

The Codification of Private International Law in Europe—Could the Community Learn from the Experience of Mixed Jurisdictions?

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*Jurists seem to have forgotten that harmony is not one single boring uniform tune or sound. It is different sounds standing against each other and out of the interplay of different tunes comes a harmony. Harmony is the unity of diversities.*¹

“The approximation of civil law and common law in Europe is no longer a ‘project of the future’ but very much an enterprise of the present”². Against this background, choosing to focus on European

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1. H. Thue, *Norwegian Private International Law at the End of the XXth Century: Progress or Regress*, in S. Symeonides (ed.), *XVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* 319-28 (Kluwer, The Hague 2000).

2. H. Kötz, *The Value of Mixed Legal Systems*, 78 *TUL. L. REV.* 436 (2003).

private international law issues within a conference on mixed jurisdictions could seem surprising in the light of the efforts underway to create a new European *ius commune*. Indeed the harmonisation of private law in Europe is presented by its proponents as a way of abolishing (albeit within a purely European context) private international law which, given the latter's "inadequacies"³, is deemed to be insufficient for fostering the internal market⁴. It is not the aim of this article to enter into the debate on the merits of this argument. Nevertheless whether or not it would be in fact *beneficial* to do away with private international law in Europe, one has to recognise that the unification of substantive law is progressively going ahead—could this therefore mark the beginning of the end for European conflict of laws? Once the material harmonisation process is complete, there could perhaps be a case for the suppression of private international law within Europe: the material *rapprochement* would be such that the remaining differences, if any, would be easy to accept on the basis of a full faith and credit type clause⁵.

Whatever one's opinion on the desirability, the feasibility and the forms of the creation of a uniform European private law⁶, the actual

3. For a short discussion of the objections directed at private international law, see Lord Mance, *The Future of Private International Law*, J. PRIV. INT'L L. 185-95, 190 *et seq.* (2005), who concludes that "that the CFR could, even remotely, presage the end of private international law even within Europe is implausible". Pleading in favour of legal pluralism and showing how private international law can acquire a much needed regulatory function, see H. Muir Watt, *European Integration, Legal Diversity and the Conflict of Laws*, 9 EDINBURGH. L. REV. 6-31 (2004-2005).

4. O. Lando & C. von Bar, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code 28 *et seq.* (25 October 2001), available at http://www.sgecc.net/media/downloads/stellungnahme_kommission_5_final1.pdf.

5. C. Kessedjian, *Le droit international privé et l'intégration juridique européenne*, in T. Einhorn & K. Siehr (eds.), INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E NYGH 192 (TMC Asser Press, The Hague 2004). The European Commission does not hide its ambition to realise a "genuine European Area of Justice" akin to the full faith and credit system applicable in the United States of America. The establishment of such a system is to be achieved through the progression from classical private international law instrument to a "new generation of instruments" focusing on a "minimum harmonisation of certain aspects of procedural law", see F. Frattini, *European Area of Civil Justice—Has the Community Reached the Limits?*, 14 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 225-35, esp. 230 (2006).

6. Reference may be made to the issues and questions raised, among others, by: H. Muir Watt & G. Canivet, *Européanisation du droit privé et justice sociale*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 517-22 (2005); P. Legrand, *Antivonbar*, 1 J. COMP. L. 13-40 (2006); B. Markesinis, *Deux cents ans dans la vie d'un code célèbre—Réflexions historiques et comparatives à propos des projets européens*, REVUE TRIMESTRIELLE DE DROIT CIVIL 45-60, esp. 53 *et seq.* (2004).

Europeanisation⁷ of private law under the impulse of the institutions of the EU is as yet far from comprehensive⁸. This fragmentation of European private law exists both in terms of the material scope and the forms taken, consequently the diversity of substantive law will continue to create the very difficulties that private international law is needed to resolve. This is in part because the legislative power of European institutions is limited; the principles of subsidiarity and proportionality apply⁹, which impose an evaluation of the necessity of the harmonisation endeavour. At the same time, as the well-known example of Scotland and England show¹⁰ widespread economic integration may be achieved notwithstanding significant differences between the legal systems. In addition, in certain areas of private law such as family law, where substantive harmonisation cannot currently be envisaged because the requisite legal foundation in the EC Treaty is still lacking, such material unification is unlikely in the near future, either because it is simply deemed premature¹¹, or plainly not desirable¹². Further, it is important to recall that the unification of material rules does not exclude choice of law problems once divergent interpretations emerge¹³. Yet these variations are bound to surface given the application of such harmonised rules remains decentralised¹⁴ and even recourse to autonomous concepts and interpre-

7. On the different acceptations and forms of Europeanisation, see R. Michaels & N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. INT'L & COMP. L. 843 *et seq.* (2006).

8. In 2002, H. Kötz, in a presentation at the 2002 World Mixed Jurisdiction Conference in New Orleans indicated that "unification has been sporadic, impinging on specific points only so that in some areas the result is a patchwork of overlapping scraps of national and uniform law with ill-defined areas of operation and divergent animating principles".

9. See S. van Erp, *European Private International Law as a Transitory Stage?*, 6 ELEC. J. COMP. L. (2002) (editorial).

10. The same illustration can be found in the United States of America. See J. SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM* 32 (Intersentia, Antwerpen 2002).

11. For example J. Meeusen, M. Pertegás, G. Straetmans, F. Swennen (eds.), *INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION passim* (Intersentia, Antwerpen/Oxford 2007). See nevertheless M.R. Marella, *The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law*, 12 EUR. L.J. 78-105 (2006).

12. At the informal Justice and Home Affairs Council meeting conducted in Dresden on 15 January 2007, it was held that family law harmonisation "would not be desirable anyway: the diverse values inherent in national family and succession law represent a key aspect of Europe's cultural diversity". See http://www.bmj.bund.de/files/-/1578/PlenarySessionII_EN.pdf.

13. For a famous illustration, see the French decision, *Hocke*, Com 4 Mar. 1963, JCP 1963 II 13376 note; Lescot, *JOURNAL DU DROIT INTERNATIONAL* 806 *et seq.* (1964); Goldman, *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 264 *et seq.* (1964); Lagarde's article pp. 235 *et seq.*

14. P.-Y. Gautier, *Inquiétudes sur l'interprétation du droit uniforme international et européen*, in M.-N. Jobart-Bachelier & P. Mayer (ed.), *LE DROIT INTERNATIONAL PRIVÉ: ESPRIT ET MÉTHODES, MÉLANGES EN L'HONNEUR DE PAUL LAGARDE* 327-42 (Daloz, Paris 2005). In the

tative rulings of the European Court of Justice cannot prevent dissimilar acceptations to come into being¹⁵. Last but not least, private international law is not just choice of law—the unification of private law does not by definition affect the issues at the heart of two out of the three pillars of private international law: jurisdiction and the recognition and enforcement of foreign judgments.

These preliminary observations in part explain why, far from signalling the end of private international law in Europe, the efforts towards a *ius commune europaeum* have not hindered progress to be made concurrently on the path towards the unification of Private International Law in Europe. As was recognised by the European Group of Private International law, the very debate on the emergence of a new *ius commune* in fact also creates an environment propitious to the academic elaboration of a European private international law code¹⁶. The codification of conflict of laws is not just a scholastic velleity; practical steps have already been taken in this direction by the European Community. While the creation of a complete European code of private international law is not as such on the agenda in Brussels, private international law has been at the heart of the reinforced European integration brought by the Treaty of Amsterdam¹⁷.

The discussions on whether mixed systems could be seen as possible models of how European integration may be achieved can therefore extend to the area of private international law, perhaps more than to any other area of private law. Given that the European Union involves legal systems belonging to both the common law and the civil

context of the Rome Convention, see also C. Kessedjian, *La Convention de Rome sur la loi applicable aux obligations contractuelles, vingt ans après*, in Basedow et al. (eds.), PRIVATE INTERNATIONAL LAW IN THE INTERNATIONAL ARENA: FROM NATIONAL CONFLICT RULES TOWARDS HARMONISATION AND UNIFICATION, LIBER AMICORUM KURT SIEHR 329-40 (TMC Asser Press, The Hague 2000); M. Wilderspin, *The Rome Convention—Experiences to Date Before the Courts of Contracting States*, in O. Lando et al. (eds.), DIE ANGLEICHUNG DES MATERIELLEN UND DES INTERNATIONALEN PRIVATRECHTS IN DER EU 111-42 (Lang, Frankfurt-am-Main 2003).

15. M. Audit, *L'interprétation autonome du droit international privé communautaire*, JOURNAL DU DROIT INTERNATIONAL 789-816 (2004). For other illustrations, see also E.C. Ritaine, *Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps*, 34 INT'L J. LEGAL INFO. 419-40 (2006). On the challenges of interpretation in Europe, see also generally N. Colneric, *Auslegung des Gemeinschaftsrechts und gemeinschaftrechtskonforme Auslegung*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 225 et seq. (2005); S. Vogenauer, *Eine gemeinsam europäische Methodenlehre des Rechts—Plädoyer und Programm*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 234 et seq. (2005).

16. Report on the Sixteenth Meeting of the European Group for Private International Law, Coimbra 22-24 September 2006, pt. V (*La codification du droit international privé européen*), available at <http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-16t-fr.html>.

17. Treaty Establishing the European Community (Amsterdam consolidated version) OJ C 340, 10.11.1997, at 173-306.

law tradition, and that the very aim of private international law is the coordination of legal systems, it would seem rather sensible that European private international law should borrow from both traditions and therefore display characteristics of *mixedness*. As Lord Mance wrote in 2005, Private International Law is the area “*par excellence* where no national legal system can maintain an insular attitude”¹⁸. How could this not *a fortiori* apply to *European* private international law?

In the midst of the frenzy of activities in this area in Brussels it will be considered here whether Europe has so far satisfactorily responded to the challenge of the accommodation between common law and civil law ideas and methods and whether it has achieved, or is in the process of achieving, *mixité* in the field of private international law. This study imposes the preliminary clarification of both whether in itself the European codification of private international law reflects a move towards a (more) civilian model of conflict of laws, as well as a short overview of the salient characteristics of private international law in common law and civil law systems in Europe. It also implies the selection of a particular domain of analysis. The current focus in Brussels is on the creation and development of a so called “European Area of Civil Justice”, but notwithstanding the profusion of instruments adopted in the last decade and despite the abundance of initiatives currently discussed in this context¹⁹, it must be recalled that the first European instrument of judicial cooperation, the Brussels Convention *on jurisdiction, recognition and enforcement of judgments in civil and commercial matters*, was adopted almost forty years ago²⁰, long before the areas of “Justice and Home Affairs” and “Freedom, Security and Justice” were put on the European institutional map. This Convention, which was transformed into a Regulation in 2000²¹, is the most important

18. Lord Mance, *supra* note 3, at 185.

19. For an overview of the achievements and current activities of the European Union in the field of judicial cooperation in civil matters, see <http://europa.eu/scadplus/leg/en/s22003.htm>.

20. Convention Adopted on 27 September 1968 (OJ 1972 L 299, at 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and—amended text—at 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, at 1), and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, at 1), and by the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention (OJ 1997 C 15, at 2).

21. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12, 16.1.2001.

of a handful of key instruments adopted in private international law²². Its many years of (decentralised) application, and the development of principles and of a body of interpretative case law it has given rise to, afford the degree of hindsight necessary for this analysis.

I. CODIFICATION OF PRIVATE INTERNATIONAL LAW IN EUROPE AND
MIXITÉ

Viewed against the background of the codification of private international law in individual countries, the current movement of codification of private international law initiated in Brussels should not be seen as reflecting in itself a “civilianisation” of the area (is not in itself the sign of the prevalence of civil law). This is because the relationship of codification and private international law has always blurred the traditional boundaries of civil law and common law and also because the legislative activity in Brussels in this area does not equate with codification in the substantive sense.

A. *Private International Law and Codification in Europe*²³

Codification undoubtedly remains a fundamental constant of the civilian tradition. Civil law systems are still essentially founded on the precedence of enacted and in principle codified²⁴ general rules on the basis of which solutions are to be deducted. But even in civil law countries private international law has for a long time been deemed

22. See Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, OJ C 27 of 26.01.1998. This Convention has now been replaced by Council Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ L 177 of 4 July 2008, which shall apply from December 2009. See also Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, OJ L 160 of 30.06.2000; Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000, JO L 338, 23.12.2003; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims, OJ L 143, 30.04.2004; Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations, OJ L 199 of 11.07.2007; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure, OJ L 199 of 11.07.2007.

23. For a brief overview of the codification of private international law in Europe, see A. Fiorini, *The Codification of Private International Law in Europe—The Belgian Experience*, 54 INT'L COMP. L.Q. 499-519 (2005).

24. On the close relationship between enacted and codified rules, see D. Bureau, *Codification*, in D. Alland & S. Rials (ed.), *DICIONNAIRE DE LA CULTURE JURIDIQUE* (Paris, Lamy-PUF 2003).

unsuitable for legislative intervention²⁵. Despite the arguable closeness of domestic substantive rules and conflict of law rules, private international law largely escaped the codification process of the nineteenth century. With the development of industry and transportation during the course of the nineteenth century international relations increased and there was a consequent need to augment the number and precision of private international law rules²⁶. However, legislation in this area remained largely incomplete and lacked specificity. In fact it was not until the second half of the twentieth century that more detailed and systematic private international law rules were adopted. This was originally done within the adoption or reform of private law codes on the basis that a private code was not complete if it did not provide the key for the territorial application of the rules it contained. And it is only from the seventies that specific private international codifications were drafted (notably in Austria,²⁷ Germany,²⁸ Switzerland,²⁹ Italy,³⁰ Liechtenstein,³¹ Belgium³², Bulgaria³³).

The long absence of private international law codes in civil law countries can be related to two factors. First it is generally recognised even in civilian countries that one of the great merits of unwritten conflict of law rules is their relative flexibility and adaptability, characteristics which are viewed as the prerequisites of a satisfactory treatment of private international situations³⁴. Furthermore the need to codify is not felt when the effort it would entail would not greatly

25. S. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT 461 (1993); B. Oppetit, *Droit international privé, droit savant*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 234, 342 (1992 III).

26. See, for example, the Greek code of 1856, replaced in 1940; the Italian code of 1865; the Spanish code of 1889; or the Swiss federal law of 1891. See M. Gutzwiller, *Le développement historique du droit international privé*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 29, 332 (1929 IV); B. Nolde, *Les étapes historiques de la codification législative du droit international privé*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 362 (1927).

27. *IPR Gesetz*, 15 Jun 1978, BUNDESGESETZBLATT No. 304/1978.

28. Art. 3-49 EGBGB, BUNDESGESETZBLATT 1994 I 2494.

29. *LDIP*, 18 Dec. 1987, RO 1988, 1776.

30. Riforma del sistema italiano di diritto internazionale privato, 31 May 1995, Supp. Ord. GU Serie Gen 128, 3 Jun 1995.

31. *IPRG*, 19 Sep 1996, LIECHTENSTEINISCHE LANDESGESETZBLATT 1996 No. 194, 290.

32. Loi du 16 juillet 2004 portant le Code de droit international privé, MONITEUR BELGE 27. 7. 2004, ed. 1, 57344-57374.

33. OJ No. 42, 17 May 2005.

34. F. van Schwind, *Problems of Codification of Private International Law*, 17 INT'L & COMP. L.Q. 434 (1968).

contribute to strengthening the coherence of the law and facilitating its accessibility. This last aspect still explains the situation in France³⁵. Indeed French courts have, on the basis of the few existing written private international law rules, developed a number of general principles which ensure a measure of coherence in the treatment of international private law disputes³⁶. In these circumstances it can be questioned whether a code would greatly improve the consistency of French private international law rules³⁷. The position in France is however very isolated today in the civil law world. Ten years ago a civilian author noted that “from China to Germany, from Turkey, Yemen to the Burkina Faso, everybody—that is the whole world or just about—has codified its private international law”³⁸. Indeed even non-civilian systems have codified their private international law: the movement of codification has been seen in mixed legal systems such as Louisiana³⁹, Quebec⁴⁰, Puerto Rico⁴¹, and even in the UK⁴² a “creeping” form of codification⁴³ has emerged⁴⁴.

Unsurprisingly the “most interesting phenomenon” of the growing “convergence between civil law and common law systems” observed by von Schwind four decades ago in his lecture on the codification of private international law has only been reinforced by the European

35. H. Muir Watt, *La codification en droit international privé*, 27 DROITS 149-60 (1998).

36. B. Oppetit, *Les principes généraux en droit international privé*, 32 ARCHIVES DE PHILOSOPHIE DU DROIT 179 (1987).

37. *Contra* A. BODÉNÈS-CONSTANTIN, LA CODIFICATION DU DROIT INTERNATIONAL PRIVÉ FRANÇAIS (Defresnois, Paris 2005).

38. Muir Watt, *supra* note 35, at 150.

39. LOUISIANA CIVIL CODE, Act No. 923 of 1991, H.B. 251.

40. S.Q. 1991, c. 64, in force Jan. 1, 1994.

41. For a presentation of book 7 (Private International Law) of the revised civil code of Puerto Rico, see Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico, Ponencia presentada por la Directora Ejecutiva de la Comisión, LCDA Marta Figueroa Torres, en Torno al Borrador del Libro Séptimo sobre derecho internacional privado del Código civil de Puerto Rico Revisado, San Juan (April 2007), available at <http://www.codigo civilpr.net/documents/PonenciadelaDirectoraEjecutiva.pdf>.

42. On the idea that private international law legislation in the UK has traditionally been “remedial” and that “in time, the common law grows round the legislation and absorbs it so that judge-made law and legislation eventually become a homogeneous blend”, see T. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT’L & COMP. L.Q. 813-28 esp. 813 (2005).

43. P. North, *Problems of Codification in a Common Law System*, 46 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT 500 (1982) (“Private international law is an area where creeping codification has crept so silently that few people other than those directly involved have even noticed it happening”).

44. D. Tallon, *La codification dans le système de Common Law*, 27 DROITS 41 (1998). Presenting the reasons of failed codification attempts on both sides of the channel and their relevance for the European endeavour, see also R. Sefton-Green, *Les codes manqués*, REVUE TRIMESTRIELLE DE DROIT CIVIL 539-52 (2005).

integration⁴⁵. This formal convergence in terms of sources is also accompanied by a certain convergence of views: in fact both common law and civil law jurists have decried some of the effects of the eruption of European rules in private international law. This is because the sectoral and often complex European private international law instruments pursue Community objectives which are essentially different from the domestic aims of national private international law systems and therefore inevitably disrupt the substantive and purposive consistency introduced by Private international law codes or maintained by courts in countries from both traditions. Notwithstanding these misgivings, this formal *rapprochement* accelerated markedly at the end of the nineties.

B. The Europeanisation of Private International Law

For a long time, despite the recognised importance of legal certainty notably in European international commercial law⁴⁶ private international law initiatives remained essentially a matter for inter-governmental negotiation within the context of the European Union⁴⁷. This meant there was no centralised private international law agenda and that States, whilst constrained to some extent by wider political considerations, could at least prolong negotiations and delay ratification and thereby the entry into force of European private international law instruments. The 1968 Brussels Convention⁴⁸ is one of the instruments of this era. It is not until 1982 that it became applicable in the UK. Similarly another European Convention, the Rome Convention⁴⁹, which harmonised choice of law rules in contract, though finalised in 1980 only came into effect over ten years later.

However, on 1 May 1999 the private international law landscape changed dramatically within Europe with the entry into force of the Treaty of Amsterdam. This afforded the Community competence in effect to take measures in the field of private international law which were necessary for the proper functioning of the internal market.⁵⁰ The European Commission adopted a very extensive interpretation of the

45. See generally Lord Goff of Chievely, *The Future of the Common Law*, 46 INT'L & COMP. L.Q. 746 (1997).

46. F. Schockweiler, *La codification du droit international privé dans la Communauté européenne*, in A. Borrás (ed.), *E PLURIBUS UNUM: LIBER AMICORUM GEORGES A.L. DROZ: ON THE PROGRESSIVE UNIFICATION OF PRIVATE INTERNATIONAL LAW* 391 (Nijhoff, The Hague 1996).

47. Under the then Article 220 EC Treaty (now Article 293) or the then Article K3 Treaty on European Union.

48. *Supra* note 20.

49. *Supra* note 22.

50. Article 65 EC Treaty.

new provisions and the Community put its new powers to “good use” producing an impressive number of regulations and directives in a very short space of time, working in the area of mutual recognition and enforcement of judgments, cooperation between Member States, access to justice, and more recently attempting to unify choice of law rules in a number of domains⁵¹.

Although the unification of private international law is very much a priority for the Community, work in this area is proceeding in a very disjointed fashion. It could well be that, ultimately, once the Community’s “codification” programme has ended and after a series of streamlining reforms⁵² of the various sectors individually codified, the European private international law rules will display the ideal characteristics of a material code: coherence, logical structure, absence of contradiction, conformity of codified and applied law, completeness, clarity, ease of use and publicity. But the possible (if unlikely) emergence of such a material European private international law code is by no means guaranteed given the method (or lack of it) presently used. Indeed coordination between the various dossiers, a very arduous exercise, is at best weak and superficial if not completely inexistent; the unification of private international law rules in Europe is very much proceeding via a piecemeal approach with no “*Kodifikationsidee*”⁵³. Further, the uncertain limits (*ratione materiae*, *ratione personae* and *ratione loci*) of the European competence in this area is not without influence on a lack of overall coherence of Community private international law⁵⁴.

As a result the European harmonisation of private international law rules can presently appear as a “paralysing hand”⁵⁵ without offering the advantage of a real code in terms of structure, uniform terminology, clear methodology and unity of approach. Nevertheless the inconvenience brought by the fragmented approach could be compensated by the fact

51. For a rapid overview of the work thus far accomplished and the orientations of the future work, see Frattini, *supra* note 5, at 230. The current objectives are set out in the *Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, OJ C53/1 of 3 Mar. 2005, esp. 11 *et seq.* (section 3—Strengthening Justice).

52. See the current codification and recasting programme of the European Commission, which was relaunched in 2006, *available at* http://ec.europa.eu/governance/better_regulation/codif_recast_en.htm. It is to be noted however that the aim of this programme is the creation of *formal* codes.

53. E. Jayme & C. Köhler, *Europäisches Kollisionsrecht 2006: Eurozentrismus ohne Kodifikationsidee?*, 26 IPRAX 537 *et seq.*, esp. 540-41 (2006).

54. See BODÉNÈS-CONSTANTIN, *supra* note 37, at 94 *et seq.*, esp. 104-20.

55. In his preface to the first edition of *Private International Law*, Cheshire observed in 1935 that private international law had “only been lightly touched by the paralyzing hand of the Parliamentary draftsman”.

that in each sector, the uniform rules realise the fine balancing act of meeting characteristic European objectives and achieving a welcome *combination* of the civil law and the common law traditions in this field.

C. Mixité in European Private International Law

It must be recalled that private international law has at its outset been the theatre of a vast transmigration of ideas⁵⁶. The reception into the common law of ideas and writings of continental jurists has been documented a long time ago, notably by Anton, who very interestingly (but perhaps unsurprisingly for mixed jurisdictions jurists) showed how it is primarily through Scottish appeals that English lawyers in the eighteenth century owed their introduction to continental theories upon the conflict of laws⁵⁷. This influence did not remain one directional. England (and Scotland) contributed to mainland systems in particular in international commercial law⁵⁸. The cross fertilisation progressively became less easy and less frequent on both sides of the channel as a result of different developments: in the UK less and less weight was placed on continental authorities as the volume of precedents increased and became more fixated⁵⁹, while on the continent, the adoption of national private international law codes⁶⁰ led to similar effects.

In the light of the above the European codification of private international law could have the huge merit of (re)instilling a greater degree of *mixity* in the area of private international law. To be able to assess whether the harmonised Community rules on jurisdiction in civil and commercial matters do bear the signs of mixedness it is useful to sketch the salient characteristics of civil law and common law systems in this specific field of private international law.

56. On the more recent history of private international law and the tensions between universalism and nationalism, see J.-L. HALPÉRIN, *ENTRE NATIONALISME JURIDIQUE ET COMMUNAUTÉ DE DROIT* (PUF Paris 1999).

57. A.E. Anton, *The Introduction into English Practice of Continental Theories on the Conflict of Laws*, 5 INT'L & COMP. L.Q. 534 (1956).

58. B. GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 25 (Clarendon Press, Oxford 1990).

59. A.E. ANTON, *PRIVATE INTERNATIONAL LAW: A TREATISE FROM THE STANDPOINT OF SCOTS LAW* 12 (Green, Edinburgh 1967).

60. This is not to say that codes cannot have an international outlook and be inspired by comparative law; this is exemplified in particular by the Dutch civil code or the Belgian Private International Law code. On the latter, see Fiorini, *supra* note 23.

II. TWO EUROPEAN PRIVATE INTERNATIONAL LAW TRADITIONS:
SALIENT CHARACTERISTICS OF JURISDICTION IN COMMON LAW AND
CIVIL LAW SYSTEMS IN EUROPE

Unlike in civil law systems the emphasis in common law systems has always been on jurisdiction as against choice of law⁶¹. The area of jurisdiction in private international law is a great divide between the common law and the civil law models. Even where aims are shared, methodology differs greatly, notably as a result of the profound difference about how courts should behave⁶².

It is well known that, put simply, civilian systems focus on the structure of the law as opposed to its operation while common law systems are based on experience rather than logic, and that traditionally common law judges have been guided by pragmatism and a strong commercial sense and very much “placed on a pedestal”⁶³, while their civil law counterparts have been the object of mistrust and been seen as playing a rather mechanical role. Further, the achievement of justice in a concrete case is the focus of common law systems while across the channel it is essentially the application of the just rule that seems to count⁶⁴. These opposite attitudes have imprinted particular marks in the field jurisdiction in private international law.

On the continent, jurisdiction is afforded on the basis of clear, rigid, strict and obvious rules which leave little room, if any, for judicial discretion while in European common law systems⁶⁵ jurisdiction is assumed on the basis of wide, flexible rules with courts having discretion in the exercise of their jurisdiction. Once seised by the parties a court on the continent will have to exercise jurisdiction even if it is not the most appropriate forum and this even if the most appropriate court has subsequently been seised of the same dispute. By contrast, in a similar

61. R.H. GRAVESON, *COMPARATIVE CONFLICT OF LAWS* 8 (North Holland, Amsterdam 1977).

62. On this, see P. NYGH & F. POCAR, *REPORT ON THE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*, Prel. Doc. No. 11 of August 2000, available at <http://www.hcch.net/upload/wop/jdgmpl1.pdf>; see also LORD MANCE, *THE COMMON LAW AND EUROPE: DIFFERENCES OF STYLE OR SUBSTANCE AND DO THEY MATTER?* (Holdsworth Club, Birmingham 2007).

63. P. Nygh, *The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, in P. Borchers & J. Zekoll (eds.), *INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER* 264 (Transnational Publishers, Ardley 2001).

64. This is nevertheless tempered by the *théorie de l'abus de droit*.

65. For differences with US conflict of laws, see M. REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE—A GUIDE THROUGH THE JUNGLE* 65 *et seq.* (Transnational Publishers, Irvington 1995) see also Nygh, *supra* note 63, at 265.

situation, a common law court would have the power under the *forum non conveniens* doctrine to decline jurisdiction even if no other court has yet been seised. In case of parallel litigation, common law courts have developed a weapon unknown to civilian courts⁶⁶: anti-suit injunctions, whereby a party can be restrained from instituting, or proceeding with, an action abroad. While it is accepted in both traditions that the parties themselves designate the court which will have jurisdiction to adjudicate on their dispute, choice of court agreements are traditionally given exclusive effect in civil law countries but not in common law countries.

III. EVALUATION OF EUROPEAN PRIVATE INTERNATIONAL LAW OF JURISDICTION

A. *Current Situation*

It has been said that the Brussels I Regulation, which replaced the 1968 Convention on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters “would seem an ideal choice for an academic exercise aimed at demonstrating the influence of civil or continental, law on the rules governing international adjudication in commercial relationships”⁶⁷. Indeed even just looking at the scope of the instrument, itself reflected in the name of the latter, it is clear that the Regulation is based on a notion of “civil and commercial matter” which is traditionally unknown in common law systems⁶⁸.

It is in the jurisdiction chapter of this double instrument that the influence of the civil law tradition most strikingly lies. The Regulation organises a system of strict, hierarchically ordered grounds of jurisdiction, guided by the principles of legal certainty and predictability, and mutual trust. Jurisdiction is in general given to the court of the domicile of the defender thus following the Roman principle *actor sequitur forum rei*⁶⁹; this general rule is then combined with a limited

66. See however in France, Cass. Civ 1ère, 19 nov. 2002; SA Banque Worms c/ Epx Brachot et al. JCP G 2002, II, 10201, concl. J. Sainte-Rose, note S. Chaillé de Néré; D. 2003, n° 12, at 797, note G. Khairallah; JCP E 2003, n° 42, at 1675, note M. Menjuq; JDI 2003, at 132, note P. Roussel Galle; LPA 2003, n° 209, at 7, note C. Legros- Cass. com., 21 mars 2006: D. 2006, act. jurispr. at 914, obs. A. Lienhard; D. 2006, jurispr. at 1466, note L.-C. Henry; Rev. des sociétés 2006, at 653, note S. Bollée.

67. A. Gardella & L. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 612 *et seq.* (2003).

68. P. SCHLOSSER, 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, Official Journal C 59, 5 Mar. 1979, No. 23, at 82.

69. *Id.* art. 2.

number of special grounds of jurisdiction⁷⁰. Arguably the very existence of a plurality of bases of jurisdiction (although limited by the hierarchical structure of the instrument), introduces a level of flexibility, which could be presented as foreign to the civilian tradition. This however is not decisive: the multiplicity of *fora*, and the flexibility it gives rise to, is not unknown to the civil law tradition. But this apparent flexibility is very limited. Indeed it is to be noted that a court seised in accordance with the Regulation is compelled to hear the case; this is deemed *a priori* appropriate given the exclusion of exorbitant grounds of jurisdiction⁷¹, and the fact that all the bases of jurisdiction found in the Regulation reflect what should be again *a priori* a genuine link between the dispute and the forum. No exception is made if this is not the case in practice. The Regulation provides a rule relating to cases of parallel proceedings which is based on purely chronological factors: the court first seised has automatic priority over the court second seised if the former assumes jurisdiction, whether or not it is best placed to hear the dispute⁷².

B. Could a Greater Métissage Have Been Achieved?

1. The Text of the Instrument

That the 1968 Convention was to be heavily if not exclusively influenced by the civil law tradition was inevitable; after all this instrument was finalised between the six founding States of the EEC, which all shared the same, civilian, heritage. This civil law imprint however did not fade even after the accession of the UK and Ireland. This could seem remarkable when one considers that the negotiation of the accession convention took some six years and involved a “considerable input from both Commissioners and Law Commission staff both in terms of the provision of advice to those negotiating on behalf of the UK and in the negotiation themselves”⁷³. However the continuing civilian mark can be easily explained by the fact that the possibility of amending the Convention upon accession of the UK, Ireland, and Denmark, was confined simply to “necessary adjustments”⁷⁴, with the original text of the Convention being taken as the basis of the negotiations. So for example, the civilian notion of civil and commercial

70. *Id.* art. 5.

71. *Id.* art. 3(2), Annex I.

72. *Id.* art. 27.

73. P. North, *Private International Law: Change or Decay?*, 50 INT’L & COMP. L.Q. 487 (2001).

74. Schlosser, *supra* note 68, No. 1 at 77 & No. 15 *et seq.* at 80 *et seq.*

matters, which in the meantime had been partially defined by the ECJ⁷⁵, was further clarified in Article 1 for the benefit of common law jurists as not encompassing revenues, customs or administrative matters. Other minor changes were introduced in the accession convention, but none of these were actually dictated by the different approach to conflicts of jurisdiction operative in the UK or Ireland; none can be explained by a need to adapt the convention to fundamental tenets of the common law⁷⁶. Instead they are “tailored for the particular needs of certain key sectors of the acceding countries’ economy” (such as insurance or shipping) or “provided rules to deal with concepts unknown to civil law jurisdictions such as trust”⁷⁷. In fact it seems that while the negotiators were well aware of the great divide between common law and civil law traditions in the area covered by the instrument, the acceding States were happy to adapt⁷⁸ to the civilian model adopted in the 1968 agreement provided what they viewed as important commercial interests were safeguarded⁷⁹ and this adaptation was possible in practice⁸⁰. With these two caveats it was not put into question that the ideas underlying the rules of jurisdiction of the 1968 Convention were not to be affected by the accession of common law Member States⁸¹. It was therefore never suggested to introduce the wide, flexible common law bases of jurisdiction as this would have destroyed the jurisdictional system organised by the Convention (and was apparently not necessary for practical or commercial reasons).

Still, discussions took place as to the discretionary powers regarding jurisdiction. It was namely conceivable that courts working on the basis of this civilian jurisdictional model could operate with the flexibility characteristic to the common law tradition. But it was observed that the practical reasons in favour of the discretion of a court in the exercise of its jurisdiction in the UK or Ireland would “lose considerably in significance as soon as the Convention became applicable in the UK and Ireland”⁸². Once the implementing legislation had introduced the necessary changes in the laws of those States (i.e., once the heads of jurisdiction at common law were replaced by the rigid and specialised

75. Case 29/76, *LTU v. Eurocontrol*, [1976] ECR 1541.

76. *Gardella & Radicati di Brozolo*, *supra* note 67, at 617-18.

77. *Id.* at 618.

78. In addition to the elements already referred to, suffice it to refer to the necessary redefinition of the concept of domicile for the purpose of the Convention.

79. For example through the inclusion of a provision on insurance.

80. See implicitly *Schlosser*, *supra* note 68, No. 69 *et seq.* at 94 *et seq.*

81. *Id.*

82. *Id.* No. 78, at 98.

provisions laid down in the Convention) it would become “largely unnecessary”⁸³ to correct rules of jurisdiction on a case by case basis by means of the concept of *forum (non) conveniens*. This point was accepted by the two common law delegations⁸⁴. When the Convention was transformed into a Regulation following the entry into force of the Treaty of Amsterdam, some further changes were introduced but far from altering the strong civilian mark of the instrument, the latter was reinforced⁸⁵.

2. The Interpretation of the European Court of Justice

This civilian imprint could however have recessed under the impetus of a dynamic interpretation of the European Court of Justice (ECJ). For example, despite the discussions which had taken place in the seventies during the negotiation of the first accession convention, the text and framework of the instrument did not provide clear responses to the debate whether all discretion was to be excluded. The European Court of Justice has though resisted all attempts to safeguard traditional common law devices or countenance flexible solutions when applying the instrument. In particular, the Luxembourg court has adopted a very civilian attitude, privileging adherence to dogma⁸⁶ over efficiency and commercial sense⁸⁷, rejecting the recourse to anti-suit injunctions even where these would have been used to support and protect deficient conventional mechanisms⁸⁸ and extending the refusal to allow the exercise of discretion by English judges even in international cases having no other connection with another contracting State⁸⁹. It is very likely, although the case is still pending before the ECJ, that it will

83. *Id.*

84. Recent practice has shown how over-optimistic this vision was—see *infra*.

85. Among the changes, it is possible to refer to the fact that article 5-1 became less flexible, articles 17/23 adopted the civilian traditional approach to jurisdiction agreement, the recital now contains references to the principle of legal certainty.

86. The principle of mutual trust, although understandably important, is very much a duty based on a fiction (of the equivalence of the systems). See the variations reported by the 2006 Report of the European Commission for the Efficiency of Justice regarding 45 of the 47 Member States of the Council of Europe. All 27 Member States of the European Union provided data and were included in this report: CEPEJ, REPORT ON EUROPEAN JUDICIAL SYSTEMS, COE publication, Belgium 2006, esp. 85 *et seq.*, available at http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf.

87. Case C-116/02, Erich Gasser GmbH v. MISAT Srl, [2003] ECR I-14693.

88. Case C-159/02, Gregory Paul Turner v. Felix Fared Ismail Grovit, Harada Ltd. & Changepoint SA, [2004] ECR I-3565.

89. Case C-281/02, Andrew Owusu v. Nugent B. Jackson, trading as “Villa Holidays Bal-Inn Villas”, Mammee Bay Resorts Ltd., Mammee Bay Club Ltd., The Enchanted Garden Resorts & Spa Ltd., Consulting Services Ltd., Town & Country Resorts Ltd., [2005] ECR I-1383.

equally refuse the grant of anti-suit injunctions against another Member State in support of an arbitration agreement, a matter ostensibly excluded from the scope of the Brussels regime⁹⁰.

In this way the ECJ has extended the civilian influence of the instrument well beyond its exclusively intra-European remit. From the perspective of the UK it would seem that the ECJ is leading to what has been described as the “systematic dismantling of the common law of conflict of laws”⁹¹. The vision expressed by Beatson that “we will become the Louisiana, or given our relationship with the European Union, the Quebec, of Europe”⁹² seems to be becoming reality, at least in this aspect of private international law. But one may also approach these developments differently and ask whether it would have been at all possible to organise the coexistence of the two so profoundly distinct cultural traditions of Europe differently. Was it not feasible (and desirable) to borrow from both worlds and create a really mixed European private international law?

It must be stressed that it is not impossible to organise or establish a system of private international law that successfully mixes common law and civil law features. The very experience of mixed legal systems confirms this view. Presenting the new Louisiana private international law codification, Symeonides concluded that this code did not aspire to resolve the perennial tension between the common law and civil law influences but could reconcile the two traditions and provide for them a framework for an interactive and hopefully productive coexistence⁹³. That this analysis however was expressed in relation to choice of law (to which the code is restricted) and does not specifically extend to the area which is the focus of this article is not decisive. The fact that the private international law approach to jurisdiction in Louisiana remains distinctly common law in emphasis does by no means imply that it would have been impossible to introduce the same level of *mixité* in this area. This is

90. The case of *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà SpA & Others*, [2007] UKHL 4, has been referred to the ECJ for a preliminary ruling on 27 February 2007.

91. Hartley, *supra* note 42. See also the equally critical analysis of A. Briggs, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, 124 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 231 *et seq.* (2005), who concludes that “the European Court has had an impact on the law and practice of English courts which is far from benign and which fully deserves the description of a menace to the morality of commercial litigation. It is difficult to avoid the sense that it should be ashamed of itself”.

92. J. Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291-314, esp. 295 (1995).

93. S. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 516 (1993).

exemplified by the Quebec codification of private international law, which shows that it is perfectly possible to combine civilian jurisdiction rules and common law approaches successfully. Indeed book 10 of the Civil code of Quebec contains a detailed codification of general⁹⁴ and specific grounds of jurisdiction which are civilian in character (including a *lis alibi pendens* provision⁹⁵) but concurrently accord Quebec authorities a large measure of discretion through a number of provisions the most important of which, Article 3135, actually codifies *forum non conveniens*⁹⁶. Interestingly recourse to this discretionary concept had previously been refused by Quebec courts but the legislator saw fit to incorporate the doctrine into the codification in view of the complexity of international litigation and as an instrument of international judicial cooperation⁹⁷. Both justifications could equally apply in Europe.

Even in Europe, what could be described as a watered down form of *forum non conveniens* has been included in a largely civilian instrument on jurisdiction, recognition and enforcement, albeit in family law matters, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the “Brussels IIa Regulation”)⁹⁸. It cannot be denied that the general economy of this instrument is different to that of the Brussels I Regulation, but the mere existence of this provision shows that it is possible to borrow successfully from both traditions.

The combination of civil law and common law approaches in private international is not just feasible; it would be both theoretically pleasing and practically profitable. In this it should be emphasised that the importance of welcoming common law influences in this area of private international law is not just underlined in common law countries

94. Article 3134: “In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.”

95. Article 3137: “On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.”

96. Article 3135: “Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”

97. P. Glenn, *Codification of Private International Law in Quebec*, 60 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 254 (1996).

98. According to article 15 [“Transfer to a court better placed to hear the case”] under certain strict conditions a court, competently seised under the Regulation of a question of parental responsibility, may decide that another court, with which the child has a particular connection and which is seen as better placed to hear the case, be requested to assume jurisdiction.

and by common law jurists out of some form of reactionary and blind attachment to traditional mechanisms of their own legal system. It is also advocated on the continent by those who have perceived that only such *métissage* would respond to complex practical problems raised by international disputes⁹⁹. Despite this academic support for mixedness in this area, the author remains somewhat pessimistic with regard to the creation of a mixed European private international law.

First it is clear that, given the interpretative criteria that it has developed¹⁰⁰, the European Court of Justice will not be in a position to further mixedness in this area of private international law¹⁰¹. The ECJ is not only bound by the very civilian wording, internal coherence and objectives of the Brussels I instrument but also by the intentions of its civilian drafters; in addition the ECJ has shown that it unfortunately tends to adopt a “civil law based approach”¹⁰² and be theory driven rather than practice driven¹⁰³, and while its position is often informed by comparative law, it essentially relies on the position of the majority¹⁰⁴ and of course the vast majority of EU Member States are civilian.

Furthermore the development of European Private International law is encased by the goal of furthering the proper functioning of the internal

99. For example, A. NUYTS, L'EXCEPTION DE FORUM NON CONVENIENS: ÉTUDE DE DROIT INTERNATIONAL PRIVÉ COMPARÉ 303 (Bruylant, Brussels 2003), suggests to combine the *forum non conveniens* mechanism with the *lis pendens* mechanism of the Brussels I regime. Suggesting to distinguish among procedural mechanisms between those which can be viewed as cooperative and those which would really interfere with the achievement of Community objectives: H. Muir Watt, note following the Turner case, *Revue critique de droit international privé* 2004, at 664; see also C. Chalas, note following the Owusu case, *Revue critique de droit international privé* 2005, at 721 *et seq.*

100. The instrument is to be interpreted teleologically (e.g., Case C256/00, ECJ 19 Feb. 2002, *Besix* ECR I 1699), systematically (e.g., Case 21/76, ECJ 30 Nov. 1976, *Bier v Mines de Potasse d'Alsace*, ECR 1735), by reference to the general principles which stem from the corpus of the national legal systems (Case 29/76, *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol*, ECR 154) and by reference to its link with the E(E)C Treaty (Case 12/76, *Tessili Italiana v Dunlop AG*, ECR 1473).

101. Hartley, *supra* note 42, at 828 *ad notam* argues that the attitude of the ECJ is possibly explained by the fact that most of its members have had careers in academia, the judiciary or the civil service but few have had experience in private practice.

102. LORD MANCE, *supra* note 62, at 19.

103. The idea that there is no practical need for anti-suit injunctions because the *lis alibi pendens* rule of the Brussels system showed its limits in the Turner case (discussed *supra* note 88) where the Spanish court exercised jurisdiction even though a court in the UK had been seised first; the invocation of the duty of mutual trust was maintained in the Gasser case (discussed *supra* note 87) in the face of well known delays and inefficiencies (themselves the cause of series of ECHR rulings condemning Italy!); the principle of legal certainty was used as a mantra, against the party who should have been the beneficiary of this principle (Owusu case, discussed *supra* note 89).

104. The elaboration of uniform notions is of course facilitated by the existence of common basic conceptions which are shared by a majority of States.

market, which is in turn seen as best served by the systematic adherence to the principles of legal certainty, legal predictability and mutual trust. Each of these aims is perceived as *prima facie* better catered for by a civilian approach to jurisdiction¹⁰⁵.

Against this background the blending of civil and common law would evidently present a much greater challenge than simply the alignment on one single (civilian) approach. As the Rome III dossier (on jurisdiction and choice of law in matrimonial matters) recently showed, deep-rooted cultural differences rendered impossible the adoption of a proposal which had opted for what seemed the easy way (the alignment) rather than tried to offer an original *métissage*. It is unfortunate that instead of accepting to re-examine the core elements of the proposal with a view to achieving a more mixed and therefore more acceptable compromise, the European institutions are simply considering going ahead with the unchanged proposal though only with the intention of securing harmonisation within a smaller, more homogeneous, number of States.¹⁰⁶ Indeed the European legislator does not currently seem to be able, or willing, to reflect on, and devise, possible hybrid mechanisms. The very existence of Article 15 of the Brussels IIa Regulation¹⁰⁷, which introduces a form of *forum non conveniens* in an otherwise civilian instrument, should not necessarily be seen as a new departure and an encouraging sign of the capacity of the EC to develop original provisions combining the best of the civil law and the common law approach to jurisdiction. While this provision is presented as an “innovative” rule in the Practice Guide for the application of the new Brussels II Regulation¹⁰⁸, it must be recalled that Article 15 was not actually invented in Brussels. Like much of the Regulation, the provision was closely “inspired” by the text of the 1996 Hague Protection of Children Convention¹⁰⁹, in particular Article 8. Of course *métissage* comes more easily to the Hague Conference on Private International Law, an intergovernmental organization where there is greater parity of esteem legally and politically between the common law and civil law traditions

105. Compare H. Muir Watt, for whom the principle of legal certainty has led to a “rigid, uniformising and literal interpretation of the text of the Convention”, *supra* note 99, at 335.

106. See Council of the European Union, 2873rd Council Meeting, Justice and Home Affairs, Press Release 9956/08 (Presse 146), at 22.

107. *Supra* note 98.

108. European Commission, June 2005, at 18; see http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf.

109. 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children; see http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70.

(not to mention numerically), and it must be questioned whether the same level of *mixité* could be replicated in Brussels. In the latter proposals are prepared by an institution which, given its composition and working methods, lacks creativity and imagination. Some have also already wondered whether “with regard to comparative preparatory work, bureaucrats in Brussels have the same motivation (not to mention expertise) as the scholars and other experts representing their countries in international convention making, such as in the Hague”¹¹⁰. Furthermore the development of European private international law is both fragmented and rushed¹¹¹; with quick fixes all too often made to imperfect or lacking civilian models¹¹². And the (numerical) minority position of common law countries in Europe, coupled with the possibility for the UK and Ireland to refuse to opt-in to the adoption of European private international law instrument¹¹³ weakens if not their negotiating power at least their influence on these dossiers. Nevertheless it remains essential to draw attention to the benefits of mixedness within the EU. According to recital 28 of the Brussels Regulation, “no later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations”. This occasion could be used, following an in-depth study,¹¹⁴

110. M. Reimann, *Comparative Law and Private International Law*, in M. Reimann & R. Zimmermann (eds.), *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1391 (OUP 2006).

111. In the context of family law, see A. Fiorini, *Rome III—Choice of Law in Divorce: Is the Communitarisation of Family Law Going Too Far?*, 22 *INT’L J. LAW, POL’Y & FAMILY* 178-205 (2008).

112. The ambitious Hague private international law programme is to be completed by 2011, i.e., within 6 years of its adoption. See *Hague Programme*, *supra* note 51, at 13.

113. The Protocol on the Position of the UK and Ireland, annexed to the Treaty of Amsterdam provides that the UK in principle shall not take part in the adoption by the Council of proposed measures pursuant to title IV of the EC Treaty, which governs Visas, asylum, immigration and other policies related to Free movement of persons (which is the case for private international law), unless it notifies its decision to opt-in to the adoption of a measure within 3 months of the presentation of the proposal to the Council. For the first time in 2006, the UK decided to invoke this power, declining to opt-in to three regulation proposals in the field of private international law: the Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) and the Proposal for a Council Regulation of 17 July 2006 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (Rome III). In the context of Rome III, it has been well publicised that Ireland too decided not to avail of the possibility to opt-in.

114. The B. Hess, T. Pfeiffer & P. Schosser’s Report on the Application of Regulation Brussels in the Member States, JLS C4/2005/03, has been published in September 2007. The Commission now has to consider the opportunity of proposing to amend the Brussels I Regulation on the basis of its findings.

to review the status quo and introduce *mixité* where more sophisticated and nuanced solutions are needed. Moreover clarification of the exact scope of the Regulation in the context of external situations could be marked by greater *esprit d'ouverture*. In this it is hoped that the position expressed in the conclusions of the 17th Session of the European Group for Private International Law¹¹⁵, which notably called for the introduction of *forum non conveniens* in such cases, could inspire the European Commission.

115. Hamburg, 15-16 Sept. 2007. The conclusions are available at <http://www.gedip-egpil.eu/documents/gedip-documents-28.html>.