAL FRAMEWORK, 65.

Rome Convention into an instrument of Community policy in order to promote the consistency of the unification process.[147] Thus, Brussels I and Rome I are seen as constituting **"complementary instruments**."[148] What is more, the renunciation of the international treaties in favor of instruments of Community law guarantees a unified interpretation of the legal acts' terminology.[149] Indeed, the need for reform was ultimately met by the **adoption of the Rome I Regulation**.

5.3.4. Principles and Aims

The affinity of both legal acts should, however, not disguise their **elementary differences**. While the Rome I Regulation, as an act on the conflict of laws, essentially answers the question of applicable law, the Brussels I Regulation, as an act of procedural law, basically solves questions of jurisdiction, mutual recognition and the enforcement of judgments.

The **objectives** of the law of conflicts and those of the law of international civil procedure **do not necessarily run in a parallel way**. For instance, the principle of protecting the defendant plays a substantive role under the Brussels I Regulation, while the Rome I Regulation, as an act on conflict of laws of Savignian character, calls for the applicability of the law most apt for the specific situation.[150] Furthermore, while the Brussels I Regulation assigns the case to the authoritative power of a state - or even directly specifies the relevant court - by regulating

[147] Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization, COM (2002) 654 final, § 2.2. For more on this text, *see* Andrea Bonomi, *Conversion of the Rome Convention on Contracts into an EC Instrument: Some Remarks on the Green Paper of the EC Commission,* 5 YPIL 196 (2003).
[148] COM (2002) 654 final, § 1.3.
[149] COM (2002) 654 final, § 2.3.
[150] *See* Anna-Kristina Bitter, *Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rome I-Verordnung*, 2008 IPRAX, 98.

jurisdiction, the Rome I Regulation only decides on the meta-question of the applicable law.[151]

In addition, the two legal acts vary from a **systematic point of view**. According to the Brussels I Regulation, the courts of the member state where the defendant is domiciled have jurisdiction, while the classification of the subject-matter in dispute only allows for an aberration in favor of a special jurisdiction in the second step.[152] Furthermore, in contrast to the Rome I Regulation, which in principle only calls for the applicability of the law of a single jurisdiction, the Brussels I Regulation provides the possibility of alternative *fora*.[153] Finally, the provisions of the Rome I Regulation are also applicable in the event that they refer to the law of a non-Member State, while the Brussels I Regulation does not feature a comparable degree of universality.[154]

On the other hand, both Regulations are based on identical or similar **fundamental principles**: freedom of choice, the principle of the closest connection, and the protection of the weaker party.[155] These supporting pillars are further supplemented by the common principles of legal certainty and predictability of the Internal Market, revealing a close connection between European civil procedure law and European private international law. What is more, the **recitals** of these legal acts may give further indications of a close connection. Thus, "mutual interrelation of European norms on the conflict of laws with

[151] Martin Schmidt-Kessel, *Zur culpa in contrahendo im Gemeinschaftsprivatrecht*, 2004 ZEuP, 1019, 1025, 1032; Bitter, *supra* note 150, at 98.
[152] Schmidt-Kessel, supra note 151, at 1025.
[153] *See* Lein, *supra* note 139, at 177, 196.
[154] *See* Lein, *supra* note 139, at 188.
[155] *See* Lein, *supra* note 139, at 188.

procedural law"[156] is evident[157] and common goals are emphasized.[158] In **consumer issues,** the necessity of a unified interpretation of terminology is even stated explicitly.[159]

5.3.5. Interpretation by the ECJ

Finally, the **decisions of the European Court of Justice imply parallelism** of the Brussels I and Rome I Regulations. The court uses certain criteria to interpret legal terms mentioned by the legislative acts, which it deduces from the respective parallel legal instrument[160]. Furthermore, the court emphasizes the necessity of consistency in interpreting terms in secondary Community law[161]. Finally, the court stresses the **continuity** between the Brussels I and Rome I Regulations and their predecessors[162]. According to these sources, consistency requires the same scope of application for congruent provisions as long there are no reasons for interpreting differently.[163]

5.3.6. Appraisal

All in all, a **parallelism** of systems and principles, as well as a certain genetic similarity due to the historical evolvement, is evident for the Brussels I and Rome I Regulations. Thus, it is appropriate to attribute an identical or similar meaning to identical or similar terms within the

[156] Burkhard Hess, *Methoden der Rechtsfindung im Europäischen Zivilprozessrecht*, 2006 IPRAX, 356.
[157] *See* Rome I, *supra* note 68, recital 7.
[158] *See* Rome I, *supra* note 68, recital 6.
[159] *See* Rome I, *supra* note 68, recital 25.
[160] Case 29/10, Heiko Koelzsch v. État du Grand Duchy of Luxemburg, March 15, 2011 E.C.R., para. 34; Case 32/88, Six Constructions Ltd v Paul Humbert, 1989 E.C.R. 341, para. 14; Case 9/87, SPRL Arcado v. SA Haviland, 1988 E.C.R. 1539, para. 15 (discussed in 1983 IPRAX 173); Case 133/81, Ivenel v. Schwab, 1982 E.C.R. 1891, para. 13 (discussed in 1983 IPRAX 173).
[161] *See* Meeusen, *supra* note 146, at 76.
[162] *See* Case 533/07, Falco Privatstiftung, 2009 E.C.R I-3327, para. 50; *see* also Brussels I, *supra* note 61, recital 19; Rome I, *supra* note 67, recital 15.
[163] *See* Case 167/00, Verein für Konsumenteninformation v. Karl Heinz Henkel, 2002 E.C.R. I-8111, para. 49.

two legal acts.[164] Such a congruence of terminology and meaning is, of course, merely a general one; variance can be justified in unique cases. Consequently, a **case-to-case assessment** is required.

5.3.7. Parallelism Demonstrated through the Example of Provisions on Consumer Protection

5.3.7.1. Introduction

Consumer-related issues exist in both the Brussels I and Rome I Regulations when the basis of a legal dispute is a **consumer contract**. In such a case, both acts provide comprehensive protection for the consumer.[165] While an abundance of legal terminology exists in the Brussels Convention and the Brussels I Regulation due to various decisions of the ECJ on preliminary references for the scope of application, the contrary may be said for the Rome Convention and the Rome I Regulation; as it had lacked jurisdiction for interpretation for years, the ECJ did not have the ability to substantiate the terms of the Rome Convention. Consequently, the still young Rome I Regulation is as yet a blank canvas in this respect. Thus, the question arises as to whether a **systematic interpretation** bridging the two legal acts will ultimately lead to a common terminology.

[164] *See* also Leible, *supra* note 140, at 43.
[165] Of course, this is under the condition that all other preconditions of their applicability are met.

5.3.7.2. Special provisions for consumers in Brussels I and Rome I

Both Brussels I and Rome I contain special provisions for consumers[166] that deal with **contracts formed by a natural person for a purpose that is "outside his trade or profession"**.

While the personal scope of application under Rome I is explicitly[167] given by a vis-à-vis situation between businesses and consumers, the notion of Article 15 of Brussels I also covers contracts between private parties.[168] However, it is clear, from the purpose of protecting the weaker party, that the contracting partner of the consumer must act according to his professional or commercial function.[169] In the context of the **material scope of application**, it is evident that Article 15 of Brussels I and Article 6 of Rome I cover substantially all contracts between consumers and businesses, independent of the contract's subject matter. Only specific contracts are exempted from the Regulations' range of application.[170]

The **situational preconditions for application** vary only in detail; the essential criteria consists of a "pursuit of a commercial or professional activity" by the professional in the home state[171] of the consumer or a "direction" of such an activity to that Member State, or to several States including that Member State, as well as the affiliation of the respective contract with such an activity.[172]

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[166] *See* Brussels I, *supra* note 62, art. 15; Rome I, *supra* note 68, art. 6.

[167] Rome I, *supra* note 68, art. 6:. "[…] a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) […]."

[168] Brussels I, *supra* note 62, art 15. ("In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession […].")

[169] *See* Tiefenthaler in Czernich et al., *supra* note 63, art. 15 § 13.

[170] *See* Nielsen, in Magnus & Mankowski, *supra* note 78, art. 15 § 28.

[171] This is the state in which the consumers have their habitual residence under Rome I, and the state in which territory the consumers have their domicile under Brussels I.

[172] For more on the "targeted activitiy criterion," *see* Lorna E. Gillies, *Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation*, 3 J. PRIV. INT'L L. 89 (2007); Peter Mankowski, *Muss zwischen ausgerichteter Tätigkeit und konkretem Vertrag bei Art. 15 Abs 1 lit c EuGVVO ein Zusammenhang bestehen?,* 2007 IPRAX, 333; *see also* Francisco J. Garcimartín Alférez, *The Rome I-Regulation: Much ado about nothing?,* 2-2008 EULF 61, 74 (stating that active consumers should not be treated as professionals but as foreign local consumers).

In addition, the **leeway for private autonomy** is similarly restricted under Brussels I and Rome I; while Brussels I generally allows a prorogation of jurisdiction for the benefit of the consumer, Rome I contains a favorability clause that grants consumers at least the same level of protection they enjoy under the mandatory rules of law of the country in which they have their habitual residence.

5.3.7.3. Interpretation

One must bear in mind that the concept of the consumer contract must be **interpreted** in an **autonomous** manner, without reference to national law.[173] As mentioned above, the parallelism of Brussels I and Rome I indicates a congruence of terminology in both legal acts. In the case of an abstract legal definition in a consumer contract, the scrutinization of its various elements is, just as in the preceding acts, left to the competent court. This is indicative of taking the evaluation of similar legal acts into consideration.

Irrespective of common fundamental principles and the common goals of the Internal Market, the aspiration to have congruent terms may seem bold from a methodological standpoint, especially when one considers the **differing purposes of the rules of** international civil procedure and the law of conflicts; indeed, norms on the conflict of laws are, unlike their procedural counterparts, generally "neutral," or, more specifically, separated from the purposes of substantive law.[174]

This traditional understanding of the rules governing conflict of laws cannot, however, be sustained when considering **European consumer contract law**, because the consumer faces

[173] *See, e.g.* Case 27/02, Petra Engler v. Janus Versand GmbH, 2005 E.C.R. I-481, para. 33; Case 464/01, Johann Gruber v. Bay Wa AG, 2005 E.C.R. I-439, para. 31; Case 96/00, Rudolf Gabriel, 2002 E.C.R. I-6367, para. 37; Case 89/91, Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, 1993 E.C.R. I-139, para. 13.

[174] *See* Stefan Leible, *Internationales Vertragsrecht, die Arbeiten an einer Rom I-Verordnung und der Europäische Vertragsgerichtsstand*, 2006 IPRAX, 365, 366.

the same difficulties in international commerce as in domestic law. In both areas, a certain **imbalance between consumers and businesses** calls for action in the interest of fairness. Hence, the system governing conflict of laws rules has to be oriented towards the system of substantive law. These considerations were determinative for conferring considerations for consumer protection under substantive law to the area of the conflict of laws,[175] which, due to similar procedural considerations, also led to a **reduction in discrepancies between international civil procedure law and private international law**. For example, the threat of a foreign jurisdiction and legal system potentially deters the consumer from participating in the market. In the worst case, the weaker party may not even recognize the potential imbalance and, consequently, almost blindly relies on the protection provided by his domestic judicial system. The ***ratio legis*** of Article 15 of the Brussels I Regulation and Article 6 of the Rome I Regulation is, therefore, **to provide consumers the legal environment with which they are familiar and to protect them from detrimental contractual agreements.**[176]

The reconciliation of the consumer provision in Rome I with the consumer rule in Brussels I is, *expressis verbis,* also envisaged by the **recitals of the Rome I Regulation**. Thus, Recital No. 24 requires that the "concept of directed activity" must be "interpreted harmoniously" in order to preserve consistency between Brussels I and Rome I. This **consistent interpretation**[177] is also emphasized by Recital No. 7, which states that "the substantive scope and the provisions of the Rome I Regulation should be consistent" with those of the Brussels I Regulation and the Rome II Regulation[178]. Furthermore, the aims listed by the

[175] For more on this "materialization," *see* Sachse, *supra note* 57, at 7.
[176] *Id*. at 65, 166.
[177] *See* also Leible, *supra* note 140, at 43; Bitter, *supra* note 150, at 96; Lein, *supra* note 139, at 177.
[178] For information on the dividing line between Rome I and Rome II Regulation *see* PLENDER & WILDERSPIN, *supra* note 127, at 47.

recitals, such as **legal certainty**[179] **and foreseeability,**[180] can primarily be achieved through a harmonized terminology.

In light of the **historical development**, the parallel aims of consumer protection provisions become particularly visible. Just as Article 13 of the Brussels Convention served as a "blueprint"[181] for Article 5 of the Rome Convention, the definition of a consumer contract under the Brussels Convention was derived from a draft of the Rome Convention.[182] This is documented by the **explanatory reports** on the different official versions of the Brussels Convention, which hold persuasive authority due to their academic background. The **Giuliano/Lagarde-Report** provides information on the relationship between consumer protection provisions by stating that the definition of a consumer contract under the Rome Convention "corresponds" to that contained in Article 13 of the Brussels Convention and should, therefore, be interpreted likewise due to the identical aim of consumer protection.[183]

The substantive reconciliation between the Brussels Convention and the Rome Convention was, nevertheless, threatened by the **extension of the material and territorial scope of application** of Article 15 of the Brussels I Regulation, which aimed to face new challenges in the area of electronic commerce.[184] While the material scope of application of Article 5 of the Rome Convention merely covers specific contracts,[185] Article 15(c) of the Brussels I

[179] Rome I, *supra* note 68, recitals 16, 39
[180] *Id*. recitals 6, 39 ; Brussels I, *supra* note 62, recital 11 .
[181] Gralf-Peter Calliess, *Coherence and Consistency in European Consumer Contract Law: a Progress* Report, 4 GLJ, 333 (2003).
[182] *See* Nielsen in Magnus & Mankowski, *supra* note 78, art. 15 § 12.
[183] Giuliano/Lagarde-Report, *supra* note 113, at 23.
[184] Brussels I, supra note 62, recital 24; Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at 1, 16, COM (1999) 348 final.
[185] Contracts whose object is 1) the supply of goods or 2) the supply of services to the consumer, and 3) contracts for the provision of credit for that object.

Regulation includes all type of contracts in its material scope and notes that it is sufficient if the professional directs a professional or commercial activity "**by any means**."[186]

As the rapid increase of B2C E-commerce also specifically demanded adjustments in the area of conflict of laws, the Rome Convention could not remain in its original state.[187] Thus, the "Groupe Européen de Droit International Privé" **(GEDIP)** called for a revision of on consumer contracts provisions under the Rome Convention as early as 2000.[188]

The European Commission took up these proposals in its **Green Paper on the Rome I Regulation** and explicitly called for a transformation of the Rome Convention into an instrument of Community Law in order to both re-establish consistency with its procedural twin and to pave the way for a harmonized interpretation of common legal terms. This commitment was incited in light of the intention of modernizing consumer protection. Thus, the Green Paper explicitly emphasizes the necessity to harmonize civil procedure law and private international law in the areas of consumer protection and employment law. In addition, during the **consultation process,**[189] the Green Paper relied on **general consent** to align consumer protection provisions with the Brussels I Regulation **to ensure the synchronization of "forum" and "ius."**[190]

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[186] For more on the deficits of Art. 5 of the Rome Convention, *see* Nemeth, *supra* note 141, at 46; Zlatan Meškić, *Europäisches Verbraucherrecht – gemeinschaftliche vorgaben und europäische Perspektiven,* 18 LUDWIG BOLTZMANN INSTITITUT FÜR EUROPARECHT 115 (2008).

[187] E.g. due to the narrow scope of application under Art. 5 of the Rome Convention, it was increasingly referred to the instrument of overriding mandatory provisions.

[188] *See* Groupe Européen de Droit international Privé, *Proposition de Modification des Art. 3, 5 et 7 de la Convention de Rome du 19 Juin 1980, et de L'article 15 de la proposition de Règlement "Bruxelles I", available at* http://www.gedip-egpil.eu/documents/gedip-documents-12pf.html (last visited Nov. 06, 2011).

[189] The replies, approximately 80 in total, are *available at*: http://ec.europa.eu/justice/news/consulting_public/rome_i/news_summary_rome1_en.htm (last visited Nov. 06, 2011).

[190] Max Planck Institute for Foreign Private and Private International Law, *Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable To Contractual Obligations into a Community Instrument and its Modernization*, 55; PETER MANKOWSKI, DAS GRÜNBUCH ZUR ROM I-VERORDNUNG, *3*; THOMAS RAUSCHER, ANTWORTEN UND BEMERKUNGEN ZU DEM VON DER KOMMISSION DER EG VORGELEGTEN GRÜNBUCH ÜBER DIE UMWANDLUNG DES ÜBEREINKOMMENS VON ROM (1980) IN EIN GEMEINSCHAFTSINSTRUMENT, *15*; THOMAS PFEIFFER, STELLUNGNAHME ZU EINIGEN ASPEKTEN DES GRÜNBUCHS ÜBER DIE UMWANDLUNG DES ÜBEREINKOMMENS VON ROM AUS DEM JAHR 1980 ÜBER DAS AUF VERTRAGLICHE SCHULDVERHÄLTNISSE ANWENDBARE RECHT IN EIN GEMEINSCHAFTSINSTRUMENT SOWIE SEINE AKTUALISIERUNG, 3.

Thus, the adoption of the Rome I Regulation was specifically developed with the aspiration to re-establish consistency with related Regulations. At the same time, both legal acts were now embedded in the same institutional level in the **areas of freedom, security and justice**.

5.3.7.4. Appraisal

The abstract **congruence of the Brussels I and Rome I Regulations becomes concrete** through their consumer protection provisions, whose parallel development allows for a mutual transfer of results obtained by interpretation. In the event that the correlation between international civil procedure law and private international law is questioned, the example of consumer provisions in the Regulations Brussels I and Rome I provides a prime answer; the purpose of both conflict of laws and procedural rules norms converge and are put on the same track by a common policy on the Internal Market and consumer protection.

For consumers, this implies that jurisdiction and applicable law will be determined with the same criteria. Thus, a synchronization of *forum* and *ius* can, to a large extent, be accomplished. The maxims of legal certainty and foreseeability have become practical reality, which strengthens the consumer's position as a market participant. This is the intention of the Union's policy on consumer protection.[191]

[191] For more information on the European consumer policy, *see* Meškić, *supra* note 186; BRIGITTA LURGER & SUSANNE AUGENHOFER, ÖSTERREICHISCHES UND EUROPÄISCHES KONSUMENTENSCHUTZRECHT (2008). For more information on "consumer strategy" of the Union for the years 2007-2013, *see Communication from the Commission to the Council, the European Parliament and the European Economic and Social Commitee – EU Consumer Strategy 2007-2013 – Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them*, COM (2007) 99 final. For European consumer contract law in general, *see* MODERNISING AND HARMONISING CONSUMER CONTRACT LAW (Geraint Howells & Reiner Schulze eds., 2009).

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