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Gap-filling in EU Private Law Regulations

Jürgen Basedow*

INTRODUCTION

Ever since the late 19th century (and even more so since the end of World War II), the body of uniform private law has been growing. Transactions in fields such as intellectual property, maritime transport, aviation or the sale of goods are nowadays mainly governed by instruments of uniform private law. While many of the relevant texts boast large numbers of ratifications and worldwide application, they all have a limited scope. They deal with the major issues in the respective field but do not cover the entire domain. Neighbouring fields of the law are left unregulated, specific subjects are excluded, and many questions of law that may come up in litigation even within the scope of the instrument do not receive an explicit answer.

A long discussion has focused on how uniform law instruments should be supplemented in such situations. The method of gap-filling that has emerged from that discussion is encapsulated in Article 7 paragraph 2 of the Vienna Convention on Contracts for the International Sale of Goods:[1]

> "Questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

The three-step analysis laid out in this provision (instrument – general principles – national law designated by conflict rules) nowadays appears to be generally accepted.[2] As to the residual application of the law referred to by choice-of-law rules, this applies even under those instruments of uniform law which do not contain a similar guideline. This means that the law designated for the filling of gaps is not necessarily the *lex fori*; depending on the conflict rules of the forum it may be a foreign law.[3]

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1 United Nations Convention on Contracts for the International Sale of Goods, Done at Vienna on 11 April 1980, 1489 UNTS I-25567.

2 In this sense M. TORSELLO, Common Features of Uniform Commercial Law Conventions – A Comparative Study Beyond the 1980 Uniform Sales Law, Munich 2004, p. 285; R. FIALHO DE OLIVEIRA, Interpretação e aplicação de convenções internacionais em matéria substantiva, processual e conflictual, Rio de Janeiro 2014, p. 293 f.; prior to the adoption of the UN Sales Convention, J. KROPHOLLER, Internationales Einheitsrecht, Tübingen 1975, p. 298 for the general principles and p. 198 for national law designated by choice-of-law rules to supplement the uniform instrument.

3 The German Federal Court decided in fact that a set-off not covered by the UN Sales Convention, which applied to the contract in dispute, was governed by Italian law according to Article 17 of the Rome I Regulation, *infra* fn. 39, see *Bundesgerichtshof* (BGH) 14 May 2014, *Neue Juristische Wochenschrift* (NJW) 2014, 3156; in a case decided under the Convention on the Contract for the International Carriage of Goods by Road (CMR), Done at Geneva on 19 May 1956, 399 UNTS 189,

Michael Joachim Bonell, to whom this paper is dedicated in longstanding scholarly respect, has spent a large part of his time and academic activities on the study and development of uniform private law as enshrined in both international conventions[4] and new forms of uniform private law, in particular the UNIDROIT Principles of International Commercial Contracts.[5] In more recent years, a third body of uniform private law has begun to emerge at the regional level in Europe, i.e. European private law created by EU institutions, in particular by directives and regulations.

This paper deals with regulations on matters of private law. Their number has grown considerably over recent years.[6] They are directly applicable in all Member States[7] and have much in common with self-executing international treaties such as those concluded for the unification of private law. Their application raises similar questions, both of interpretation and of gap-filling. Some of them have already been addressed by the case law of the Court of Justice of the European Union. The following remarks will first elaborate on gap-filling in European private law in general and in EU regulations in particular, *infra* I., then turn to the case law of the Court of Justice on the matter, *infra* II., discuss the possibility of filling gaps by general principles, *infra* III., and thereafter raise some open questions, *infra* IV.

I EU PRIVATE LAW AND THE TASK OF FILLING GAPS

A) GAPS IN DIRECTIVES AND REGULATIONS

To date, the private law of the European Union has been enacted primarily in the form of directives. These directives, however, are not applied by national courts as such but rather in the form that the directive has assumed in the individual provisions of national law. Through transposition, directives are, in effect, incorporated into the corpus of national law. They apply as part of the law designated by choice-of-law rules. To the extent that gaps exist in the directives they do not remain clearly visible; rather, they are, as otherwise occurs in national law, filled by the provisions and principles of the generally comprehensive national legal regime.

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the Court of Appeals of Cologne had to deal with a recourse by the main carrier against a subcarrier for costs the main carrier had sustained by payments to the shipper; the Court held such recourse to be outside the scope of the CMR and applied Austrian law instead: *Oberlandesgericht* (OLG) Köln 15 October 2013, *Transportrecht* 2015, 112.

4 M. BIANCA and M.J. BONELL (eds.), *Commentary on the International Sales Law – The 1980 Vienna Sales Convention*, Milan 1987.

5 M.J. BONELL (ed.), *A New Approach to International Commercial Contracts – The UNIDROIT Principles of International Commercial Contracts*, The Hague 1999; *Id.,* An International Restatement of Contract Law, 3rd ed., Ardsley, NY 2005; his interest in these non-State rules of law had already emerged much earlier, see *Id.*, Le regole oggettive del commercio internazionale, Milan 1976.

6 For an earlier survey, see J. BASEDOW, EC Regulations in European Private Law, in J. Basedow/I. Meier/A. K. Schnyder/T. Einhorn/D. Girsberger (eds.), *Private Law in the International Arena – Liber Amicorum Kurt Siehr*, The Hague 2000, p. 17 – 31.

7 See Article 288 para 2 of the Treaty on the Functioning of the European Union (TFEU), consolidated version in O.J. 2012 C 326/47.

This is different in the case of regulations. Pursuant to Article 288, paragraph 2 TFEU, they are directly applicable in each Member State. They take priority over autonomous national law and are to be called upon first by the courts.[8] Where the EU legislature issues a regulation it therefore directly addresses not the Member States but individuals and corporate bodies across the whole Union. This has consequences for the style of legislation. First, regulations – just like uniform law conventions – have to define their own scope of application by appropriate scope rules.[9] Secondly, regulations – unlike directives[10] – do not merely indicate a result to be achieved in all Member States, leaving the choice of form and methods to the Member States. Consequently, they do not allow Member States to choose between various options[11] and regulate an issue as precisely as possible themselves. Thirdly, because of their direct application, it is immediately apparent when a necessary rule is not to be found in the regulations and a gap has to be filled; since the court is applying an EU instrument that is silent on the matter, it has to find the rule designed to fill the gap somewhere outside that EU instrument.

The third point takes us to the subject of this paper. An example is provided by Regulation 261/2004 which grants airline passengers a right to compensation and assistance in the event of denied boarding or cancellation of their flight.[12] Just like its predecessor, Regulation 295/91,[13] Regulation 261/2004 lacks any rule on the limitation of actions, an issue which is usually considered as an essential element of instruments establishing compensation claims. We shall see how the Court of Justice has dealt with this issue; see below part II.

But of course, not every legislative silence represents a gap that somehow needs to be filled. One finds as well, as is widely acknowledged, moments of eloquent legislative silence, where lawmakers were simply disinclined to enact a certain rule and where the absence of the rule in itself refers to a more general principle. A gap in need of filling is

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8 In its landmark ruling of 15 July 1964, Case 6/64 (*Costa v. E.N.E.L.*), ECR 1964, 1253, 1270, the Court of Justice of the European Union (CJEU) expressly referred to Article 189 EEC (now: Article 288 TFEU) in order to establish the primacy of Union law. More currently, see also the reference to the 22 June 2007 Opinion of the Council Legal Service in No 17 of the Declarations Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, OJ 2012 C 326/34.

9 For uniform law conventions, see J. KROPHOLLER, above at n. 2, p. 189; case law relating to scope rules can be found in all countries and even in the EU. With regard to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, done on 28 May 1999 approved by Council Decision 2001/539/EC of 5 April 2001, OJ 2001 L 194/38, see CJEU 9 September 2015, case C-240/14 (*Prüller-Frey v. Brodnig and Axa Versicherung AG)*, cons. 25 ff.

10 See Article 288 para. 3 TFEU.

11 For such an option, see Council Directive (86/653/EEC) of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed agents, OJ 1986 L 382/17; with regard to the agent's post-contractual indemnification, Article 17 gives Member States the choice between a kind of deferred remuneration and compensation for damages.

12 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 291/95, OJ 2004 L 46/1.

13 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport, OJ 1991 L 36/5.

encountered only in case of a law's "unintended incompleteness".[14] Where the law – as in the case of Regulation 261/2004 – provides a remedy without dealing with prescription one might, of course, ask first whether the EU legislature consciously refrained from setting a period of limitation because the rights in question should be subject to vindication without temporal limit, i.e. in perpetuity. In the case reported in part II below, neither the Court of Justice nor the national courts made this inquiry, perhaps because the notion struck all the participants as too absurd, or perhaps because European instruments have thus far never sought to craft a comprehensive legal scheme, and thus it is the norm that external as well as internal gaps emerge and demand supplementation.[15]

B) STATUTORY RULES ON GAP-FILLING IN REGULATIONS

Before turning to the answer of the courts, it should be noted that numerous EU regulations have expressly prescribed how such internal or external gaps are to be filled. For instance, Article 9 of Regulation 2157/2001 on the European Company (*Societas Europaea* – SE), lists the whole range of legal rules which may come into play where that Regulation governs and where it is silent on a given issue; it makes a residual reference to the law of the Member State in which the SE has its registered office, albeit without making clear whether it intends to refer only to the procedural rules of the Member State of registration or also to its conflict-of-law rules.[16]

Conversely, the Community Trade Mark Regulation provides that for all matters not covered by the Regulation, particularly infringement litigation, a court shall apply its national law, including its private international law.[17] While this provision applies to civil actions, the Regulation states that in proceedings of the Office for Harmonisation of the Internal Market, gap-filling is to be undertaken with reference to "the principles of procedural law generally recognized in the Member States."[18]

A third example relates to the civil liability of rating agencies under Regulation 1060/2009. While Article 35a lays down a number of general principles, paragraph 4 refers to the "applicable national law as determined by the relevant rules of private international law" for "matters concerning the civil liability of a credit rating agency which are not covered by this Regulation."[19]

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[14] See K. LARENZ, Methodenlehre der Rechtswissenschaft, 2nd ed., Berlin 1992, pp. 258-260; C.-W. CANARIS, Die Feststellung von Lücken im Gesetz, 2nd ed., Berlin 1983, p. 16.

[15] See e.g., U. P. GRUBER, Methoden des internationalen Einheitsrechts, Tübingen 2004, p. 86.

[16] See Article 9, para 1(c)(ii) of Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 l 294/1.

[17] Article 101, para 2 of Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1.

[18] Article 83 of Regulation 207/2009, see preceding note.

[19] See Article 35a para. 4, second sentence of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ 2009 L 2009 L 302/1, as amended by Regulation (EU) No 462/2013 of 21 May 2013, OJ 2013 L 146/1; see A. DUTTA, Die neuen Haftungsregeln für Ratingagenturen in der Europäischen Union – Zwischen Sachrechtsvereinheitlichung und europäischem Entscheidungseinklang, *Zeitschrift für Wirtschafts- und Bankrecht* (WM) 2013, 1729 – 1736.

The Proposal on a Common European Sales Law which was withdrawn in 2014 distinguishes between "internal" and "external" gaps: for the latter – i.e. matters not addressed in the Proposal – the national law determined pursuant to the Rome I Regulation is prescribed as being applicable.[20] Conversely, for internal gaps encountered in the Proposal's scope of application, only the Common Sales Law is deemed relevant: "Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law."[21]

II THE STANCE OF THE COURT OF JUSTICE

Thus, the possible solutions anchored in Union private law are, as this discussion of European legislation shows, of considerable diversity. But some instruments, such as Regulation 261/2004, are silent on this point. Here, gap-filling is a task for the judiciary.

a) CUADRENCH MORÉ V. KLM

In what appears to be the first case in point, the following facts were submitted to the Court of Justice. The plaintiff had booked a flight from Shanghai through Amsterdam to Barcelona for 20 December 2005 with the defendant airline KLM. The flight was cancelled and the plaintiff had to rebook his trip to Europe for the following day with another airline through Munich. More than three years later, on 27 February 2009, he sued KLM before a court in Barcelona. He claimed compensation amounting to €2,990.00 plus interest and costs on the basis of Regulation 261/2004. KLM invoked the prescription of the claim under Article 29 of the Warsaw Convention,[22] the predecessor of the current Montreal Convention.[23] The court rejected this defence, holding the rules on prescription of both conventions inapplicable to a claim based on Regulation 261/2004. It considered that prescription was governed by Spanish law. According to the statement of facts that was later provided by the Court of Justice, the "applicable national rules" provided for a limitation period of ten years. Contrary to the wording the Court thereby referred, not to the *national* law of Spain which establishes a limitation period of 15 years, Article 1964 Civil Code, but to the prescription period laid down in Article 121-20 of the Civil Code of Catalonia. On appeal, the *Audiencia Provincial de Barcelona* submitted the case to the Court of Justice of the European Union, asking whether Regulation 261/2004 had to be interpreted in the sense that the compensation claim was subject to the two-year prescription under Article 35 of the Montreal Convention or to national law.[24]

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20 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011, COM (2011) 635, Recital 27 referring to the Rome I Regulation, *infra* n. 39.

21 Proposal, preceding note, Recital 29; see also Article 11 of the Proposal for the basic regulation.

22 The Warsaw Convention was concluded in French, see *Convention pour l'unification de certaines règles relatives au transport aérien international*, *signée à Varsovie le 12 octobre 1929*, 137 LNTS 11, *Reichsgesetzblatt* 1933, II-1039.

23 For the Montreal Convention, see above n. 9.

24 CJEU 22 November 2012, case C-139/11 (*Cuadrench Moré v. KLM*); for the facts of the case see para 16 – 21; for the 10-years prescription period under Spanish law see para 15.

It is noteworthy that the Advocate General did not draft a written opinion; this may indicate the scant weight given by the Court of Justice to this case. It should further be noted that the Spanish court – contrary to the Austrian court in the recent case *Prüller-Frey* – did not , in its preliminary question, mention private international law as a further element to be taken into account in the analysis.[25] The Court of Justice's point of departure was that it is

> "settled case-law that, in the absence of provisions of EU law on the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that those rules observe the principles of equivalence and effectiveness."[26]

The Court of Justice rejected the application of Article 35 of the Montreal Convention since that provision relates only to claims arising under the Montreal Convention, while the compensation claim under Regulation 261/2004 falls outside the scope of this instrument.[27] The Court's conclusion connected to the consideration cited above was brief:

> "It follows that the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State, provided that those rules observe the principles of equivalence and effectiveness."[28]

B) METHODOLOGICAL SHORTCUT

As compared with the ranking of legal sources laid down in Article 7 paragraph 2 CISG,[29] the immediate recourse to national law appears to be a kind of shortcut. The precedential rulings cited by the Court of Justice in support of this proposition stem from public law cases. Public law matters are simple, as state agencies as well as the reviewing courts are specifically concerned with the implementation of their own national administrative law. It is only this law to which they turn, unless some Union law has priority as an exception. In this regard one can speak of a convergence of jurisdiction and the governing law (*Gleichlauf*).

The case is different in private law proceedings: here the court must apply the national law designated by the rules of private international law, a reference which might also point to a foreign law. This is also made clear by the above-cited legal rules on the filling of gaps in EU Regulations.[30] In *Cuadrench Moré*, the Court of Justice simply referred to the "absence of provisions of EU law on the matter" without the slightest hint at the existence of EU instruments on the private international law of obligations which might govern the limitation of the plaintiff's claim, see *infra* IV.

When it comes to gap-filling in private uniform law, recourse to national law, whether to the *lex fori* or a foreign law, is not the only solution. In accordance with Article

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25 See above in n. 9.
26 CJEU, *Cuadrench Moré,* above n. 24, para 25.
27 CJEU, *Cuadrench Moré*, above n. 24, para 27 to 32.
28 CJEU, *Cuadrench Moré*, above n. 24, para 26 and 33.
29 See above text at n. 1.
30 See above part I/2.

7 paragraph 2 CISG, the search for general principles would appear to deserve priority; recourse to the national law indicated by the relevant conflict-of-law rules is only a subordinate option. A primary adherence to general principles of law is dictated by many uniform law conventions.[31] While these instruments confine the recourse to general principles "on which [the respective instrument] is based", the Court of Justice has never imposed such a limitation when referring to general principles.

Even in the absence of an explicit indication, "resort to general principles of law normally matches the spirit of international uniform law".[32] With regard to EU law, the Court of Justice has often stressed the need to maintain its uniformity or autonomy by way of interpretation.[33] It becomes apparent that having recourse to national law is not the only means of filling gaps in uniform law and that other methods are, in fact, frequently given preference. Also in the case of Regulation 261/2004, the search for general principles of law would have been appropriate, not least because of the wholly unsatisfactory results produced by the ruling handed down by the Court of Justice.

C) PRACTICAL INCONVENIENCE OF THE JUDGMENT

The ruling is not persuasive when considered in view of its practical consequences. In a typical relationship between a passenger and an airline, only relatively low-value claims will arise. In accordance with the Regulation, the maximum amount stands at €600. According to the Court of Justice, such claims could potentially be raised more than 10 years after their inception. To the extent that Member States have not enacted national

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[31] See e.g., Article 3 of the United Nations Convention on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978, the so-called Hamburg Rules, text to be found on the website of UNCITRAL: www.uncitral.org; Article 8(1) of the Convention Concerning International Carriage by Rail of 9 May 1980 as amended by the Protocol of Vilnius of 3 June 1999, *Bundesgesetzblatt* (BGBl.) 2002, II-2140; Article 4 of the UNIDROIT Convention on International Factoring, done at Ottawa on 28 May 1988, BGBl. 1998, II-172; Article 6 of the UNIDROIT Convention on International Financial Leasing, done at Ottawa on 28 May 1988, see the website of UNIDROIT: www.unidroit.org; Article 2 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, done at New York on 11 December 2008, the so-called Rotterdam Rules, see the website of UNCITRAL: www.uncitral.org; Article 5 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, done at New York on 11 December 1995, see the website of UNCITRAL: www.uncitral.org; Article 5 of the Convention on International Interests in Mobile Equipment, done at Cape Town on 15 November 2001, OJ 2009 L 121/8.

[32] J. KROPHOLLER, above n. 2, p. 298 (my translation, J.B.); for the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956, 399 UNTS 199, see also B. LIESER, Ergänzung der CMR durch unvereinheitlichtes deutsches Recht für grenzüberschreitenden Güterfernverkehr mit Abgangs- und Bestimmungsort in der Bundesrepublik Deutschland, Neuwied 1991, p. 21 ff.; R. HERBER/H. PIPER, CMR – Internationales Straßentransportrecht. Kommentar. Munich 1996, text preceding Article 1, marginal no. 1 b; J. BASEDOW, Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts, *Unif. L. Rev*. 2000, 129-139 (134 f.); GRUBER, note 15 above, pp. 294. 297.

[33] See H. RÖSLER, Interpretation of EU Law, in J. Basedow/K. Hopt/R. Zimmermann/ A. Stier (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford 2012, p. 979 f. with further references.

implementation laws with special rules on limitation of action, the general national law on time limits comes into play, which in some countries can be as long as 30 years.

It should be recalled that limitation periods determine how long records need to be preserved in electronic or physical form. In a high-volume enterprise such as the civil aviation industry, the obligation to preserve data on millions of flights and passengers produces significant costs – costs which are ultimately passed on to all passengers. Is it right that all of them should be forced to pay more because a small sub-set of individuals fail to bring their claims in a reasonably timely fashion? While the long retention period may be in order for higher-value claims, it is disproportionate for minimal claims.

III GAP-FILLING BY GENERAL PRINCIPLES

The Court's decision is also not consistent with the short period of limitations otherwise common in national and international transport law. The Court of Justice itself referred to the two-year limitation period under Article 35 of the Montreal Convention, an instrument constituting an integral part of Union law in the wake of its ratification by the European Union.[34] Passenger claims against railroads become time-barred after three years when based on physical injuries and after one year otherwise – a rule which is now also Union law.[35] A similar situation exists with the Athens Convention relating to carriage by sea: although also part of EU law, under this instrument passenger claims against the carrier lapse after two years.[36]

The justification for such short limitation periods is obvious: transport is a fast-paced, high-volume business and an activity generally serving aims other than a change of location as such. Consequently, a carriage having occurred in the past is of no interest in the present. Allowing a passenger to demand compensation for a five-hour delay, ten or fifteen or thirty years after the fact, borders on the absurd. Yet the Court of Justice did not engage in such essentially private law reflections. Instead, it confined itself to a rather structural focus on the relationship between Union law and Member State law, an approach presumably to be expected from a court inclined to view its tasks from a constitutional law perspective.

But from this viewpoint as well, recourse to national law is unsatisfactory, since the limitation periods applicable in the individual Member States vary from one country to the next and uniform application of the regulation is, as a consequence, *a priori* unobtainable.

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[34] CJEU 10 January 2006, Case C-344/04 (*IATA/Department for Transport*), ECR 2006, I-403, Paragraph 36.

[35] Article 60 of the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) – Annex A to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, amended by the Vilnius Protocol of 3 June 1999, printed as Annex I to Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations. OJ 2007 L 315/14; pursuant to Article 11 of the Regulation, Article 60 CIV has been incorporated into Union law.

[36] See Article 16 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, Annex I of Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ 2009 L 131/24; pursuant to Article 3 of the Regulation, Article 16 of the Athens Convention has been incorporated into Union law.

Whereas the Court of Justice's ruling observes that the period of limitations in Spain (or rather in Catalonia) encompasses 10 years as a general rule, it is a mere 3 years in Germany following the reform of the law of obligations, § 195 BGB. In the case at hand, the period would have already expired in Germany in relation to a claim first raised in February 2009. A number of European legal orders still feature quite extensive periods of limitation – running up to 30 years in length[37] – notwithstanding the trend observed in more recent years towards shorter time limits and which, for example, is reflected by the UNIDROIT Principles with its three-year limitation period.[38]

As to the compensatory claims stemming from Regulation 261/2004, the Court of Justice could have easily avoided the broad divergence of limitation periods under national rules. It only had to look to the European Union's law in respect of passenger transport: from these rules it could, as a first step, have readily derived a general principle of law establishing that the limitation period – regardless of its precise means of measurement – for passenger claims under a contract of carriage is relatively brief and not longer than three years. In light of the Regulation's substantive similarity to the Montreal Convention, the adoption of a two-year period of limitation would, as a second step, have proved logical and easily defensible.

IV OPEN QUESTIONS RAISED BY THE COURT OF JUSTICE RULING

The Court of Justice's ruling only ostensibly answers the question at issue. In referring to "the rules of each Member State on the limitation of actions", the judgment in fact simultaneously raises a number of new questions.

A) LIMITATION – A PROCEDURAL ISSUE?

The first is whether the use of the term "limitation of actions" is intended to suggest the existence of a procedural law question that is to be resolved according to the *lex fori* of the court seised. This would quite clearly appear to be the consequence resulting from the term used in the German version of the judgment (*Klageverjährung*). This is confirmed by the terms used in the French and Spanish versions of the ruling (*prescription d'action* and *prescripción de la acción*, respectively) which similarly point to a procedural law understanding.

A classification of prescription as a procedural matter would, however, be in direct contradiction to the substantive law characterization of limitation of actions that is set down in Article 12, paragraph 1(d) of the Rome I Regulation[39] and Article 15(h) of the Rome II Regulation.[40] In this matter, both Regulations simply reiterate a legal view that has long

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[37] See the comparative Notes for Article 14:201 of the Principles of European Contract Law in: O. LANDO/E. CLIVE/A. PRÜM/R. ZIMMERMANN (eds.), *Principles of European Contract Law – Part III*, The Hague 2003, pp. 164-166.

[38] See Article 10.2 of the UNIDROIT Principles, see UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2010, Rome 2010, p. 346.

[39] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"), OJ 2008 L 177/6.

[40] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), OJ 2007 L 199/40.

prevailed in Europe and one that has – contrary to the earlier Common Law understanding – even been accepted in England since the 1980 adoption of the Rome Convention.

One would thus have to read the ruling's reference to "time-limits for bringing actions for compensation" as a reference to a substantive law notion such as that expressed in the Draft Common Frame of Reference.[41]

B) A CONTRACTUAL OR A NON-CONTRACTUAL ISSUE?

This leads to the next question, that of whether the compensatory claim is to be characterized as contractual or non-contractual in nature. Weighing in on the side of a non-contractual characterization, it must be observed that the legal claim at issue is not one whose original policy basis lies in penalizing a carrier in respect of its behaviour in individual contracts. Rather, the claim seeks to financially de-incentivize the business practice of systematically overbooking flights. Moreover, the claims also work to the detriment of an operating carrier that – typically – has not itself concluded a contract with the passenger but which has merely conducted a flight that the passenger booked with some other firm.

Yet at the same time, the contractual element is firmly in the foreground. The passenger and the airline share a special relationship premised on a contract. This is not necessarily a contract concluded directly between the claimant and the defendant airline, but the airline passenger did acquire his right of carriage through a contract[42] and can exercise his claim only to the extent that this contract was valid. It is regrettable that the Court of Justice did not clarify this characterization issue.

The answer to this question will determine whether, in the future, it is the Rome I or Rome II Regulation that is applicable, assuming that the Court's reference to the "rules of each Member State" was meant to include the private international law of the national court and not merely the substantive law of the *lex fori*, i.e. the rules indicating the period of limitation in the domestic law of the court seized. The latter would amount to a procedural law characterization of the limitation question that – as already mentioned – would not be in conformity with the European Union's private international law of obligations.

If the Spanish court were to view the compensatory claim as a contractual claim stemming from the contract of carriage between *Mr Cuadrench Moré* and *KLM*, then it would have had to determine the applicable law based on the Rome Convention of 1980,[43] the predecessor of the Rome I Regulation which at the relevant time had not yet taken effect. Under the Rome Convention's Article 5, paragraph 4, contracts of carriage are excluded from the special conflict-of-law rules for consumer contracts, such that the applicable law would be determined with reference either to a choice of law under Article 3 or in the absence of such choice, under Article 4, to the law of the party who is to effect the performance characteristic of the contract, here KLM. In the latter case, Dutch law would

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41 Pursuant to Book III.-7:101 the subject of prescription is a right to the performance of an obligation and not to the claim of performance in court, see C. VON BAR/E. Clive/H. SCHULTE-NÖLKE (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*. Outline Edition, Munich 2009, p. 271.

42 See the definition of "operating air carrier" in Article 2(b), Reg 261/2004.

43 Convention on the law applicable to contractual obligations of 19 June 1980, OJ 1980 L 266/1.

be applicable here. It is worth noting, if only in passing, that the determination of foreign law in a relatively low-value dispute – such as the one at hand – often entails an ultimately disproportionate amount of effort. This observation also militates in favour of the ascertainment of a general principle as outlined above.

C) LIMITATION UNDER THE LAW OF THIRD STATES?

The Court of Justice makes reference only to the law of "Member States"; the application of third-state law is apparently not contemplated. This may reflect the fact that the Court of Justice sees itself in a dialogue with the national court seized, which is itself necessarily a component of a Member State's judicial system. If, however, the limitation of actions represents – as considered above – a substantive law question, then it is certainly the case that the relevant conflict-of-law rules might point to the law of a third state as the law governing the contract of carriage.

Many years ago, for instance, the Frankfurt Regional Court was confronted with a compensatory claim by a German passenger against Tunis Air that was based on Council Regulation 295/91, the predecessor of Regulation 261/2004. The airline raised as a defence the short six-month period of limitations which, at that time, was prescribed in German law for all-inclusive travel packages. (The limitation period is now two years, under § 651 g, paragraph 2 BGB.) The court refused to apply this provision to the case, as the claimant had not purchased a package holiday but a single flight, and it had no reason to give further thought to the question of whether the claim was time-barred.[44] The court also did not explicitly address the question of which national law would have been applicable as a complement to the Warsaw Convention. Under Article 5, paragraph 2, sub-paragraph 2(b) Rome I, which would today govern this issue, Tunis Air would be free to choose Tunisian law. This would have the rather curious consequence that the claim's limitation-of-actions issue would be determined under a law which, beyond being distinct from the law governing the claim itself, does not even contemplate claims of the type in question.

Such contradictions could – along with the disproportionate costs of determining foreign law – be avoided if the period of limitations for these compensatory claims were determined by general principles of law rather than provisions of national law.

CONCLUSION

By opting to turn to national law for the filling of gaps in a European Union Regulation, the Court of Justice embraced an approach grounded in traditional jurisprudence. It is, however, an approach which has evolved in the field of public law. In the area of private law, this methodology yields inacceptable results and produces further problems not considered by the Court. In meeting its task of ensuring the uniform application of Union private law, the gaps which emerge in fragmentary legal instruments should, to the greatest extent possible, be filled through the prudent development of general principles of law. In the present case, this would have been eminently possible by reference to the Montreal

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[44] LG Frankfurt am Main 29.4.1998, NJW-RR 1998, 1985, 1590; critical of this approach, A. STAUDINGER/R. SCHMIDT-BENDUN, Neuregelung über Ausgleichs- und Unterstützungsleistungen für Fluggäste, NJW 2004, 1897-1901, 1900.

Convention as well as other legal instruments of the European Union governing passenger transport. This approach in essence comes down to what is laid down in Article 7 paragraph 2 CISG. Where no general principle can be ascertained, recourse to national law is inevitable. But the national law is not necessarily the substantive law of the *lex fori.* It is up to the private international law of the forum to determine the applicable national law.