

THE EXTERNAL DIMENSION OF EU PRIVATE INTERNATIONAL LAW
AFTER OPINION 1/13

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EU PRIVATE INTERNATIONAL
LAW AFTER OPINION 1/13

Edited by

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PREFACE

The scope of the external competence of the EU as regards judicial cooperation in civil matters, the conditions upon which this competence is to be regarded as exclusive and the principles that should govern its exercise are among the most controversial issues that arise in connection with the emergence of a regional system of private international law in Europe.

The external dimension of EU private international law provoked discussions even before the European legislature adopted its first measures in this area.¹ The matter has since been one of keen interest for Member States and in the relationship between the political institutions of the Union.

The Court of Justice, for its part, has had various opportunities, over the years, to consider the legal problems involved in the international projection of judicial cooperation in civil matters. Its key decisions in this regard, Opinion 1/03 of 7 February 2006 on the competence of the Community (as it was then) to conclude the revised Lugano Convention on jurisdiction and the recognition of judgments in civil and commercial matters,² and Opinion 1/13 of 14 October 2014 on the Union's competence regarding the acceptance of third States' accessions to the Hague Convention of 1980 on the civil aspects of international child abduction, provided a significant contribution to the understanding of the topic.³

The debate, however, has not ended with the Court's interventions. The views expressed by the Court, heavily criticised by some commentators, have been triggering further discussions, and several questions are awaiting answers.

The statements made by Germany and the United Kingdom upon the adoption of a Council Decision authorising Austria and Malta to ratify or accede to the Hague Convention of 1965 on the service of documents abroad in the interest of the Union⁴ provide the most recent illustration of the uncertainties

¹ See, in particular, doc. No 6683/99 and doc. No 7871/00, available through the Public Register of Council Documents at <<http://register.consilium.europa.eu>>.

² EU:C:2006:81.

³ EU:C:2014:2303.

⁴ Decision (EU) 2016/414 of 10 March 2016 [2016] OJ L 75/1. For the statements of Germany and the United Kingdom see, respectively, doc. No 13240/15 ADD 1 and ADD 2, in the Public Register of Council Documents.

that still surround the development of the external relations of the EU in judicial cooperation. Taking into account the characteristics and the content of the Hague Service Convention and of EU legislation on the service of documents from one Member States to another, the two delegations expressed their doubts as to whether the conclusion of the former should be regarded as falling within the exclusive external competence of the Union.

Actually, the participation of the EU in international efforts towards the unification or harmonisation of the rules on jurisdiction, applicable law and the international circulation of judgments and other acts raises a number of complex issues, which lie at the crossroads of public international law, private international law, and EU institutional law.

Furthermore, the development of the external relations of the EU in this area implies some politically sensitive questions. The expansion of the exclusive external competence of the EU obviously limits the ability of individual Member States to pursue their own policies in this field in their relations with third countries and within international organisations. Some Member States seem to regard these limitations as a serious handicap in their international relations, whether with neighbouring third countries, with countries with which the Member States in question entertain special political or historical ties, or globally.

A recent measure adopted by the European Parliament and the Council shows just how difficult it is for the Member States to accept that EU legislation might have such a precluding effect. Reference is made to Regulation (EU) 2016/1191 of 6 July 2016 on the simplification of the requirements for presenting certain public documents in the European Union.⁵ Member States have for a long time negotiated and concluded bilateral and multilateral agreements dealing with legalisation and related issues, and seem to be eager to keep these matters, internationally, in their hands. The Regulation, pursuant to Article 12(4), does ‘not preclude Member States from negotiating, concluding, acceding to, amending or applying international agreements and arrangements with third countries’, insofar as these agreements and arrangements apply to public documents ‘to be used in relations between the Member States and the third countries concerned’. For the same reason, the Regulation does not preclude Member States ‘from deciding on the acceptance of the accession of new contracting parties to such agreements and arrangements to which one or more Member States is or may decide to become party’. This provision, which only surfaced in the negotiations after the Court of Justice issued Opinion 1/13, may in fact be regarded as a sort of reaction to the principle stated therein: the principle whereby, given the nature and content of the Child Abduction Convention and the relationship between the provisions of the Convention and EU legislation

⁵ [2016] OJ L 200/1.

dealing with the return of wrongfully removed or retained children, the acceptance of the accession of a third State to the Hague Convention comes with the exclusive external competence of the EU.

The papers collected in this book discuss some of the key aspects of EU external relations law with respect to judicial cooperation in civil matters, in particular as it stands after Opinion 1/13.

The book is divided into four parts. Part I outlines the wider context in which the external dimension of EU private international law is developing, and addresses some of the basic issues that arise in connection with this area of EU law. Marise Cremona examines the implications of Opinion 1/13 and Opinion 2/13, regarding the accession of the EU to the European Convention on Human Rights, for the development of EU external relations law. Serena Forlati further discusses the relationship between the legal order of the EU and the European Convention on Human Rights, focusing on the impact of such a relationship on private international law.

Part II is specifically concerned with Opinion 1/13. Paul Beaumont offers a critical assessment of the judicial activism displayed by the Court of Justice in the Opinion. Karen Vandekerckhove and Giorgio Gaja analyse some of the implications of the Court's decision, as regards, *inter alia*, the immediate consequences of the Opinion as to the treatment of third States' accessions to the Hague Child Abduction Convention and the competence of the Union concerning acts related to the Convention other than the acceptance of accessions. Chiara Tuo further unfolds the reasoning of the Court to inquire into the standards to be used to assess the Union's external competence in matters not already covered by EU legislative measures.

The evolving features of the external dimension of EU private international law are examined in Part III. Alex Mills discusses the general approaches that the EU, based on its external powers, might pursue through an 'outward facing' private international law. The contribution of Alessandra Zanobetti is concerned with the dialogue that the EU entertains with the international organisations involved in the unification of private international law, namely the Hague Conference on Private International and Unidroit. Chris Thomale critically examines the prospects of the particular legal framework provided by the Lugano Convention to govern cross-border situations involving the EU, on the one hand, and some of its neighbours, on the other. Jan-Jaap Kuipers looks at the instruments elaborated by the European institutions to allow individual Member States to negotiate and conclude agreements with third countries in respect of particular matters that come with the exclusive external competence of the Union.

Finally, Part IV looks at EU legislation in the field of private international law and considers its relationship to international developments and situations connected with one or more third countries. The opening contribution, by the

editor of this book, gives an account of the different ways in which EU legislative measures may relate to international agreements that do not bind the EU, and discusses the political significance of each pattern. Focusing on the Regulation (EC) No 650/2012 on successions upon death, Fabrizio Marongiu Buonaiuti provides an in-depth analysis of some of the ways in which EU legislation may address situations connected with a non-Member State, in particular as regards jurisdiction and the treatment of parallel proceedings.

Most of the contributions in this book are based on papers that were presented at a seminar that took place on 13 February 2015 at the Department of Law of the University of Ferrara. The editor wishes to thank Giorgio Gaja and Alfonso-Luis Calvo Caravaca for chairing the two sessions of the seminar, as well as the various scholars – among whom Cristina Mariottini, Emmanuel Guinchard, Marta Pertegás and Francesco Salerno – who joined in the discussion or otherwise contributed to the initiative.

The editor is also indebted to Ilaria Aquironi, Pietro Alessandro Barcellona, Ester di Napoli, Irene Maccagnani and Omar Vanin for their help in the organisation of the seminar, and to Adrienne Lester-Fitje and Martina Mantovani for their precious assistance in the editing of the book.

Pietro Franzina
Ferrara, 20 August 2016

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