

# TABLE OF CONTENTS

## GENERAL REPORT

JOHAN MEEUSEN, MARTA PERTEGÁS AND GERT STRAETMANS .....	1
Introduction .....	1
Chapter 1. General framework .....	2
A. The communitarization of the Rome Convention and issues of institutional law .....	2
B. Free movement and the principle of home-country control .....	4
C. External relations .....	5
Chapter 2. Territorial scope of application of Brussels I and Rome I .....	6
Chapter 3. Substantive scope of application of Brussels I and Rome I .....	7
A. On contractual obligations .....	7
B. On jurisdiction clauses, arbitration clauses and ADR agreements ..	8
C. On family matters .....	9
D. On company matters .....	10
Chapter 4. The principle of party autonomy .....	12
Chapter 5. The closest connection in article 4 of the Rome Convention .....	12
Chapter 6. Consumer and insurance contracts .....	13
Chapter 7. Employment contracts .....	16
Chapter 8. Mandatory rules, super-mandatory rules and public policy .....	18
Chapter 9. Questions relating to assignment and subrogation .....	20

## RAPPORT GÉNÉRAL

JOHAN MEEUSEN, MARTA PERTEGÁS ET GERT STRAETMANS .....	21
Introduction .....	21
Chapitre 1. Cadre général .....	22
A. La communautarisation de la Convention de Rome et les questions de droit institutionnel .....	22
B. Libre circulation et le principe du contrôle de l'État d'origine ..	24
C. Les relations extérieures .....	25
Chapitre 2. Le champ d'application <i>ratione loci</i> de Bruxelles I et Rome I .....	27

Chapitre 3. Le champ d'application <i>ratione materiae</i> de Bruxelles I et Rome I .....	28
A. Les obligations contractuelles .....	28
B. Les clauses d'élection de for, les clauses d'arbitrage et les accords ADR .....	29
C. En matière familiale .....	30
D. En matière de droit des sociétés .....	31
Chapitre 4. Le principe de l'autonomie de la volonté .....	33
Chapitre 5. Les "liens les plus étroits" dans l'article 4 de la Convention de Rome .....	33
Chapitre 6. Contrats de consommation et d'assurance .....	34
Chapitre 7. Contrats de travail .....	38
Chapitre 8. Règles impératives, "hyper-impératives" (lois de police) et ordre public .....	39
Chapitre 9. Questions relatives à la cession de créance et à la subrogation .....	42

## **1. FIFTEEN THESES ON BRUSSELS I, ROME I AND THE EUROPEAN UNION'S INSTITUTIONAL FRAMEWORK**

JOHAN MEEUSEN .....	43
Introduction .....	43
Thesis 1. The Treaty of Amsterdam transforms European private international law into Community private international law... at last .....	44
Thesis 2. The communitarization of private international law doesn't bring a conflicts revolution .....	46
Thesis 3. Due to political misapprehension, the Treaties of Amsterdam and Nice have failed to construct a proper institutional framework for the development of a coherent Community private international law system .....	47
Thesis 4. The Community legislator failed to make the communitarization of private international law fully accepted in the Member States .....	50
Thesis 5. Articles 61(c) j° 65 EC constitute an adequate legal basis for the Brussels I-regulation and the conversion of the Rome Convention .....	51
Thesis 6. The legal basis debate constitutes no more than rearguard action... really at stake is the decision on the substantive limits of articles 61(c)/65 EC .....	55
Thesis 7. The draft Constitutional Treaty brings substantial, though still unsufficient progress .....	56

Thesis 8. Mutual recognition has become the lead principle of Community private international law .....	58
Thesis 9. The conversion of the Brussels and Rome Conventions into Community instruments conforms to the subsidiarity principle .	62
Thesis 10. Community action in private international law is preferable to intergovernmental cooperation .....	63
Thesis 11. Regulations must be preferred to directives .....	66
Thesis 12. The Community should urgently respond to its greatest challenge: solving the patchwork of conflicts rules .....	69
Thesis 13. Codification is not the answer, though information is useful .....	71
Thesis 14. The Community legislator can contribute in different ways to remedy the proliferation of rules... .....	73
Thesis 15. ... and the Court of Justice must do its share too, which requires the amendment of art. 68 EC .....	75

## **2. RESTRICTIONS RESULTING FROM THE EC TREATY PROVISIONS FOR BRUSSELS I AND ROME I**

STEFANIA BARIATTI .....	77
Chapter 1. Introductory remarks .....	77
Chapter 2. The restrictions imposed by EC free movement provisions on Member States' substantive laws and conflicts of laws .....	78
Chapter 3. The relationship between EC substantive law and EC conflicts of laws .....	82
A. Introduction .....	82
B. Compliance with EC general principles .....	83
C. Compliance with EC free movement provisions .....	83
Chapter 4. The choice of the connecting factor .....	86
A. General remarks .....	86
B. Choice of law and the home-country control principle .....	87
C. Party autonomy .....	90
D. Choice of law and prohibition of discrimination .....	91
Chapter 5. Jurisdiction and recognition of judgments .....	92
A. Jurisdiction and recognition of judgments and the home- country law principle .....	92
B. Jurisdiction and recognition of judgments and prohibition of discrimination .....	94
C. Jurisdiction and recognition of judgments and public policy ..	95
Chapter 6. Some general conflicts-of-laws issues in the EC system ..	97

**3. THE EFFECT OF THE ADOPTION OF BRUSSELS I AND  
ROME I ON THE EXTERNAL COMPETENCES OF THE EC  
AND THE MEMBER STATES**

ALEGRÍA BORRÁS .....	99
Chapter 1. Introduction .....	99
Chapter 2. The external projection of internal competence .....	100
A. Implied external competence .....	101
B. Exclusive or shared external competence .....	102
Chapter 3. The conclusion of international treaties with third States .....	107
A. Conventions coinciding totally with the Community instrument .....	108
B. Conventions with partial coincidence .....	112
C. Bilateral conventions .....	116
D. Conventions on applicable law .....	118
Chapter 4. Participation in other international organisations .....	121
Chapter 5. Final considerations .....	123

**4. APPROCHE SYSTÉMIQUE DE L'APPLICABILITÉ DANS  
L'ESPACE DE BRUXELLES I ET DE ROME I**

MARC FALLON .....	127
Chapitre 1. Notion d'applicabilité dans l'espace .....	128
A. Applicabilité dans l'espace de règles matérielles .....	129
B. Applicabilité dans l'espace de règles de conflit .....	131
C. Conclusion intermédiaire .....	133
Chapitre 2. Applicabilité dans l'espace du droit communautaire ..	133
A. Applicabilité des règles sur la circulation des marchandises et des capitaux .....	135
A.1. Applicabilité des règles du droit primaire .....	135
A.2. Applicabilité des règles du droit dérivé concernant la circulation des marchandises .....	137
B. Applicabilité des règles sur la circulation des personnes et des services .....	140
C. Conclusion intermédiaire .....	145
Chapitre 3. Approche systémique de l'applicabilité du droit dérivé en matière civile .....	146
A. Applicabilité de "Bruxelles I" relativement au droit primaire .....	147
A.1. Le domicile du défendeur comme critère d'applica- bilité conventionnel .....	147

A.2. Le domicile du défendeur comme critère d'applicabilité d'un acte communautaire .....	149
A.3. Conclusion intermédiaire .....	159
B. Applicabilité de "Bruxelles I" relativement à l'acquis communautaire en matière civile .....	160
B.1. Contrats en général .....	160
B.2. Contrats spéciaux .....	162
B.3. Conclusion intermédiaire .....	171
Chapitre 4. Conclusion .....	172

## **5. THE NOTION OF CONTRACTUAL OBLIGATION IN BRUSSELS I AND ROME I**

MARTA PERTEGÁS .....

Chapter 1. Introduction .....	175
Chapter 2. Does the notion "contractual obligations" in Rome I amount to "matters relating to a contract" in Brussels I? .....	176
A. Objectives and scheme of Brussels I and Rome I .....	176
B. "Brussels I": Matters relating to a contract for jurisdictional purposes .....	177
C. "Rome I": Contractual obligations for the purposes of selecting the applicable law .....	180
C.1. "Matters relating to a contract": a broader notion? .....	181
C.2. Scope of application of Rome I .....	182
Chapter 3. A selection of nebulous areas .....	184
A. Pre-contractual obligations .....	186
B. Dispute on the contractual relationship .....	187
C. Annulment of a contract and related actions .....	187
D. Third party involved in the dispute .....	189
Chapter 4. Concluding remarks .....	190

## **6. THE SUBSTANTIVE SCOPE OF APPLICATION OF BRUSSELS I AND ROME I: JURISDICTION CLAUSES, ARBITRATION CLAUSES AND ADR AGREEMENTS**

ROBIN MORSE .....

Chapter 1. Introduction .....	191
Chapter 2. Jurisdiction clauses .....	194
A. Convergence issues .....	194
B. Jurisdiction clauses... a residual role? .....	197

Chapter 3. Arbitration clauses .....	201
A. Convergence issues .....	201
A.1. Brussels I .....	202
A.2. Rome I .....	203
B. Arbitration clauses... a residual role? .....	204
Chapter 4. ADR agreements .....	206
Chapter 5. Conclusions .....	209

**7. CONVERGENCE AND DIVERGENCE BETWEEN  
BRUSSELS I AND ROME I WITH REGARD TO CONTRACTS  
REGULATING MATTERS OF FAMILY LAW**

MICHAEL BOGDAN .....	211
Chapter 1. Introduction .....	211
Chapter 2. Contracts regulating maintenance obligations .....	214
Chapter 3. Contracts regulating property regime between cohabittees .....	216
Chapter 4. Contracts regulating property regime between registered partners .....	219
Chapter 5. Contracts regulating property regime between same-sex spouses .....	221
Chapter 6. Concluding remarks .....	222

**8. BRUSSELS I, ROME I AND ISSUES OF COMPANY LAW**

MASSIMO V. BENEDETTELLI .....	225
Chapter 1. Inconsistencies of the Community law regime on conflicts of jurisdiction and conflicts of law in company matters .....	225
A. General observations .....	225
B. The Brussels Convention .....	229
C. The Brussels I-regulation .....	231
D. The Rome Convention .....	233
Chapter 2. Four Community law criteria for the co-ordination of the company laws of the Member States .....	235
Chapter 3. The company's domicile as criterion for the scope of application of the Brussels regime .....	238
Chapter 4. The company's domicile as general criterion of jurisdiction .....	241
Chapter 5. The company's seat as exclusive criterion of jurisdiction .....	243

A. Article 22(2) of the Brussels I-regulation .....	243
B. The meaning of “seat” .....	244
C. The matters falling within the scope of the exclusive forum .....	246
D. Contracts and other acts of autonomy in company law matters .....	248
E. The non-arbitrability of the matters falling within the exclusive forum .....	249
Chapter 6. Recognition and enforcement of judgments in corporate matters .....	250
Chapter 7. The applicability of the Rome Convention to contracts and other acts of autonomy in company law matters .....	251
Chapter 8. The impact of the <i>lex societatis</i> on the working of the Rome Convention .....	253

## **9. AUTONOMIE DE LA VOLONTÉ ET PRINCIPE DE PROXIMITÉ DANS BRUXELLES I ET DANS ROME I**

ANNE MARMISSE .....	255
Chapitre 1. La mise en jeu de l'autonomie de la volonté .....	256
A. La manifestation de volonté .....	256
B. La problématique de la loi applicable à la clause d'élection de for .....	259
Chapitre 2. Le recours au principe de proximité .....	261
A. Le rôle et les contours de la prestation caractéristique .....	262
B. Le cantonnement du concept des “liens les plus étroits” .....	265

## **10. CONSUMER CONTRACTS AND INSURANCE CONTRACTS IN A FUTURE ROME I – REGULATION**

JÜRGEN BASEDOW .....	269
Chapter 1. Evaluation of and amendments to the conflict rule on consumer contracts .....	269
A. Evaluation of the present art. 5 – Its scope .....	270
A.1. Independent loans .....	271
A.2. Timeshare contracts on immovable property .....	271
A.3. Securities .....	272
A.4. Software .....	273
A.5. Exceptions of § 4 .....	273
A.6. Personal scope .....	274

B.	Evaluation of the present art. 5 – The bargaining situations .....	275
C.	Evaluation of the present art. 5 – The protection granted .....	277
C.1.	Synchronization of jurisdiction and applicable law .....	278
C.2.	A bilateral and universal conflicts rule .....	278
C.3.	The law-mix .....	279
C.4.	The proper law in the absence of the parties' choice of law .....	282
D.	Future solutions .....	282
D.1.	Scope .....	282
D.2.	Bargaining situations .....	284
D.3.	Choice of law .....	285
D.4.	Synchronization with art. 15 Brussels I-regulation .....	286
D.5.	Proposal .....	288
Chapter 2. Consolidation of the conflict rules on insurance contracts .....		288
A.	Need for a coherent set of rules .....	289
B.	Structure of a new conflict rule on insurance contracts .....	291
C.	Choice of law in small-risk and life insurance .....	292
D.	Proposal .....	294
<b>11. THE CONSUMER CONCEPT IN EC LAW</b>		
GERT STRAETMANS .....		295
Chapter 1. Introduction .....		295
Chapter 2. Consumer concept in the EC Treaty and the case-law of the Court of Justice .....		296
A.	EC Treaty .....	296
B.	Consumer concept in the case-law of the Court of Justice .....	302
Chapter 3. The concept of consumer in EC secondary legislation ..		304
A.	Two definitions, but only one standard in European consumer contract law .....	304
B.	Current developments in European consumer policy legislation .....	311
Chapter 4. Consumer concept in “Brussels I” and Rome Convention .....		315
Chapter 5. Parallel application of the consumer concept? .....		320

<b>12. ‘LABORUM DULCE LENIMEN’? JURISDICTION AND CHOICE-OF-LAW ASPECTS OF EMPLOYMENT CONTRACTS</b>	
MAURICE V. POLAK .....	323
Chapter 1. Introduction .....	323
Chapter 2. Protection of the employee: the fundamental principle and its consequences for jurisdiction and choice-of-law rules .....	324
A. The starting point: the fundamental principle .....	324
B. The consequences: <i>lex atque forum loci laboris</i> .....	326
C. Temporary employment in another country .....	327
D. Habitual employment in more than one country .....	330
E. A closer connection with another country .....	331
Chapter 3. Convergence between jurisdiction and applicable law: the connection between Brussels I and Rome I .....	332
Chapter 4. Restrictions on the freedom of choice of forum and choice of law .....	334
Chapter 5. Non-mandatory, mandatory and super-mandatory rules of labour law .....	336
Chapter 6. General versus specific regimes: Brussels I and Rome I versus the directive concerning the posting of workers .....	338
Chapter 7. General observations and recommendations for the transformation of Rome I and for the amendment of Brussels I .....	339
A. Question (a): Should the Rome Convention be converted into a Community instrument? .....	339
B. Question (b): The need and search for a parallel interpretation of Rome I and Brussels I .....	340
C. Question (c): The relationship between Rome I and Brussels I, on the one hand, and specific (also future) Community legislation on the other hand .....	341
D. Rome I and Brussels I: adequate and fair legal protection of employees .....	342
<b>13. EUROPEAN PUBLIC POLICY AND OTHER RESTRICTIONS ON THE NORMAL OPERATION OF THE CHOICE-OF-LAW AND CHOICE-OF-JURISDICTION RULES</b>	
SYLVAINE POILLOT PERUZZETTO .....	343
Introduction .....	343
A. Subject-matter .....	343
B. Basis of analysis and questions excluded .....	343

C. Terminology .....	344
D. Hypotheses .....	345
Chapter 1. Restrictions of national origin: recognition of diversity together with respect for European principles .....	347
A. International public policy and overriding mandatory rules before the national judge: incitement or obligation to take into account the restrictions of another Member State? .....	347
A.1. Overriding mandatory rules .....	347
A.2. International public policy .....	348
B. International public policy and overriding mandatory rules before the European Court of Justice: sphere and effects of the control .....	349
B.1. Indirect control on the result of the implementation of a national restriction based on free movement of goods ..	349
B.2. Direct control on the use of a national restriction .....	350
Chapter 2. Restrictions of European origin: assertion of the European culture .....	352
A. Assessment of restrictions of European origin .....	352
A.1. Overriding mandatory rules: the recognized European restrictions .....	352
A.2. International public policy: the partly supposed European restrictions .....	356
B. Effects of the restrictions .....	359
B.1. Area of effects .....	359
B.2. Effects in relation to jurisdiction .....	360
Proposals .....	360
 <b>14. BRUSSELS I, ROME I AND QUESTIONS RELATING TO ASSIGNMENT AND SUBROGATION</b>	
EVA-MARIA KIENINGER .....	363
Introduction .....	363
Chapter 1. Assignment and subrogation in international civil procedure .....	364
A. Assignment, subrogation and questions concerning jurisdiction .....	364
A.1. Enforcement of jurisdiction agreements (art. 23 Brussels I) against third parties .....	364
A.2. Establishment or alteration of jurisdiction through assignment or subrogation? .....	367
A.3. Bulk assignment of claims against consumers .....	369

B. Subrogation and recognition of a foreign judgment against the debtor .....	370
Chapter 2. Conversion of the Rome Convention into a Com- munity instrument, seen from the perspective of assignment .....	371
A. The need for a uniform interpretation .....	371
A.1. Legislation .....	372
A.2. Case-law .....	373
A.3. Academic literature .....	375
A.4. Conclusion: The need for a uniform rule and a uniform interpretation .....	377
B. Reform of art. 12 Rome Convention in a future Community instrument .....	378
B.1. Advantages and disadvantages of the different conflicts rules relating to the proprietary aspects of an assignment .....	378
Conclusion .....	387

