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APPLICATION OF EUROPEAN PRIVATE
INTERNATIONAL LAW**

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NATIONAL COURT SYSTEMS AND UNIFORM APPLICATION OF EUROPEAN PRIVATE INTERNATIONAL LAW

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1. STRUCTURE OF NATIONAL COURT SYSTEMS AND JUDICIAL COOPERATION IN CIVIL MATTERS. 2. DEMAND FOR SPECIAL COURTS: GENERAL PERSPECTIVES. 3. CROSS-BORDER CASES AS A SUBJECT AREA FOR SPECIALIZED COURTS? 4. FLEXIBLE MEANS OF ACHIEVING COURT CONCENTRATION. 5. NATIONAL COURTS AND THEIR DIALOGUE WITH THE COURT OF JUSTICE. 6. OTHER FACTORS INFLUENCING UNIFORMITY. 7. JUDICIAL TRAINING, ACCESS TO INFORMATION AND ADAPTATION OF THE JUDICIAL INFRASTRUCTURE. 8. CONCLUSIONS.

1. STRUCTURE OF NATIONAL COURT SYSTEMS AND JUDICIAL COOPERATION IN CIVIL MATTERS

This contribution forms part of the broader discussion on the institutional framework and the judicial infrastructure for application of European Private International Law undertaken by this book. In particular, it looks at the possible role to be played by special courts or special chambers dealing with Private International Law matters in making actual court practice more European.

The development of judicial cooperation in civil matters having cross-border implications is one of the core elements of the establishment of an area of freedom, security and justice in the European Union. As laid down in Art. 67 TFEU, a basic feature of such area is that it is to be built with respect for the different legal systems and traditions of the Member States. Art. 67 is the provision opening Title V of Part Three of the TFEU on the area of freedom, security and justice. The measures adopted by the European Union concerning judicial cooperation in civil matters directly influence the activities of the courts of the Member States and the conduct of proceedings by them. Such measures may concern, in particular, the mutual recognition and enforcement of judgments; the cross-border service of documents; the rules on jurisdiction; cooperation in the taking of

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evidence; access to justice; the elimination of obstacles to the proper functioning of civil proceedings; the development of alternative methods of dispute settlement; and support for the training of the judiciary and judicial staff (Art. 81.2 TFEU).

Therefore, the adoption of measures regarding the judicial organisation or infrastructure of the national court systems is not, in principle, envisaged, although such measures may be relevant to achieve goals of judicial cooperation in civil matters, such as facilitating access to justice and promoting the proper administration of justice.¹ The instruments adopted in the field of judicial cooperation in civil matters do not require the establishment of specific organisational structures within national court systems. This is in contrast with certain developments in other areas particularly related to public law, where EU law imposes a requirement for the creation of independent and regulatory agencies by Member States. Nevertheless, legal certainty and foreseeability play a prominent role in ensuring some basic goals underlying the Europeanisation of Private International Law, given its significance for the broader integration process. For instance, connecting factors that allow a clear prediction of what law will be applicable to a legal relation tend to prevail in European Private International Law and facilitate the uniform interpretation by the courts of all Member States. The need to ensure uniform interpretation and application of EU law in this field is to be balanced with the procedural autonomy of Member States, as a guiding concept acknowledged by the case-law of the Court of Justice of the European Union (CJEU). Procedural autonomy allows the application of national institutions for the implementation of EU law to the extent that Member States can choose the means to guarantee the effectiveness of EU law.²

The structure of the court systems of the Member States is very much influenced by national factors, such as political organisation, social structure, judicial practices and other elements, including the size of the country and its population density.³ Therefore, judicial organisation is a significant element of the different legal systems and traditions of the Member States that the Union respects. Moreover, the CJEU has established that in the absence of EU rules, it is for each Member State to define the number of instances of jurisdiction, to adopt the procedural rules relating to the structure of internal legal remedies and to designate the courts having jurisdiction over such remedies.⁴

¹ For instance, a proposed Directive on common minimum standards of civil procedure in the European Union makes clear that it does not affect the judicial organisation of the Member States, see 'European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL))', P8_TA-PROV(2017)0282, at recital AA.

² D.U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?*, Springer, Berlin-Heidelberg 2010, pp. 33–74.

³ See e.g. European Commission for the Efficiency of Justice (Council of Europe), 'European judicial systems. Efficiency and quality of justice', *CEPEJ Studies*, No. 23, 2016, <<https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>>, pp. 165–77, accessed 15.04.2019.

⁴ See e.g. Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v. Assitalia SpA*, ECLI:EU:C:2006:461, para. 62.

Contributing to legal certainty and ensuring uniform practice throughout the national territory may be a factor influencing decisions by Member States on issues such as venue or local jurisdiction.⁵ The discretion that Member States enjoy in this regard is subject to the observance of the principles of equivalence and effectiveness. It is required that actions intended to safeguard the rights of litigants under EU law are not brought in circumstances that are less favourable than those governing similar domestic actions. Moreover, it is required that national procedural rules do not make it excessively difficult for litigants to exercise rights deriving from EU law, do not undermine the objectives of EU provisions or render them ineffective.⁶

2. DEMAND FOR SPECIAL COURTS: GENERAL PERSPECTIVES

In light of the increasing complexity of the legal order, the development of highly specialised substantive areas of the law, and the compartmentalisation of legal knowledge and practice, the debate about the appropriateness of the specialisation of courts systems has been intense on both sides of the Atlantic.⁷ Leaving aside the broader topic of the acquisition by judges of specialised knowledge, from the perspective of the organisation of national court systems the main issue concerns the possibility of granting restricted and concentrated jurisdiction to certain courts to hear defined categories of cases relating to a specialised subject matter, as opposed to the general jurisdiction of ordinary courts.⁸

It is widely acknowledged that specialisation in a legal area of certain courts may help to ensure that courts have deeper knowledge and expertise in their field of jurisdiction, improve the quality of their decisions, promote legal certainty as a result of increased consistency, and enhance their efficiency and case management. On the contrary, possible disadvantages of establishing specialised courts include risks related to separation from the general body of judges, reinforced compartmentalisation of the law, lack of necessary versatility of judges and unity of the judiciary, and increased exposure to pressure and

⁵ Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León v. Anuntis Segundamano España SL*, ECLI:EU:C:2013:800, para. 45.

⁶ Case C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd et al.*, ECLI:EU:C:2001:465, para. 29.

⁷ However, see L. BAUM, 'Probing the Effects of Judicial Specialization' (2009) 58 *Duke Law Journal* 1667, noting that understanding of the effects of specialisation on judicial decisions remains limited. Moreover, the impact of the creation of specialised courts in court performance is uncertain, see G. PALUMBO, G. GIUPPONI, L. NUNZIATA and J.S. MORA-SANGUINETTI, 'The Economics of Civil Justice: New Cross-Country Data and Empirics', OECD, *Economics Department Working Papers* No. 1060, ECO/WKP(2013)52, 2013
<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2013\)52&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2013)52&docLanguage=En)>, pp. 29–30, accessed 15.04.2019.

⁸ See e.g. R.C. DREYFUSS, 'Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes' (1995) 61 *Brooklyn Law Review (Brook. L. Rev.)* 1, 5; J.W. STEMPEL, 'Two Cheers for Specialization' (1995) 61 *Brook L. Rev.* 67, 70; F. CARPI, 'Specialisation of Judges as an Efficiency Factor in Civil Justice', in J. ADOLPHSEN et al. (eds), *Festschrift Gottwald*, C.H. Beck, Munich 2014, p. 74.

influence from parties and interest groups. Moreover, centralisation of certain categories of disputes in selected courts will usually lead to greater distance between the court where disputes are heard and the litigant, whether applicant or defendant, and hence may undermine the interest of the litigant in gaining easy access to justice.⁹

A trend towards a stronger specialisation of the judicial system seems to be a feature common to most European States. Specialised first instance courts have been established in many countries to concentrate jurisdiction with respect to certain matters. Specialised administrative courts, commercial courts, labour courts, criminal courts, family courts, juvenile courts, intellectual property courts, courts dealing with rent and tenancies, tax courts, for example, exist in many European countries. This trend is clearly reflected also in EU law with regard to a highly technical area, such as unitary intellectual property rights. For example, the relevant EU instruments require Member States to designate as limited a number as possible of national courts of first and second instance having jurisdiction in matters of infringement and validity of EU trade marks and Community designs.¹⁰ Such a designation is to be made by Member States 'having regard to their own national system'. Notwithstanding this exception, significant differences remain between EU Member States regarding the extent to which disputes in civil and commercial matters are addressed by specialised courts and the areas of specialisation established. The current situation is consistent with the lack of harmonisation within the EU concerning the judicial organisation of national court systems.¹¹

3. CROSS-BORDER CASES AS A SUBJECT AREA FOR SPECIALISED COURTS?

Cross-border disputes as a potential area of specialised adjudication have traditionally played no role in the general discussion on judicial specialisation. That seems to be the

⁹ See the list of possible advantages and disadvantages of specialisation provided by the Consultative Council of European Judges, 'Opinion (2012) No. 15 on the Specialisation of Judges' adopted at the 13th plenary meeting (5–6 November 2012)' <<https://rm.coe.int/16807477d9>>, pp. 2–4, accessed 15.04.2019.

¹⁰ See Art. 123 of Regulation (EU) 2017/1001 on the European Union trade mark (codification) [2017] OJ L 154/1 and Art. 80 of Regulation (EC) No 6/2002 on Community designs [2002] OJ L 3/1. Moreover, regarding the possibility of establishing a unitary copyright title based on Art. 118 TFEU in the future, the Commission has stated that: '(u)niform application of the rules (of a single copyright code and a single copyright title) would call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation', see EU Commission, 'Towards a modern, more European copyright framework', Communication of 9 December 2015, COM(2015) 626 final, p. 12. In the field of patents, it is envisaged that a separate court system common to the Contracting Member States shall be established and shall replace the national courts for certain disputes, see Agreement on a Unified Patent Court [2013] OJ C 175/1.

¹¹ On the finding that in Europe profound differences exist between States where most of the case categories are addressed in first instance by courts of general jurisdiction and those where a significant part of the disputes is addressed by specialised courts, see European Commission for the Efficiency of Justice (Council of Europe), 'European judicial systems. Efficiency and quality of justice', above n. 3, pp. 168–69.

case in general scholarly literature on the topic¹² and in studies carried out with a focus in judicial practices.¹³ However, international disputes raise a number of highly technical and complex issues concerning conflict of laws that require particular expertise. Concentration of such disputes before a limited number of judges could contribute to improve cost efficiency and even to higher quality of decisions, especially by allowing a better management of certain specific tools, such as service in a foreign country, taking of evidence abroad and, particularly, with regard to the ascertainment and interpretation of foreign law.¹⁴ In this context, it is noteworthy that the CJEU has acknowledged with regard to cross-border maintenance claims that centralisation of jurisdiction promotes the development of specific expertise that can improve the effectiveness of recovery.¹⁵

However, in comparison with other areas, such as commercial law, insolvency law, intellectual property, family law and labour law, formal concentration of Private International Law claims in specialised courts has traditionally been very limited in national legal systems, as illustrated by the situation even in Germany, where the issue has received particular attention in the context of improving the application of foreign law.¹⁶ Such a situation seems to be influenced by the fact that Private International Law is a horizontal field that spreads across all areas of civil and commercial matters and hence overlaps traditional subject matter specialisation based on other areas of the laws and can also benefit from it. Conflict of laws issues do not arise in isolation but as part of broader disputes regarding different areas of civil and commercial matters. Moreover, it can be observed that those cases are currently highly dispersed and have reached a significant number. These findings are relevant in concluding that formal court specialisation in such an area could pose more disadvantages than benefits.¹⁷ Concentration of cases raising conflict of laws issues should provide in many cases a second layer of specialisation to be added to the previous division of courts. In fact, issues of civil procedure are

¹² See e.g. S.H. LEGOMSKY, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization*, OUP, Oxford 1990; R.C. DREYFUSS, 'Specialized Adjudication', (1990) *Brigham Young University Law Review* 377; L. BAUM, *Specializing the Courts*, University of Chicago Press, Chicago 2011; F. CARPI, above n. 8.

¹³ European Commission for the Efficiency of Justice (Council of Europe), 'European judicial systems. Efficiency and quality of justice', above n. 3, p. 169.

¹⁴ See B. HESS et al., 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law (Strand I Mutual Trust and Free Circulation of Judgments)', JUST/2014/RCON/PR/CIVI/0082, <<https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en>>, p. 51, accessed 15.04.2019.

¹⁵ Joined Cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber*, ECLI:EU:C:2014:2461, para. 45.

¹⁶ See J. VON HEIN, 'The Determination and Application of Foreign Law. A Blind Spot of European Private International Law?', in A. BRUNS and M. SUZUKI (eds), *Realization of Substantive Law through Legal Proceedings*, Mohr Siebeck, Tübingen 2017, pp. 55–56, discussing the failed German experience concerning the creation of a special appellate division for foreign law cases.

¹⁷ On the 'segregability' of the issue targeted for special treatment and distribution of cases within the judicial system as factors influencing the success of the establishment of specialised courts, see R.C. DREYFUSS, above n. 12, p. 412.

increasingly addressed by the Union legislature in a sector-specific manner, as illustrated by developments in fields such as intellectual property, consumer protection, antitrust damages and data protection.¹⁸

Moreover, concentration of international cases in specialised courts in addition to general dangers of specialisation, such as increased distance between the court where disputes are concentrated and the litigant, poses other challenges. In particular, the delimitation between domestic and international cases may become an additional factor of uncertainty in this context. For instance, it has been considered that the concept of 'cross-border implications' in the text of Art. 81(1) TFEU regarding the adoption of civil justice cooperation measures should be construed as a broader notion than 'cross-border litigation'.¹⁹ The ever increasing number of cross-border cases as a consequence of the inter-connectedness of societies and economies and the internationalisation of individual lives,²⁰ particularly at EU level, leads to a landscape in which international elements are present in a significant percentage of private law cases in most European jurisdictions. In this context, some traditional examples of concentration of cross-border issues in a single court, such as the situation concerning exequatur proceedings in Spanish legislation until recently,²¹ do not correspond to current needs.

The importance of ensuring uniform application of EU Private International Law throughout the European Union may be regarded as an additional factor favouring some sort of concentration in this highly technical area of the law. Concentration of international cases has been regarded as a relevant tool to allow national judges to gain specific knowledge and improve the uniform application of European Private International Law.²² This approach has traditionally received no particular attention in the regulations adopted in the field of judicial cooperation in civil matters. In national practice, it has been reported that some Member States have concentrated cross-border cases related to certain procedural regulations by allocating exclusive jurisdiction to a single court, in particular the European Order for Payment Procedure (Germany, Finland and The Netherlands) and the European Small Claims Procedure (Finland).²³ A step in that direction has been introduced in the Proposal concerning the Brussels IIbis

¹⁸ As has been acknowledged by the European Parliament, above n. 1, recital J.

¹⁹ *Ibid.*, paras 1112.

²⁰ J. BASEDOW, *The Law of Open Societies (Private Ordering and Public Regulation in the Conflict of Laws)*, Brill-Nijhoff, The Hague 2015, pp. 1–3.

²¹ From 01.04.1881 to 31.12.2003 jurisdiction over exequatur proceedings concerning foreign judgments not governed by EU Regulations or international conventions providing otherwise were concentrated in the Spanish Supreme Court, pursuant to Art. 955 of the 1881 Civil Procedure Act.

²² J. VON HEIN and G. RÜHL, 'Towards a European Code on Private International Law?', in European Parliament (Directorate-General for Internal Policies) (ed.), *Cross-Border Activities in the EU – Making Life Easier for Citizens*, Brussels 2015, <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU\(2015\)510003_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf)> accessed 15.04.2019, pp. 43–44.

²³ See B. HESS et al., above n. 14, p. 51.

Regulation recast with regard to a very specific type of proceedings, such as the child return procedure.²⁴

As noted in Recital 26 of the 2016 Proposal concerning the Brussels IIbis Regulation, the main reason for concentration on this occasion is to ensure that return proceedings under the 1980 Hague Convention on the civil aspects of international child abduction are concluded as quickly as possible. In fact, the envisaged provision on concentration of local jurisdiction is closely related to Art. 11 of the Hague Convention, which imposes on the judicial authorities of Contracting States the obligation to act expeditiously in proceedings for the return of children. However, from a broader perspective, it should be noted that the explanatory memorandum of the Proposal stresses that concentration of jurisdiction is expected not only to shorten proceedings but also to improve quality of decisions and generate cost savings for the administration of justice in general, since fewer judges will have to be trained and decisions by specialised first instance courts are appealed less frequently.²⁵ Art. 22 of the Proposal obliges Member States to concentrate local jurisdiction for the applications for the return of a child in a limited number of courts. The Proposal leaves significant leeway to Member States to take into account their internal structures for the administration of justice. Recital 26 mentions that jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, for example, upon one court of first instance within each district of a court of appeal.

In a different context, the CJEU has highlighted that centralisation of jurisdiction to achieve specialisation at national level may undermine certain jurisdiction rules established at EU level. In particular, in joined cases *Sanders* and *Huber* the CJEU held that Art. 3(b) of Regulation No 4/2009, which grants jurisdiction to the court for the place where the creditor is habitually resident, precludes national legislation, which establishes a centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations, except where such concentration 'helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims'.²⁶ In connection with a German provision concentrating jurisdiction in a single court, the CJEU noted that concentration may render the procedure more cumbersome by causing the parties to spend a considerable amount of additional time (paras. 41–46) Hence, it cannot be ruled out that such concentration may restrict the effective recovery of maintenance claims in cross-border situations. The position adopted by the CJEU seems very much related to one of

²⁴ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM (2016) 411.

²⁵ *Ibid.*, p. 12.

²⁶ Joined Cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber*, ECLI:EU:C:2014:2461, para. 47.

the traditional dangers of judicial specialisation, namely that it can hamper access to courts by increasing the distance between the litigant and the court.

As a significant recent development, several EU Member States are considering or have already decided to set up specialised courts regarding international business disputes. Among these initiatives, reference can be made to the establishment of an International Commercial Chamber at the Paris Court of Appeal, the International Commercial Chambers of the Amsterdam District Court (Netherlands Commercial Court) and the Amsterdam Court of Appeal (Netherlands Commercial Court of Appeal), and the Brussels International Business Court. These developments are aimed at providing specialised courts well suited to deal with complex cross-border disputes and able to conduct proceedings in a foreign language, such as English. The creation of these courts seems very much influenced by the position of English as the language in which international contracts are frequently drafted – and litigated – particularly in some areas such as financial transactions.

Offering to parties the possibility to conduct proceedings in English before judges with particular expertise on international commercial law is aimed at making forum courts attractive for litigation regarding international commercial contracts. The possibility to initiate an action in these courts is usually limited to matters within the autonomy of the parties having an international aspect. Moreover, it requires a prior agreement by the parties designating the relevant court and choosing English as the language of the proceedings. To the extent that the possibility to bring an action in one of these specialised courts is limited to matters having an international aspect, distinguishing cross-border cases from purely domestic situations becomes a relevant and sometimes complex issue. However, a very flexible approach prevails in order to facilitate that disputes be considered as cross-border for these purposes. In this regard, the Explanatory Note to the Rules of Procedure of the newly established Netherlands Commercial Court devote particular attention to provide guidance as to when a matter has an international aspect for such a purpose.²⁷

This phenomenon of creation of supplementary specialised chambers is not intended to grant certain courts jurisdiction over international disputes with a view to favour uniformity and more efficient application of EU conflict of laws rules. On the contrary, its main goal is to provide an alternative to commercial arbitration and to establish courts

²⁷ See section I of Annex III of the Rules of Procedure for the Netherlands Commercial Court, <https://www.rechtspraak.nl/SiteCollectionDocuments/concept-procesreglement-ncc_en.pdf> accessed 15.04.2019. Regarding Art. 1.2.1(1)(b) of the Rules of Procedure, the explanatory note provides a non-exhaustive list of elements required to establish that a matter has an international aspect. Factors included in the list are: the residence abroad of any of the parties; the applicability of a treaty of foreign law to the dispute or its connection with an agreement prepared in a language other than Dutch; the fact that any of the parties has the majority of its worldwide employees outside the Netherlands or realises more than one-half of its consolidated turnover outside of the Netherlands; the fact that the securities of any of the parties are traded on a regulated market outside the Netherlands; the location of legal facts or legal acts relevant to the dispute outside the Netherlands; or the fact that the dispute otherwise involves a relevant cross-border interest.

that may be competitive in attracting highly complex litigation involving usually large sums of money, and hence the international nature of the dispute as a limit to their jurisdiction is defined in very broad terms. Brexit (i.e. the withdrawal of the United Kingdom from the European Union) and uncertainties regarding recognition and enforcement of English judgments in EU Member States have also contributed to this trend. Therefore, it is of limited significance from the broader perspective of fostering the uniform application of EU instruments regarding judicial cooperation in civil and commercial matters.

4. FLEXIBLE MEANS OF ACHIEVING CONCENTRATION

Apart from special situations, such as international child abduction cases where there is a particular need to act expeditiously in a peculiar context of cross-border cooperation, no trend towards imposing concentration on cross-border cases can be found in EU law. This is consistent with the fact that judicial cooperation in civil matters does not involve the adoption of measures regarding the judicial organisation or infrastructure of the national court systems at EU level. Moreover, the different judicial structures and other features of Member States, including size and population density, hamper a single approach in this regard. Cross-border cases involving the application of EU instruments on conflict of laws arise frequently in many types of civil and commercial matters. Moreover, criteria distinguishing between domestic and international situations or even domestic and intra-Union situations may prove problematic to apply. Implementation of this new specialisation as an additional layer of concentration may also pose significant costs and coordination problems with the current specialisation framework in the Member States. Therefore, formal specialisation by means of EU legislation granting concentrated jurisdiction to certain courts to hear conflict of laws cases does not seem feasible as a general tool to foster uniformity in the application of EU Private International Law rules.

Notwithstanding this, conflict of laws, due to its complexity and highly technical nature, is an area in which a certain level of specialisation proves particularly valuable. However, such concentration does not usually require centralised intervention at legislative level or formal restructuring of the court system. Significant concentration may result from informal non-legislative mechanisms that increase expertise and its benefits without posing the disadvantages of formal specialisation based on the creation of specialised courts.

From a comparative perspective, even in systems based on generalist judges, such as the federal courts in the US, it is noteworthy that opinion assignments based on the special expertise or interest in certain topics or subject areas reveal that specialisation is an essential feature of everyday judicial practice.²⁸ Moreover, in the European context

²⁸ E.K. CHENG, 'The Myth of the Generalist Judge' (2008) 61 *Stanford Law Review* 519, 526.

creation of special chambers and workload distribution within courts through internal court rules are regarded as the most widespread means of achieving specialisation.²⁹ This flexible approach may allow national court systems to benefit from expertise and increased effectiveness with regard to a complex area, such as Private International Law, which has not traditionally been identified as a subject of formal specialisation in national court systems. Moreover, flexible specialisation based on internal court rules and workload distribution seems particularly well suited in this area since expertise in this field is of relevance with regard to all civil and commercial matters. However, this sort of specialisation – as other possible alternatives – may not be possible when courts do not reach a minimum size. Moreover, increased expertise in conflict of laws by certain judges and further awareness about the gains to be obtained from this sort of concentration are two preconditions for this approach to be effective.

5. NATIONAL COURTS AND THEIR DIALOGUE WITH THE COURT OF JUSTICE

The significance of regulations as the preferred legal instrument regarding conflict of laws reflects the importance of achieving uniformity at EU level in this area. The CJEU plays a pivotal role in guaranteeing the uniform application of EU Private International Law, particularly as result of its authoritative interpretation of EU instruments in the framework of the preliminary reference mechanism established in Art. 267 TFEU. The basic goal of the preliminary ruling mechanism of European Union law is to enable national courts to ensure uniform interpretation and application of EU law in all Member States.³⁰ The function of the CJEU is limited to giving decisions on questions of interpretation posed to it by the courts of the Member States. This system allows national courts to interact with the CJEU, to have an influence on the development of the uniform interpretation of EU rules, and to trigger the possibility for EU institutions and Member States to comment on the interpretation of the relevant provisions in the proceedings at the CJEU. Uniform application of EU law throughout the Union is enhanced because of the binding nature of the rulings of the CJEU on national courts and tribunals.

Prior to the Lisbon Treaty and the application of the TFEU as from 1 December 2009, under Art. 68 of the EC Treaty, references concerning measures in the field of judicial cooperation in civil matters could only be made by national courts 'against whose decision there is no judicial remedy under national law'. The Lisbon Treaty granted full competence in preliminary questions to the CJEU. Widest possible access by national courts to the CJEU concerning the EU instruments on civil and commercial matters is

²⁹ See Consultative Council of European Judges, 'Opinion (2012) No. 15 on the Specialisation of Judges', above n. 9, p. 6; and B. HESS et al., above n. 14, p. 51.

³⁰ CJEU, 'Information note on references from national courts for a preliminary ruling', OJ C 297, 5.12.2009, p. 1, para. 1.

essential to guarantee the involvement of national courts of all instances in the uniform interpretation of such instruments.

The power of lower or intermediate courts to refer questions to the CJEU if they consider that an interpretation of the rules on judicial cooperation in civil matters is necessary in a case before them may be decisive in enabling the CJEU to adapt its case-law in this area to social changes as they develop, without excessive time gaps. Referral of preliminary questions by lower or intermediate courts in this field can also be particularly appropriate in order to ensure respect for the efficiency of proceedings in the light of some of the issues covered by the relevant instruments, such as the rules on jurisdiction.

The notorious judgment in joined cases C-509/09 and C-161/10, *eDate Advertising GmbH and Olivier Martinez*³¹ is relevant to appreciation of the progress brought about by the Treaty of Lisbon in this respect. The judgment developed the previous case-law of the Court of Justice concerning the interpretation of Arts 2 and 5(3) of Regulation No 44/2001 with regard to alleged infringements of personality rights by means of content placed on the Internet. It also provided significant guidance as to the interpretation of Art. 3 of Directive 2000/31/EC on electronic commerce and the interplay of its country of origin principle with conflict of laws rules. Case C-161/10 arose from the dispute before the Tribunal de grande instance de Paris (Paris Regional Court) *Olivier Martinez, Robert Martinez v MGN Limited*. However, the relevant questions as to the interpretation of Art. 5(3) of Regulation No 44/2001 had been referred by the Tribunal de grande instance de Paris in the framework of the same dispute months before by decision of 6 July 2009. The answer to that initial reference³² was that the CJEU had no jurisdiction to rule on the question referred by the Tribunal de grande instance de Paris. The lack of jurisdiction was due to the fact that the TFEU was not yet in force and Art. 68 and 234 EC were still applicable. Since the reference concerned Regulation 44/2001, which was adopted on the basis of Art. 61(c) EC, the CJEU concluded that only a national court or tribunal against whose decisions there is no judicial remedy under national law could request the CJEU to give a preliminary ruling on the interpretation of that regulation.³²

Therefore, the abolition of the restrictions on the jurisdiction of the CJEU to give preliminary rulings on the interpretation of provisions in the field of judicial cooperation in civil matters and the acceptance that references could also be made by lower and intermediate national courts was a significant improvement in this regard. The fast evolution of EU regulations on conflict of laws and the novelty of many of these instruments seem to make it advisable for national courts, even if they are not courts of last resort, to have recourse in that area to the preliminary reference mechanism. According to the guidance provided by the CJEU, a reference for a preliminary ruling

³¹ Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Olivier Martinez, Robert Martinez v. MGN Limited*, ECLI:EU:C:2011:685.

³² Case C-278/09, *Olivier Martinez, Robert Martinez v. MGN Ltd*, EU:C:2009:725.

may prove particularly useful at an appropriate stage of the proceedings when there is a new question of interpretation of general interest for the uniform application of EU law.³³

6. OTHER FACTORS INFLUENCING UNIFORMITY

In the light of the above, it appears that formal arrangements at EU level on the court structure of Member States to impose specialisation regarding conflict of laws have significant limitations as a mechanism to improve uniformity in the application of EU Private International Law. Recourse to legislative action at EU level in other areas could be more effective in fostering uniform application of such rules. In this context, it is remarkable that some current features of EU Private International Law support the view that further legislative intervention to clarify, coordinate or supplement the existing EU regulations relevant for this field may be much more effective in terms of promoting the uniform application throughout the Union of EU Private International Law rules.

Fragmentation resulting from the rapid adoption of a significant number of separate regulations on conflict of laws with a high technical content influences the particular complexity of the current landscape in this area. Complexities arising from the content of those instruments, but also from the delimitation of their respective scope of application and the interplay with other EU instruments and the relevant international conventions pose important challenges to legal operators and hinder their uniform interpretation. Some of the current gaps in EU Private International Law are relevant to the conclusion that having adopted common provisions on certain issues does not guarantee uniform results throughout the European Union. For instance, common rules have been adopted concerning *lis pendens* and related actions between courts in Member States and courts of third States (Art. 33 and 34 Regulation (EU) 1215/2012). However, the application of those mechanisms depends on several factors. In particular, they can only apply if it is expected that the court of the third State will give a judgment capable of recognition and enforcement in that Member State. The lack of common rules at EU level on recognition and enforcement of judgments rendered in third States undermines uniformity with regard to Arts 33 and 34 Regulation (EU) 1215/2012.

Concerning choice-of-laws rules, it is well-known that the lack of common standards on the treatment of foreign law at EU level weakens the level of effective uniformity achieved after formal unification of choice of rules and connecting factors.³⁴ The legal

³³ CJEU, above n. 30, para. 13.

³⁴ See SWISS INSTITUTE OF COMPARATIVE LAW, 'The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future', JLS/2009/JCIV/PR/0005/E4, 2011, <<https://publications.europa.eu/en/publication-detail/-/publication/c92e8d95-ac55-4c9c-91b6-36a5a7564838/language-en>> accessed 15.04.2019; C. ESPLUGUES, 'General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe', in C. ESPLUGUES, J.L. IGLESIAS and G. PALAO (eds), *Application of Foreign Law*, Sellier, Munich 2011, pp. 3–94; C. TRAUTMANN, *Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren*, Mohr Siebeck, Tübingen 2011, pp. 265–441; E.M. KIENINGER, 'Ascertaining and Applying Foreign

rules effectively applied to a given cross-border dispute may be influenced by the position of forum law concerning the mandatory or facultative application and ascertainment of foreign law. Significant differences among Member States remain as to the criteria regarding the respective roles of judges and parties in determining the content of foreign applicable law, the means for the ascertainment of foreign law, when foreign law is considered to be sufficiently proved, and the interpretation and application of foreign law. Different approaches have also been adopted with regard to the consequences of the failure to establish foreign law and how to proceed in case of failure to ascertain the content of the foreign law applicable to the dispute.

Increased expertise by courts regarding conflict of laws may contribute to improve the identification of international cases and the implementation of the mechanisms to ascertain and apply foreign law. However, in order to overcome the challenges posed to the uniform operation of EU conflict rules throughout the Union by the divergent national approaches in this field, it seems necessary to consider the adoption of common standards in EU legislation concerning the application of EU choice-of-law rules and the foreign law that they designate. Yet, it is noteworthy that progress in that direction poses significant challenges, for instance due to the different legislative procedure under Art. 81 TFEU for family law and other instruments.³⁵

7. JUDICIAL TRAINING, ACCESS TO INFORMATION AND ADAPTATION OF THE JUDICIAL INFRASTRUCTURE

Some of the main advantages traditionally linked to court specialisation can be obtained in this area, at least to a certain extent, by improving some elements that influence court practices regarding cross-border cases. Moreover, as already noted, increased court specialisation and effectiveness in this area is expected to be achieved in the judicial systems of EU Member States mainly by means of informal non-legislative mechanisms. Those methods may include internal court rules on work distribution and assignment of cases, in which expertise in conflict of laws is considered as a relevant factor to improved quality of decisions and effectiveness. Therefore, specialised knowledge in this area by judges and other legal practitioners is necessary in order to develop such mechanisms.

Judicial training is an essential factor to increase expertise in an area that has been transformed in less than two decades and includes brand new instruments with highly complex provisions implementing cooperation between courts and tribunals of Member States to an extent previously unknown. Increased training on specific cross-border judicial cooperation instruments is a key tool to make possible the acquisition by judges

Law', in S. LEIBLE (ed.), *General Principles of European Private International Law*, Kluwer, Alphen aan den Rijn 2016, pp. 357–73; Y. NISHITANI, 'General Report', in Y. NISHITANI (ed.), *Treatment of Foreign Law: Dynamics Towards Convergence?*, Springer, Switzerland 2017, pp. 43–47.

³⁵ R. WAGNER, 'A "Rome 0 Regulation" from a Political Point of View', in S. LEIBLE (ed.), *General Principles of European Private International Law*, Kluwer, Alphen aan den Rijn 2016, p. 82.

and other relevant actors of the specialised knowledge necessary to enhance their ability to deal diligently with cross-border proceedings and increase effectiveness and mutual trust. However, judicial training remains primarily the responsibility of the Member States, although the European Union provides financial support, particularly to the European Judicial Training Network, which coordinates national training activities and develops cross-border training. Moreover, certain mechanisms set up to promote cooperation, such as the Judicial Network in Civil Matters and Eurojust may be of assistance and play a role in disseminating information on the relevant EU instruments and their application.³⁶ The Justice Programme for the period 2014 to 2020 illustrates the increasing support at EU level of judicial training as a means to foster a common legal and judicial culture.³⁷

EU institutions have stressed the importance of judicial training with regard to the application of the instruments on judicial cooperation in civil matters.³⁸ However, lack of inclusion of international components in the national training curricula of judges and court staff has been identified as one of the main challenges and obstacles to European judicial training. Cross-border civil and commercial proceedings are listed regularly at the top of the main fields of EU law where training for court staff is relevant, for instance, in connection with completing requests to courts in other Member States or receiving such requests from other Member States.³⁹ Overcoming the language barrier between judges and court staff used to working exclusively in their mother tongue must be also a primary concern.

Improving access by judges to specific information regarding EU instruments on conflict of laws and their application is also essential to guarantee specialised knowledge in dealing with cross-border cases. Moreover, increasing availability of reliable information about the application and performance of existing Union instruments in the area of civil justice cooperation and the improvement of the current mechanisms to obtain information about the judicial systems of other Member States, such as the European e-Justice Portal, are of the utmost importance. The European Judicial Network in civil and commercial matters, as a network cooperation structure in this field, was set up at Community level.⁴⁰ It is composed of: contact points designated by the Member States,

³⁶ Communication from the Commission to the European Parliament and the Council of 29.06.2006 on Judicial Training in the European Union (COM(2006) 356 final), p. 5.

³⁷ Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17.12.2013 establishing a Justice Programme for the period 2014 to 2020 [2013] OJ L 354/73. See also Council Conclusions 'Training of legal practitioners: an essential tool to consolidate the EU acquis' (2014/C 443/04) [2014] OJ C 443/ 7.

³⁸ See Communication from the Commission to the European Parliament and the Council the European Economic and Social Committee and the Committee of the Regions on Building Trust in EU-Wide Justice – A New Dimension to European Judicial Training, COM(2011) 551 final.

³⁹ See e.g. R.R. OERTEL and P.I.B. GOLDSCHMIDT, 'The Training of Court Staff and Bailiffs at the European Union Level', in European Parliament, *The Training of Judges and Legal Practitioners*, PE 583.134, 2017, <<http://www.europarl.europa.eu/supporting-analyses>> accessed 15.04.2019, p. 42.

⁴⁰ Council Decision of 28.05.2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC) [2001] OJ L 174/25.

central bodies and central authorities in the area of judicial cooperation in civil and commercial matters; certain liaison magistrates; and other appropriate judicial or administrative authorities with responsibilities for judicial cooperation in civil and commercial matters (Art. 2 of Council Decision 2001/470/EC).

The contact points designated by the Member States in accordance with the 2001 Decision are at the disposal of the local judicial authorities in their own Member State in order to improve judicial cooperation in this field. The relevant tasks of the designated contact points include: the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States; and the effective and practical application of Community instruments. Adaptation of the judicial infrastructure of Member States to provide flexible means of support may be of particular interest in this regard. The establishment of support units at national – or even regional – level, which are able to provide specialised information and advice to judges and court staff concerning the management of international cases, may be a particularly effective tool.

The development of an infrastructure of specialised support resources at the disposal of the judges involved in the application of the EU instruments concerning judicial cooperation in civil and commercial matters seems to be an effective method of obtaining many of the possible advantages traditionally linked to judicial specialisation. For instance, such an infrastructure may facilitate access on demand to the elements necessary to obtain the requisite knowledge and expertise in this field; provide background information contributing to consistency in judicial decisions concerning the interpretation of the relevant EU instruments; and increase the courts' efficiency and management regarding cross-border cases. Moreover, such gains can be obtained without incurring some of the traditional disadvantages of formal specialisation of courts, such as concentrating specialisation within a limited number of courts and hence hindering access to courts and increasing the distance between the litigant and the court.

8. CONCLUSIONS

Cross-border disputes raise a number of highly technical and complex issues concerning conflict of laws that require particular expertise. The goal of achieving uniform application of EU Private International Law has been regarded as a factor favouring some sort of concentration in this highly technical area of the law. However, leaving aside the recent trend in some EU Member States to establish courts having jurisdiction over certain international disputes to provide an alternative to commercial arbitration and litigation before certain foreign courts, conflict of laws has traditionally played no significant role as a field for the creation of specialised courts. Moreover, conflict of laws issues do not arise in isolation but as part of disputes regarding different areas of civil and commercial law, which are currently highly dispersed. From the EU perspective, judicial cooperation

in civil matters does not involve the adoption at European Union level of measures regarding the judicial organisation of the national court systems. Formal specialisation by means of EU – or national – legislation granting concentrated jurisdiction to certain courts to hear conflict of laws cases does not seem feasible as a general tool to foster uniformity in the application of EU Private International Law rules.

Given its highly technical nature, conflict of laws seems to be an area in which certain level of specialisation may prove particularly valuable. However, such concentration does not require usually centralised intervention at legislative level or formal restructuring of the court system. Significant concentration may result from informal non-legislative mechanisms, such as creation of special chambers and workload distribution through internal court rules. This flexible approach may improve expertise and its benefits without posing the disadvantages of formal approaches based on the creation of specialised courts. Relevant tools in this context are judicial training intended to provide specialised knowledge and the development of an infrastructure of specialised support resources at the disposal of courts involved in the application of the EU instruments concerning judicial cooperation in civil and commercial matters.