Preface

This book is primarily written for educational purposes. It is intended to serve as an introductory textbook in private international law for law students with an interest in cross-border business activities. The book centers on companies that do business from one EU Member State in another EU Member State or from a third state in an EU Member State. In doing business across borders any company faces a wide variety of complex legal questions such as questions involving the negotiation and conclusion of contracts, the special position of consumers and employees, the liability of the directors and liability arising out of tort (such as product liability). In all of these areas, the book answers questions of jurisdiction and applicable law: which court is internationally competent to adjudicate a dispute? and which law (national or foreign) will that court apply?

The book consists of seven chapters and deals with selected issues of doing business abroad by using an example-based approach. After an introduction into the general structure and operation of private international law within the EU (Chapter 1) and a discussion of the system and the grounds for jurisdiction under the Brussels Ibis Regulation (Chapter 2), general contracts (Chapter 3), consumer contracts (Chapter 4), individual employment contracts (Chapter 5), directors' liability (Chapter 6) and tort (Chapter 7) are addressed. Chapters 3-7 indicate, for each subject matter, the conditions under which the courts of an EU Member State can assume jurisdiction and which law will be applied.

Because of the integrated treatment of jurisdiction and applicable law per subject matter, the book also forms an excellent guide for legal practice. The legal practitioner who quickly wants to find his way in the world of international contracts and liability can determine per subject matters which risks are run or which opportunities exist when it comes to adjudication of a dispute and determining the applicable law.

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judgments of the European Court of Justice. Those seeking to further increase their knowledge of the subject matter(s) are encouraged to seek out more profound works of private international law.

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Chapter 1

Private international law in the EU Member States

1.1 Introduction

In today's world, companies frequently engage in business activities outside national borders. Economic globalisation and innovations in the world of telecommunication and technology have made it easier for companies to compete in the global economy or to seek growth abroad. Nowadays, it is not uncommon for companies to do business with foreign partners, to set up an establishment abroad, to serve customers from different countries, to employ foreign workers or to have foreign shareholders and directors.

Within the European Union, the existence of cross-border business activities is due, in part, to the establishment of the internal market ensuring the free movement of goods, services, capital and persons. Moreover, the establishment of the digital single market proposes new opportunities for businesses through e-commerce. Companies from one European Member State may seek to do business in another. Likewise, companies from outside the European Union may seek to do business within the European Union. For example, a Chinese company may sell its products to European customers or a German company may seek the services of Bulgarian IT-professionals. In doing business abroad, companies inevitably face questions of private international law: which court has jurisdiction in the event of a dispute; which law (national or foreign) will that court apply and will a judgment be recognised and enforced where needed?

Private international law is the field of law that deals with private legal relationships that include an international element, such as a foreign place of business, domicile, nationality or place of action (e.g. delivery of a product, commission of a tort, location of damage). The field of private international law consists of three main areas: jurisdiction, applicable law and the recognition and enforcement of foreign judgments.

Example 1.1
A French company (SA), with headquarters in Nice, France sells sports apparel through its website and delivers orders anywhere within the European Union. A Czech national domiciled in Prague, Czech Republic buys a pair of shoes on their website. The shoes are delivered to his house in the Czech Republic. Upon arrival, the shoes appear defective: several of the o-rings which are to hold the laces are missing.

Suppose that the Czech national wants to sue the French company. Which court can he turn to, the French or the Czech? Which law, French or Czech, will that court apply? If a Czech judgment

is granted, will that judgment be recognised and enforced in France (where the French company has its assets)?

The first area of private international law is the area of jurisdiction. This area of private international law is concerned with the question of which court is internationally competent to adjudicate a dispute. Does a national court have jurisdiction, i.e. is it allowed to rule, in a case that has foreign elements? The second area the conflict of laws or the applicable law. When doing business abroad, a company faces different legal regimes. After all, national laws differ significantly from country to country, even within the European Union. In cases that involve an international element, a so-called conflict of laws can therefore arise. Once a court has assumed jurisdiction, it must decide which law it will apply to the case (national or foreign law). In other words, the court must solve the conflict of laws. Although one might think that a national court will always resolve a case on the basis of national law, the reality is that national courts may apply foreign law to resolve a dispute with international elements. Once the court has decided which law it will apply to the case, it will render a judgment on the basis of this law. The question then arises whether this judgment will be recognised and enforced where needed, e.g. where the assets of the judgment debtor are located. The recognition and enforcement of foreign judgments is the third area of private international law. It deals with the question of when and under which conditions a foreign judgment is recognised and enforced.

Pre-conditions for existence

In studying the field of private international law it is important to remember that the existence and need for private international law is predicated on two distinct conditions. As outlined above, a conflict of laws inevitably arises when a business located in country A does business with a company located in country B. The question of which law applies in this case (the law of country A or B) is solved by the conflict of laws. Legal diversity and cross-border legal relationships are two preconditions to the existence of such a conflict. In the absence of legal diversity, i.e. if all legal systems in the world were the same, no conflict of laws would arise. Likewise, if no one ever ventured outside national borders, no conflict of laws would arise. In today's globalised world, cross-border legal relationships are commonplace. In fact, such relationships keep diversifying and multiplying, cementing the continued need for private international law.

1.2 Character of private international law

Although the name suggests otherwise, 'private international law' is national law and is not based on principles of international law. It is not based on world-wide common grounds applicable to all countries in the world. This is where private international law differs from international law, which is presumed to have a universal common basis.

This means that each country has its own private international law ('PIL') rules. Each country thus determines its own rules on the applicable law, international jurisdiction and recognition and enforcement of foreign judgments. These PIL rules are drawn up on the basis of the values and objectives present in that country, its

own national values and standards. Portuguese PIL can therefore contain completely different rules than, for example, the Italian, Russian, Mongolian, Nigerian, Brazilian, American or Chinese PIL. Since PIL is not 'international law' and PIL rules vary from country to country, international unification of PIL rules can only be achieved through specific arrangements on an international level. In particular, the Hague Conference on Private International Law,[1] a global organisation dedicated to the unification of PIL rules, carries out this task on a global level and creates PIL treaties. The Hague Conventions are usually subject-specific. Within the European Union, the private international law of the Member States is also unified via European regulations and, sometimes, specific provisions in European directives.

1.3 EU and private international law

Regulations and directives have a special position in European PIL. Article 81 of the Treaty on the Functioning of the European Union (TFEU),[2] which will be quoted below, shows that it is an autonomous goal of the EU to create an area of freedom, security and justice in which the free movement of persons is ensured and citizens in the EU are afforded a high level of protection. The creation of this area of freedom, security and justice has its origins in the Tampere Programme (1999-2004), the Hague Programme (2004-2009) and the Stockholm Programme (2010-2014). This area is based on Title V of the TFEU, which governs the area of freedom, security and justice. Since the Member States have largely transferred their powers in this area to the European legislator, the creation of EU PIL regulations is relatively simple.
The Treaty on the Functioning of the European Union orders the unification of all PIL rules:

Article 81
1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;

1. See https://hcch.net.
2. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp 0001- 0390.

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(…)

Under these provisions, the European Union has the power to develop European instruments in all areas of PIL. Proposals are adopted under the ordinary legislative procedure. Only proposals in the area of family law require unanimity of the Council of Ministers, after consulting the European Parliament.[3]
For companies doing business in the EU or with parties domiciled in EU Member States, the Brussels Ibis Regulation (jurisdiction and recognition/enforcement), the Rome I Regulation (applicable law contractual obligations) and the Rome II Regulation (applicable law non-contractual obligations) are of particular relevance.
European regulations, due to their supranational (Union law) character, take precedence over the national rules of the Member States. The national PIL rules of the Member States cease to apply to these subjects. EU PIL prevails.
Every European regulation states precisely from when the regulation will apply (temporal scope), to which matters it relates (material scope) and what its territorial scope is, ie in relation to which countries the regulation applies (formal scope).
If the matter falls outside the scope of the regulation, then, logically, the regulation will not apply. If the matter falls outside the temporal scope, it will be necessary to examine whether there is an earlier or later regulation. If the matter is outside the material scope, it will have to be examined whether another regulation might apply to that subject. If the case falls outside the formal scope, usually no other regulation is applicable.
If no regulation is applicable, the court where the case is pending will have to apply its own (national) rules of private international law.[4]

Temporal scope
On 12 March 2008, German-based company X entered into a distribution contract with Spanish-based company Y. In 2021, problems arise between the parties concerning fees that Y should pay to X under the contract. X claimed fulfilment of the obligations of the contract before the Spanish court. The Spanish court has jurisdiction on the basis of Article 4 of the Brussels Ibis Regulation as the defendant is domiciled in the territory of a Member State. The claim concerns contractual obligations and thus falls within the material scope of the Rome I Regulation. However, Article 29 stipulates that the Regulation only applies to contracts entered into on or after 17 December 2009. The case falls outside the temporal scope. The court will have to refer to an older regime, namely the European Contracts Convention 1980.

Substantive scope
A Belgian newspaper (owned by a publisher based in Belgium) makes defamatory comments about a company based in Poland. The Polish company claims rectification and compensatory damages before the Belgian courts. The Belgian court has

3. Article 81(3). This requirement has led, among other things, to the rejection of draft regulations in the area of divorce law, matrimonial property law and partnership property law.
4. This may include bilateral or multilateral PIL conventions.

jurisdiction on the basis of Article 4 of the Brussels Ibis Regulation as the defendant is domiciled in the territory of a Member State. Which law should the Belgian court apply? The Rome II Regulation regulates the law applicable to torts and delicts (Article 1.1). However, Article 1(2)(g) excludes defamation from the material scope. The Regulation does not apply. The Belgian judge will have to apply his national conflict of law rules on this subject.

Formal scope of application
A company based in Turkey supplies raw materials to an Italian-based company. During the production process in the Italian factory, the raw materials cause serious damage to the machinery used in the process. The raw materials are found to be contaminated. The Italian company sues the Turkish supplier in the Italian courts and claims damages in tort. As the defendant is not domiciled in the territory of a Member State, the Brussels Ibis Regulation does not apply. The case falls outside the formal scope of application (Article 4). The Italian court will have to apply its national rules of jurisdiction to see if it has jurisdiction.

The European Court of Justice plays an important role in the interpretation of the various PIL regulations. Where, in the course of legal proceedings, there is a lack of clarity as to how a provision of EU PIL is to be applied or interpreted, the national court has the possibility, and in certain cases the obligation, to refer the question to the European Court of Justice (Article 267 TFEU). The Court's interpretation of a preliminary ruling question binds the national court, which must then rule in accordance with that interpretation. The interpretation given is also binding on the courts of the other Member States of the EU, where appropriate.

1.4 EU Member States and rules of international jurisdiction

National rules of international jurisdiction
The rules of international jurisdiction indicate under which circumstances and conditions the national court is competent in a private law matter with a cross-border character. In the past, the jurisdiction of the court in international cases was considered to be a matter of international law. In this view, jurisdiction is an expression of sovereignty. Since state sovereignty does not extend beyond national borders, the judge of a country has no power to judge disputes between non-residents. Passing judgment on residents of a foreign state, in this view, constitutes an infringement of that foreign state's sovereignty. The view that international jurisdiction is part of international law has long been abandoned. International law now only plays a minor role. Nowadays, the law of international jurisdiction is national law that is interpreted on the basis of national values and objectives. The international jurisdiction of a country is unilateral and only indicates when its own court is competent. These national rules does not provide any guidance on the jurisdiction of foreign courts. For this it is necessary to consult the international rules on jurisdiction of the foreign country concerned.

International regulations
The fact that each country has its own unilateral international rules of jurisdiction leads in practice not only to coordination problems but also to forum shopping.