E. English Summary

I. Introduction

Over the last 30 years, European case law has increasingly addressed questions of *conflit mobile* under the Rome I, II and Brussels Ia Regulations. The term *"conflit mobile"* describes the phenomenon that the applicable law or international jurisdiction changes after its first determination because the facts of the determined case evolve (in German: *"Statutenwechsel"* under the Rome I and II Regulation, and *"Gerichtsstandswechsel"* under the Brussels Ia Regulation). For instance, a *conflit mobile* can arise through the relocation of the parties, which changes their habitual residence, habitual place of work, or domicile; through a contract amendment that changes the contract type or the contractual positions; or through a duplication of tort/delict damages that changes the place where the damage or harmful event occurred. The French term "*conflit mobile*" is more widespread in English than the description "change of the governing/applicable law" (starting on p. 69).

Conflits mobiles have historically been known in international property law for movable objects or in international family law (starting on p. 53). In contrast, they have only been discussed to a limited extent in the law of international contractual and non-contractual obligations in civil and commercial matters under the Rome I, II and Brussels Ia Regulation – including their predecessors. The Court of Justice of the European Union (CJEU) has already issued several decisions related to *conflit mobile* under the Brussels Ia Regulation, although it did not use the term "*conflit mobile*" in this context (starting on p. 53). For example, in *Shearson Lehman Hutton, Henkel, Vorarlberger Gebietskrankenkasse, Schrems,* and *CNP* the CJEU addressed the implications of assignments of claims on the protective jurisdictions (Art. 10–23 Brussels Ia Regulation).[1462] In *CDC Hydrogen Peroxide*

1462 CJEU Judgment of 19.1.1993 – C-89/91 = ECLI:EU:C:1993:15 – *Shearson Lehman Hutton*; Judgment of 12.2.2004 – C-218/01 = ECLI:EU:C:2004:88 (para. 33) – *Henkel*; Judgment of 17.9.2009 – C-347/08 = ECLI:EU:C:2009:561 – *Vorarlberger Gebietskrankenkasse*; Judgment of 25.1.2018 – C-498/16 = ECLI:EU:C:2018:37 (2. judgment) – *Schrems*; Judgment of 20.5.2021 – C-913/19 = ECLI:EU:C:2021:399 (1. judgment) – *CNP*.

and *Ryanair/DelayFix*, the CJEU addressed the effects of assignments of rights on prorogations of jurisdiction (Art. 25 Brussels Ia Regulation).[1463] Recently, however, there has been an increase in decisions that go beyond the assignment of rights. In the *Schrems* case, for instance, the CJEU additionally ruled in an *obiter dictum* on whether the consumer status can still be lost after the conclusion of the contract (Art. 17–19 Brussels Ia Regulation).[1464] *mBank* and *Commerzbank* dealt with the complex situation of a consumer changing residences across borders after a consumer contract is concluded.[1465] Early on, the CJEU had already ruled in *Weber* that the habitual place of work is changeable (Art. 23(1)(b)(i) Brussels Ia Regulation).[1466]

The courts of the Member States have also dealt with questions concerning *conflits mobiles* several times – primarily in relation to the Brussels Ia Regulation, but also in some cases in relation to the Rome I and II Regulations. The German Federal Court of Justice (BGH) has addressed these issues primarily in relation to the assignment of a contractual right under the Rome I Regulation,[1467] the legal consequences of a subsequent choice of law under the Rome Convention,[1468] and the transfer of domicile[1469] or establishment[1470] under the Brussels I Regulation. Furthermore, the BGH and the Austrian Supreme Court of Justice (OGH) have addressed questions regarding extended tortious circumstances involving several successive places of action or success – "continuous torts" – under the Lugano I Convention and the Rome II Regulation.[1471] Additionally, some German Higher Regional Courts (OLG) have already dealt with questions of changeability and

1463 CJEU Judgment of 21.5.2015 – C-352/13 = ECLI:EU:C:2015:335 (3. judgment) – *CDC Hydrogen Peroxide*; Judgment of 18.11.2020 – C-519/19 = ECLI:EU:C:2020:933 – *DelayFix*.

1464 CJEU Judgment of 25.1.2018 – C-498/16 = ECLI:EU:C:2018:37 (1. judgment) – *Schrems*.

1465 CJEU Order, 3.9.2020 – C-98/20 = ECLI:EU:C:2020:672 – *mBank*; Judgment of 30.9.2021 – C-296/20 = ECLI:EU:C:2021:784 (para. 46) – *Commerzbank*.

1466 CJEU Judgment of 7.2.2002 – C-328/00 = ECLI:EU:C:2002:91 (para. 54) – *Weber*.

1467 BGH Judgment of 8.5.2014 – III ZR 371/12 = SchiedsVZ 2014, 151, 153 (para. 23).

1468 BGH Judgment of 22.1.1997 – VIII ZR 339/95 = IPRax 1998, 479, 480 et seq.

1469 BGH Judgment of 1.3.2011 – XI ZR 48/10 = NJW 2011, 2515, 2518 (para. 27).

1470 BGH Judgment of 12.6.2007 – XI ZR 290/06 = NJW-RR 2007, 1570, 1571 et seq. (1. judgment and para. 11–21).

1471 BGH Judgment of 27.5.2008 – VI ZR 69/07 = NJW 2008, 2344, 2344 et seq. (judgment und para. 15–20); OGH Order of 20.9.2011 – 4 Ob 12/11k = GRURInt 2012, 468, 471.

conflit mobile.[1472] Finally, I would like to highlight a decision by the German Regional Court (LG) of Heilbronn. The court addressed the question of whether the applicable law to a consumer contract under the Rome I Regulation changes due to the transfer of a contractual position.[1473]

Against this background, this dissertation attempts to provide a comprehensive analysis of *conflits mobiles* under the Rome I, II and Brussels Ia Regulation.

II. Dogmatic and Terminological Background

1. Rome I and II Regulations

The dissertation begins with a dogmatic and terminological examination of *conflits mobiles* (starting on p. 59 and 420). The provisions that regulate conflicts of laws reveal three different elements that connect the facts to the applicable law ("connecting elements", in German: *"Anknüpfungselemente"*): The connecting category, the connecting factor, and the connecting person (starting on p. 59 and 423). The connecting category defines the facts or legal issues for which the applicable law is to be determined. In German, it is labelled *"Anknüpfungsgegenstand"*, and in French private international law it is labelled *"catégorie de rattachement"*. Alternatively, the connecting category can be described as the scope of application of a conflict of laws provision. It comprises the material, personal, and situational scope of application.

For example, the material scope of Art. 6 Rome I Regulation comprises all contracts except those mentioned in Art. 6(4). Its personal scope requires that the parties to the contract fulfill the status of consumer and professional, and its situational scope requires that the professional pursues or directs commercial or professional activities in the country where the consumer has its habitual residence (starting on p. 61). Against this background, the relationship between the connecting category, person, and factor can be clarified: The example illustrates that personal requirements of the connecting category are defined differently than the connecting

1472 OLG Hamburg Judgment of 14.10.2021 – 6 U 116/20 = RdTW 2023, 65, 66 (para. 39 and 40); OLG München Judgment of 19.6.2012 – 5 U 1150/12 = WM 2012, 1863, 1866 (sect. II.8.b); OLG Frankfurt aM Judgment of 26.11.2008 – 7 U 251/07 = NJW-RR 2009, 645, 647; OLG Hamburg Judgment of 21.12.2007 – 12 U 11/05 = BeckRS 2010, 28849.

1473 LG Heilbronn Judgment of 10.2.2023 – We 6 O 345/21 = BeckRS 2023, 1485.

person. While the status as consumer or professional is part of the connecting category and is defined by the purpose of the contract, the connecting person is defined solely by who is a party of the contract. In other words: The consumer/professional requirement of the rule could change with a different contract purpose, whereas the change of a contract party would require a transfer of the contractual position (starting on p. 67). Additionally, only the consumer's habitual residence should be considered the connecting factor. In contrast, the professional's pursuing/directing of commercial/professional activities is part of the connecting category and not a supplementary connecting factor. Some academics disagree and accept combined connecting factors, specifically in the context of the question "if the product was marketed in that country" pursuant to Art. 5 Rome II Regulation. In my opinion, such elements narrow the scope – the connecting category – rather than establish a connection with the applicable law – the connecting factor (starting on p. 64).

The connecting factor allocates the connecting category to a legal system, the applicable law. In German, it is referred to as *"Anknüpfungsmoment", "Anknüpfungsmerkmal", "Anknüpfungsgrund", "Anknüpfungsbegriff"*, or *"Anknüpfungspunkt"* (starting on p. 62 and 423). In French terminology, it is labelled as *„critère "*, *„élément "*, *„facteur"*, or *„point de rattachement"* (starting on p. 63 and 423). Sometimes, the connecting factor refers to a personal element – the connecting person (in German: *"Anknüpfungsperson"*, starting on p. 66 and 423). Each of the three elements of a conflict of laws provision has a connecting moment (in German: *"Anknüpfungszeitpunkt"*, starting on p. 68). For example: Sales contracts for movable goods that are not consumer contracts (connecting category) are subject to the law of the country in which the seller (connecting person) has its habitual residence (connecting factor) at the time of conclusion of the contract (connecting moment of the connecting factor). In this example, the connecting category, connecting factor, and connecting person are regulated by Art. 4(1)(a) in conjunction with Art. 6(1) Rome I Regulation. The connecting moment of the connecting factor "habitual residence" is established by Art. 19(3) Rome I Regulation (starting on p. 59).

If the connecting moment of the connecting element is fixed – for example at the conclusion of the contract – it is unchangeable (in German: *"unwandelbar"*). Then, no *conflit mobile* can occur. By contrast, if its connecting moment is dynamic, it is changeable (in German: *"wandelbar"*). Consequently, a *conflit mobile* can arise. As a result, under private international law, changeable connecting elements remain alterable for an indefinite period and may cause a *conflit mobile*. However, under procedural law,

they are subject to the usual restrictions: After a certain point in time, the parties can no longer introduce subsequent changes as new submissions in civil proceedings. In the absence of European legal standards, this point in time is determined by autonomous national civil procedural law.

Traditionally, legal analyses have focused on the connecting factors. Consequently, they have not attributed a connecting moment to the connecting categories or persons. In contrast, the Rome I Regulation explicitly includes connecting moments of connecting categories. For instance, the scope of application for formal validity pursuant to Art. 11(2) Rome I Regulation refers to a "contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion". In addition, the category of incapacity pursuant to Art. 13 Rome I Regulation refers to the "incapacity at the time of the conclusion of the contract". The connecting moment of the connecting person usually concurs with the one of the connecting factor because the former is linked with the latter. However, a change in the connecting person can shift the connecting factor and its moment. Therefore, the connecting moments of all connecting elements should be considered separately (starting on p. 78 and 424).

2. Brussels Ia Regulation

Under the Brussels Ia Regulation, the dogmatic structure and terminology of changeability and *conflit mobile* are less prevalent. However, there are indications that it follows this structure. The English version uses the term "connecting factor", the German version utilizes the term "*Anknüpfungskriterium*", and the French version uses "*critère de rattachement*" (Rec. 15 sent. 2 Brussels Ia Regulation). Additionally, the CJEU often uses these terms in its decisions. Lastly, some academics transfer the concepts from domestic private international law and/or the Rome I and II Regulation. Overall, I endorse the view that the terminology and logic of connecting elements, (un-)changeability, and *conflit mobile* should be adopted under the Brussels Ia Regulation (starting on p. 420, 423, and 424). Although the Brussels Ia Regulation differs significantly from the Rome I and II Regulations, the terminology and logic can reflect these differences. Moreover, the Brussels Ia Regulation structures its requirements in a comparable way and at least partly pursues similar interests (starting on p. 429). Therefore, the dogmatic and terminological approach should also apply to it. As with the Rome I and II Regulations, the connecting moments of the connecting elements should be determined by the separate interpretation of

the Brussels Ia Regulation's respective jurisdiction clause. In contrast, they should not be fixed at the time the court was seized pursuant to Art. 32 (lat. *"perpetuatio fori"*, starting on p. 424 and 428).

One final example under the Brussels Ia Regulation: A consumer may bring proceedings against a professional (personal connecting category) either in the courts of the Member State in which that professional is domiciled or, regardless of the domicile of the professional, in the courts for the place where the consumer is domiciled (connecting factors, connecting persons, and personal connecting category). This applies if the contract is not for the sale of goods on instalment credit terms, nor for a loan repayable by instalments or for any other form of credit made to finance the sale of goods (material connecting category). Additionally, the professional must pursue commercial or professional activities in the consumer's Member State of domicile or direct such activities to that Member State (situational connecting category). Art. 17(1)(c) and (3) in conjunction with Art. 18(1) Brussels Ia Regulation rule this. They do not explicitly include the connecting moment, which follows from the interpretation of the rules (starting on p. 427).

III. Rome I Regulation

1. Unchangeable Connecting Elements

The Rome I Regulation includes factually, explicitly, and implicitly unchangeable connecting elements (starting on p. 82, 83, 94, and 300). The country where immovable property is situated, and the country where the auction takes place are factually unchangeable connecting factors (Art. 4(1)(c) and (g) Rome I Regulation, starting on p. 83). The Rome I Regulation includes several explicitly unchangeable connecting elements, such as the connecting factors "habitual residence", "Member State in which the risk is situated", "place of business through which the employee was engaged is situated", "residence", "incapacity", or the connecting categories "residence" and "awareness or negligent unawareness of incapacity" (Art. 4–18, Art. 7(3) subpara. 3, Art. 8(3), Art. 11(1) and (2), Art. 13 Rome I Regulation, starting on p. 93).

The habitual residence is the most widespread unchangeable connecting factor because Art. 19(3) Rome I Regulation rules that it shall be determined at the time of the conclusion of the contract. Most commentators interpret Art. 19(3) in two ways beyond its wording: First, they fix all

connecting elements of the conflict-of-law rules referring to the habitual residence at the time of the conclusion of the contract. Therefore, they consider not only their connecting factors to be unchangeable, but also their connecting categories and persons. Second, most commentators extend the wording of Art. 19(3) as far as they also derive from it an unchangeability of the conflict-of-law rules that are not referring to the habitual residence. As a result, the prevailing view extends the wording of Art. 19(3) in such a way that it disregards any change to the conflict-of-law rules of the Rome I Regulation after the conclusion of the contract. Consequently, they would be generally unchangeable and a *conflit mobile* could not occur (starting on p. 102).

In my view, one should not follow this interpretation. It overextends the wording of Art. 19(3) and renders other rules meaningless insofar as they regulate unchangeable connecting elements – which contradicts EU law's principle of effective legal provisions (in French: *effet utile*, Art. 7(3) subpara. 3, Art. 8(3), Art. 11(1) and (2), Art. 13). Moreover, the Rome I Regulation includes several connecting elements that the prevailing opinion accepts to be changeable: Art. 3(2), Art. 5(1), (2), and Art. 8(2). This speaks against a generalization of Art. 19(3) terminologically and structurally (starting on p. 105 and 120). In addition, academics widely agree that Art. 19(3) aims to prevent unilateral changes because one party defines the habitual residence. Therefore, in any case, the purpose of Art. 19(3) does not justify extending it to bilateral changes (starting on p. 113 and 125).

Other than Art. 19(3), the supporters of such an extension of unchangeability rely on the requirement of highly foreseeable conflict-of-law rules (Rec. 16 sent. 1). While it is correct that this requirement could speak in favor of a fixation of the applicable law, it cannot be reliably determined. Foreseeability is defined by the average parties' expectations. However, without quantitative studies on whether average parties expect a *conflit mobile* or not, one cannot establish this standard. Without such research, it may well be the case that the average parties foresee a shift in the applicable law when a connecting element changes. After all, the EU legislator chose these elements to be an accurate reflection of the closest connection (starting on p. 115 and 125). In any case, one must weigh the requirement of highly foreseeable conflict-of-law rules against the principle of the closest connection, which speaks in favor of a *conflit mobile* because it upholds the closest connection after a change (Rec. 16 sent. 2 and Rec. 21, starting on p. 118 and 125). Lastly, the supporters of the extension of Art. 19(3) argue with the principle of unitary determination of the applicable law that is reflected in Art. 10(1), Art. 12(1), and Art. 18(1) Rome I Regulation. However,

the regulation includes many exceptions of this principle in Art. 1(2), 3(1) sent. 3, Art. 6(2) sent. 2, Art. 8(1) sent. 2, Art. 9, Art. 10(2), Art. 11, Art. 12(2) (starting on p. 105, 107, 108, 114, 121, and 124). In combination with the principle of the closest connection and the commonly accepted changeability of Art. 3(2), Art. 5(1), (2), and Art. 8(2), the unitary determination of the applicable law steps back (starting on p. 118, 120 and 125). Overall, one should not endorse the generalization of Art. 19(3) in favor of regulation-wide unchangeability. Instead, the connecting elements of the Rome I Regulation should be interpreted separately in terms of their changeability (starting on p. 119 and 126).

This interpretation produces several implicitly unchangeable connecting categories, namely the consumer and professional of Art. 6, the professional's pursuing or directing of its commercial or professional activities in the consumer's country of Art. 6, the large insurance risk of Art. 7, and the conclusion of the contract of Art. 4–8 (starting on p. 127, 134, 137, and 138). Against this background, it should be highlighted that the contractual and statutory assignment of a right (in German: *"Zession/Abtretung"* and *"Legalzession"*), or the substitution and addition of a debtor (in German: *"Schuldübertragung"* and *"Schuldbeitritt"*), does not cause a *conflit mobile* because the Rome I Regulation defines neither the creditor status nor the debtor status as a connecting element – but rather the status as a contractual party (starting on p. 139 and 143).

In summary, the connecting elements of the Rome I Regulation are only partly unchangeable (starting on p. 144). However, its connecting factors are often unchangeable because the regulation defines them unilaterally (starting on p. 300)

2. Changeable Connecting Elements

In contrast, its factually, explicitly, or implicitly unchangeable connecting elements, the Rome I Regulation includes explicitly and implicitly changeable connecting elements (starting on p. 145 and 174). Academics and courts unanimously accept that the choice of law and the habitual place of work are explicitly changeable (Art. 3(2) and Art. 8(2) Rome I Regulation). This verifies that the regulation knows and recognizes *conflits mobiles*. In addition, it shows that the Rome I Regulation includes both legal and factual bilateral connecting factors: While a choice of law is defined legally the habitual place of work is defined factually (starting on p. 145 and 155).

In addition, the Rome I Regulation includes many implicitly changeable connecting elements (starting on p. 174 and 292): First, the (manifestly) closer and closest connection of Art. 4(3), (4), Art. 5(3), Art. 7(2) subpara. 2 sent. 2, and Art. 8(4). While the closer connection of Art. 8(4) is unanimously considered to be changeable, the closer and closest connections of the respective connecting factors of the other rules are predominantly seen as unchangeable (starting on p. 174 and 181). The latter discussion traces back to *Giuliano's* and *Lagarde's* report on the Rome Convention. It states: *"In order to determine the country with which the contract is most closely connected, it is also possible to take account of factors which supervened after the conclusion of the contract."*[1474] In my opinion, a holistic interpretation of the Rome I Regulation supports the changeability of all closer and closest connections provided that the change is caused bilaterally, not unilaterally. Therefore, these connecting elements factor in consensual changes of the contractual place of performance, language, or currency, or connected contracts. However, they do not consider unilateral changes of the habitual residence or nationality that cause a common habitual residence, or common nationality. The result is based on the wording of the Rome I Regulation, which does not fix the closer/closest connection at the moment of the conclusion of the contract. In my opinion, Art. 19(3) is not applicable. In addition to the wording, the accepted changeability of Art. 5(1), (2), and Art. 8(4) systematically supports this result. Lastly, the principle of the closest connection speaks in favor of a changeability because it aims to appoint the latest closest connection. The requirement of highly foreseeable conflict-of-law rules does not offset these arguments because – due to the lack of quantitative studies – it cannot be reliably determined whether the parties rather foresee a *conflit mobile* or not (starting on p. 115, 125, and 181).

A second implicitly changeable connecting element is the personal category of employer or employee (Art. 8, starting on p. 188). Courts and academics unanimously define it as the factual – non-contractual – consensus between the parties. If a person performs a service in a dependent capacity, subject to instructions, for a certain period and in return for payment, this person is an employee of the employer receiving the services. Contradictory contractual agreements are irrelevant.

Third, many connecting elements of the Rome I Regulation are implicitly changeable through contract amendments (starting on p. 189). This is unanimously agreed for the connecting factor of Art. 5(1) sent. 2 – the place of delivery (starting on p. 198). It is also recognized for the place of receipt,

1474 *Giuliano/Lagarde,* Official Journal No L 282 of 31.10.1980, 20 (left column, para. 5).

the place of delivery, the place of departure, and the place of destination pursuant to Art. 5(1) sent. 1 and (2) sent. 1 (starting on p. 198 and 203). The latter four elements can be considered as additional connecting factors besides the habitual residence but should be defined as a component of the connecting category. In general, the bilaterally changeable factual habitual place of work of Art. 8(2) and the bilaterally changeable contractual place of delivery of Art. 5(1) together imply that the connecting factors are merely changeable if they are defined consensually. Both a legally consensual (contractual) definition and a factually consensual definition suffice. However, unilaterally defined connecting factors of the Rome I Regulation are not changeable – both factual unilateral elements like the habitual residence and legal unilateral elements like the nationality (starting on p. 203). Consequently, the connecting factors that take into account unilateral and bilateral elements are only changeable in regard of bilateral elements (starting on p. 209). Above all, this applies for the closer and closest connection (Art. 4(3), (4), Art. 5(3), Art. 7(2) subpara. 2 sent. 2, and Art. 8(4), starting on p. 208).

Furthermore, contract amendments can change the connecting person of the Rome I Regulation's conflict-of-law rules (starting on p. 212 and 253). Regularly, the connecting persons are the contract parties. Therefore, in principle, only a transfer of the contractual position can cause a *conflit mobile* (in German: *"Vertragsübernahme"*, starting on p. 237). In contrast, a change of the creditor or debtor regularly does not suffice. There is one exception: Art. 19(2) localizes the habitual residence at the branch, agency, or establishment responsible for the performance. Here, the status as a debtor is decisive. Consequently, a substitution of the debt can cause a *conflit mobile* (starting on p. 232). The interpretation of the Art. 4–8 is not fruitful because they do not explicitly or implicitly address the temporal issue (starting on p. 223). Both the changeability of the contractual position and the establishment responsible for performance are based on the interpretation of Art. 19 Rome I Regulation (starting on p. 229). Art. 19(3) relies on the "conclusion of the contract". This could either mean the original contract or its amendment. The principle of the closest connection speaks in favor of the contract amendment being relevant – and thus favors a changeability. In addition, the detailed differentiations of Art. 19(1) and (2) aim to fulfil the principle of the closest connection. This supports a changeability of the contractual position and the establishment responsible for performance. Moreover, both changes are bilateral, and a holistic interpretation of the Rome I Regulation supports the hypothesis that consensual changes are relevant (Art. 3(2), Art. 5(1), (2) and Art. 8(2)). Finally, a

transfer of a contractual position constitutes a fundamental amendment. Against this background of a bilateral and fundamental change, a potential *conflit mobile* is foreseeable for the parties – even though the requirement of highly foreseeable conflict-of-law rules is in principle not determinable (starting on p. 237)

Overall, a transfer of contract or change of the establishment responsible for performance can shift the habitual place of residence and cause a *conflit mobile* (starting on p. 253). However, under Art. 8 a transfer of the contractual position regularly does not lead to a *conflit mobile* because the transfer does not automatically shift the habitual place of work, which is defined separately, factually, and bilaterally between the parties (starting on p. 237). Besides the effects on the connecting factor, a shift of the connecting person through a transfer of contract can also have implications for the connecting category: If the new contract party fulfils the qualified personal elements of the scope of Art. 5–8 and that is the only outstanding requirement, a qualifying *conflit mobile* from Art. 4 to Art. 5–8 occurs. These personal elements are the status as consumer, professional, employee, or employer, or the pursuing or directing of commercial or professional activities (Art. 6 and 8). Conversely, if the new contract party does not fulfil the qualified element the original contract party fulfilled, a disqualifying *conflit mobile* from Art. 5–8 to Art. 4 occurs (starting on p. 239 and 249). Finally, a transfer of contract constitutes a fundamental contract amendment updating the time of the conclusion of the contract pursuant to Art. 19(3). Therefore, the regulation also considers whether personal elements of the remaining contract party shift between the original conclusion of the contract and its amendment (starting on p. 249 and 303). For example, if the remaining or overtaking party starts to pursue its commercial or professional activities in the Member State of the new consumer after the conclusion of the original contract but before the amendment, Art. 6 is fulfilled. This can happen if two professionals or two consumers want to transfer a contract between them, e.g. as a part of a corporate asset deal transferring consumer contracts or as a part of transferring a consumer account of an online service (starting on p. 249).

Lastly, contract amendments can change the connecting categories of the Rome I Regulation's conflict-of-law rules (starting on p. 259 and 286). This comprises the contractual obligations and corresponding contract types specified in Art. 4–8, such as the sale of goods, provision of services, carriage of goods or passengers, consumer, insurance, or individual employment contracts (Art. 4(1)(a), (b), Art. 5–8, starting on p. 261). In addition, an amendment can change the applicability and the result of Art. 4(2)–

(4), Art. 5(3), Art. 7(2) subpara. 2 sent. 2, and Art. 8(4). If the parties to the contract amend the obligations under the contract, the contract can fulfil the scope of a different conflict-of-law rule. The Rome I Regulation recognizes that change, a *conflit mobile* can occur if the new conflict-of-law rule refers to a different law. For example, if the parties extend a tenancy of immovable property concluded for private use for a period of more than six consecutive months, the originally applicable Art. 4(1)(d) shifts to (c). Now, the law of the country where the property is situated is decisive, not the law of common habitual residence. In my opinion, Art. 4–8 establish a differentiated system of connecting categories based on contract types aiming to best achieve the principle of the closest connection. In addition, the Rome I Regulation regularly explicitly indicates if a connecting element is unchangeable (Art. 7(3) subpara. 3, Art. 11(1), (2), Art. 13, and 19(3)). Therefore, the wording, systematic structure, and purpose of Art. 4–8 speak in favor of considering changes of the contract types after their initial conclusion. Moreover, the changeability of the contract categories is compatible with the requirement of highly foreseeable conflict-of-law rules. On the one hand, the contract types can only be changed consensually. On the other hand, a contract amendment that shifts the contract category between Art. 4–8 is a fundamental change. Against this background – consensual and fundamental change – the contract parties foresee or at least should foresee an implication on the conflict-of-law rules and a potential *conflit mobile*. Consequently, like a transfer of contract, a contract amendment that shifts the connecting category between Art. 4–8 updates the time of the conclusion of the contract pursuant to Art. 19(3) (starting on p. 278 and 303).

A *conflit mobile* does not affect a choice of law, unless the *conflit mobile* is caused by a later choice of law – because a choice of law pursuant to Art. 3 precedes the determination of the applicable law pursuant to Art. 4–8 Rome I Regulation. However, in my opinion, there is one exception: A *conflit mobile* pursuant to Art. 5(2) subpara. 2 and Art. 7(3) subpara. 1 can heal an initially invalid choice of law. In this context and only as an exception, even unilateral changes of the connecting factors should be considered because the choice of law verifies the parties' intention of a valid choice of law (starting on p. 165, 180, 187, 211, 257, and 290).

In summary, the interpretation of the Rome I Regulation reveals numerous changeable connecting elements illustrating the breadth of possible *conflits mobiles*. In particular, contract amendments can cause *conflits mobiles* based on changeable connecting persons and categories (starting on p. 292, 301, and 301).

3. Requirements of Changeability

From a holistic viewpoint, the Rome I Regulation does not take into account unilateral changes of connecting elements – respecting the wording, systematic structure, and purposes of Art. 3(2), Art. 5(1), (2), Art. 7(3) subpara. 3, Art. 8(2), Art. 11(1), (2), Art. 13, and Art. 19(3). Therefore, unilateral changes cannot cause *conflits mobiles* (starting on p. 297). Consequently, only bilateral changes can cause a *conflit mobile*, either based on legal or factual consensus. Naturally, unchangeable connecting elements cannot be altered by either unilateral or bilateral changes and thus cannot lead to a *conflit mobile*. In addition, *conflits mobiles* require the connecting elements of the Rome I Regulation to be factually or legally alterable and not determined at a moment before the change (starting on p. 303).

4. Effects of *Conflits Mobiles*

The dissertation not only analyses the requirements of *conflits mobiles* under the Rome I Regulation but also their effects (starting on p. 147, 160, 187, 210, 255, 289, 304, and 345). Here, neither courts nor academics have written much. It is accepted that subsequent choices of law pursuant to Art. 3(2) Rome I Regulation can have retrospective or prospective effect, depending on the parties' agreement (lat. *"ex tunc"* or *"ex nunc"* effect). The retrospective effect is absolute: It even affects contracts that were validly concluded under the previously applicable law (starting on p. 323). The retrospective effect also applies to acquired rights. Most commentators even consider a subsequent choice of law to have retrospective effect if the parties' intentions are unclear in this regard. In my opinion, however, this prevailing opinion should not be followed. The implications of a retrospective effect are too severe to be applied without the parties' clear agreement. While a retrospective effect of *conflits mobiles* may comply with the principle of unitary determination of the applicable law, the requirement of highly foreseeable conflict-of-law rules should be kept in mind. Even though I consider this requirement to be principally undeterminable due to the lack of quantitative studies of the parties' expectations (starting on p. 115, 125, and 181), the severe implications of a retrospective effect justify an exception – in the absence of a clear intention (starting on p. 326 and 345).

In addition to Art. 3(2), effects of *conflits mobiles* are discussed under Art. 8(2) Rome I Regulation. Here, the prospective effect of *conflits mobiles*

is commonly recognized (starting on p. 318, 322, 324, and 331). However, the details of the prospective effect are not clarified. It seems to be widely accepted that a *conflit mobile* with prospective effect divides the legal assessment of a case into two segments (starting on p. 318 and 322). The first segment is governed by the previously applicable law and the second segment by the subsequently applicable law. While this basic principle seems evident and logical, many overlapping questions remain unanswered and/or unclear. For instance, which law governs the validity and obligations of a contract that continues through several segments? Similarly, which law governs a termination right that arises in an earlier segment but is exercised during a later segment?

In my opinion, the validity of a contract is in principle governed by the applicable law at the time of its conclusion (starting on p. 323, 330, and 346). Two exceptions should be made: First, if a contract amendment shifts the contract type pursuant to Art. 4–8 Rome I Regulation because it changes the character of the contract – in contrast, a transfer of contract is not sufficient for an exception because it does not change the substantive contents of the contract (starting on p. 327). Second, a subsequently applicable law should govern if it heals a previously invalid contract (starting on p. 329).

Contractual obligations are principally governed by the applicable law at the time of their formation (starting on p. 331, 339, and 347). The initial obligations arising at the end of the contract are governed by the applicable law at that time. Obligations arising during a later segment are governed by the applicable law at the time they arise. Consequently, the governing law of subsequent obligations can differ from the law that governs the validity of the contract. Every obligation is determined separately. The time of the performance is not decisive. Once an obligation is formed, it survives *conflits mobiles* and will be governed by the law of its formation. One exception is appropriate: Secondary obligations like damages for non-performance or delay are governed by the law of the primary obligation they refer to because they are inherently connected – consequently, the principles of the closest connection and of the unitary determination demand this result (starting on p. 338). For the same reasons, objections, or counter-rights against obligations or contracts like fulfillment, time-barring, or termination, follow the law governing the obligation or contract they refer to (starting on p. 340, 343, and 347).

5. Proposal for Future Amendment of the Rome I Regulation

Based on the above results, I propose the following amendment to the Rome I Regulation (starting on p. 347):

Article 19a Rome I Regulation
Conflits Mobiles

(1) [1]A change to an element of a conflict-of-law rule in this Regulation after the formation of a contract shall result in a different law being applicable to this contract than the law that was previously applicable ("*conflit mobile*") if the change is mutual, if the element is alterable, and if no earlier point in time, in particular the conclusion of the contract, is decisive for determining the element. [2]Otherwise, a *conflit mobile* shall only occur if the change results in a different type of contract of this Regulation becoming relevant or if the contracting parties change, in which case the date of the change becomes decisive.

(2) [1]A *conflit mobile* shall only result in an earlier choice of law becoming valid, unless a subsequent choice of law leads to the *conflit mobile*. [2]Unilateral changes can result in a choice of law becoming valid.

(3) [1]The law applicable to the formation of a contract shall be the law that was applicable at the time when it first became valid. [2]The law applicable to an obligation arising from such a contract shall be the law that was applicable at the time when the obligation formed. [3]Obligations relating to the consequences of the complete or partial non-performance of another obligation, to the consequences of defenses, or to the consequences of objections shall be governed by the law that was applicable at the time when the other or the affected obligation formed. [4]A *conflit mobile* shall only alter the applicable law of previously formed contracts, obligations, defenses, and objections if a corresponding choice of law is made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

IV. Rome II Regulation

1. Unchangeable Connecting Elements

The Rome II Regulation includes explicitly and implicitly unchangeable and changeable connecting elements (starting on p. 351 and 411). Overall, it contains fewer changeable elements than the Rome I Regulation (starting

on p. 412). Firstly, the Rome II Regulation regularly explicitly established its connecting moments (starting on p. 411). Most commonly, it defines "the time when the damage occurs" as the connecting moment, either explicitly or by referring to "country in which the damage occurs" as the connecting factor (Art. 4(1), (2), Art. 5(1) subpara. 1 (a), (c), Art. 6(2), Art. 7 alt. 1, Art. 12(2)(a) Rome II Regulation). Courts and academics agree that the damage occurs in the country or at the time of the direct or primary damage. Indirect or secondary damages are irrelevant (Art. 4(1) and Art. 12(2)(a): "irrespective of the country or countries in which the indirect consequences of that event occur", from p. 351 and 359). Similarly, the connecting factor "country in which the unjust enrichment took place" sets the connecting moment at the time of the unjust enrichment (Art. 10(3), starting on p. 356). Additionally, several conflict-of-law rules refer to the country from which the damage, infringement, unjust enrichment, or *negotiorum gestio* originated (Art. 7 alt. 2, Art. 8(2), Art. 10(2), Art. 11(2) and (3), and Art. 12(2)(b) Rome II Regulation). These rules are unchangeable because they only refer to the primary act that causes the tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*, not secondary acts that indirectly influence them (starting on p. 357).

In addition to the explicitly unchangeable connecting factors, the connecting persons, and connecting categories of Art. 4–12 Rome II Regulation are implicitly unchangeable because they are automatically determined by the factual circumstances of the torts/delicts, unjust enrichment, *negotiorum gestio*, and *culpa in contrahendo* (starting on p. 361, 362, and 412). A change of right or debt does not alter the connecting persons because they are not defined by who holds the claim or debt, but rather by who sustained the damage or unjust enrichment, and who is the person claimed to be liable or enriched (Art. 4(2), Art. 5(1) subpara. 1(a), subpara. 2, Art. 10–12 Rome II Regulation, starting on p. 365). Lastly, an interpretation of Art. 5(1) subpara. 1 (b) shows that the "country in which the product was acquired" is unchangeable. Its wording, structure, and purpose imply that it is also the connecting moment – instead of the time when the damage occurred pursuant to Art. 5(1) subpara. 1 (a) and (c) (starting on p. 360).

2. Changeable Connecting Elements

In contrast, the Rome II Regulation includes only a few changeable connecting elements. First, a choice of law can change the originally applicable law pursuant to Art. 4–12 and is itself subsequently changeable (Art. 14

Rome II Regulation in conjunction with Art. 3(2) Rome I Regulation, starting on p. 366). Second, the conflict-of-law rules of the Rome II Regulation are changeable to the extent that they refer to the Rome I Regulation (Art. 4(3)2, Art. 5(2)2, Art. 6(2), Art. 10(1), Art. 11(1), and Art. 12(1) Rome II Regulation, starting on p. 367). Third, the connecting factor of "manifestly closer connection" is changeable. Unlike many other connecting factors, it is not explicitly set at a certain moment in time. Moreover, its wording is comparably extensive, referring to "all the circumstances of the case" (Art. 4(3), Art. 5(2), Art. 6(2), Art. 10(4), Art. 11(4), and Art. 12(2)(c) Rome II Regulation, starting on p. 368).

The Rome II Regulation demonstrates a special cause of changeability: Successive duplication of connecting factors (starting on p. 370). One action causing a tort/delict can lead to several subsequent damages. For example, prolonged contact with a harmful product such as medication or chemicals can cause damage in each country of contact. However, these cases should be rare due to the extensive definition of irrelevant "indirect consequences" of the event giving rise to the damage pursuant to Art. 4(1) and Art. 12(2)(a) Rome II Regulation. A mere deterioration of damage from one country to another does not suffice. However, such cases are possible if the harmed person is periodically cured but later harmed again by the same medication or chemical stemming from the same event – such as the same prescription of harmful medication or the same work assignment that exposes the person to the chemical. Another example would be environmental damage that spreads successively to different countries, such as river pollution. Moreover, computer hacking provides plausible cases: A perpetrator can infiltrate a company's network via the internet with malware or automated hacking. If the perpetrator attacks only one end device and the malware spreads automatically throughout the company network, then the primary damage occurs solely at the location of the end device. If, on the other hand, the perpetrator attacks several end devices belonging to the same company in different countries successively, then there are multiple primary damages. Overall, some sources support a *conflit mobile* in such "continuing torts/delicts" (starting on p. 370). This is convincing because it corresponds to the structure of the Rome II Regulation's conflict-of-law rules on torts/delicts: One primary damage in one country leads to one applicable law. Consequently, several primary damages in several countries lead to several applicable laws – each segment of the tort/delict having its applicable law (starting on p. 377, 394, 398, and 406). Some sources refer to this as a "temporal mosaic solution", similar to the territorial mosaic solution for torts/delicts that simultaneously cause damages in several

countries (starting on p. 370). In fact, temporal and territorial mosaics regularly coincide because each mosaic solution requires damages in multiple countries and territorial mosaics frequently arise successively, rather than simultaneously (starting on p. 380 and 393). Unlike the Rome I Regulation, the Rome II Regulation acknowledges unilateral changes in connecting factors because it primarily includes unilateral connecting elements, and lacks a provision like Art. 19(3) Rome I Regulation (starting on p. 362 and 408).

In my opinion, the temporal mosaic solution should extend beyond the damage of torts and delicts. Generally, if one tort/delict, one unjust enrichment, one *negotiorum gestio*, or one *culpa in contrahendo* includes several acts or several outcomes that constitute a connecting factor, each should define a segment of a non-contractual legal relationship. As a prerequisite, one act or one outcome must merge the multiple opposing outcomes or acts into one non-contractual legal relationship. Otherwise, several non-contractual legal relationships of tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo* will exist. The act or outcome must be the connecting factor of the conflict-of-law rule. In this context, "outcome" is either the primary damage of a tort/delict, a *negotiorum gestio*, or a *culpa in contrahendo* (Art. 4–9, Art. 11, Art. 12 Rome II Regulation, starting on p. 394, 398, and 406). Alternatively, the outcome can be an unjust enrichment (Art. 10 Rome II Regulation, starting on p. 398 and 406). "Act" paraphrases "the event giving rise to the damage", „the act of infringement", "the act performed without due authority in connection with the affairs of another person", or "the event giving rise to the liability" (Art. 7 alt. 2, Art. 8(2), Art. 11(2), (3), Art. 12(2)(b), Art. 13, Art. 17 Rome II Regulation, starting on p. 399 and 406). Some academics and court decisions support this generalization (starting on p. 385, 388, 390, and 391).

3. Requirements of Changeability

According to the results of the previous two chapters, the conflict-of-law rules of the Rome II Regulation can be the source of *conflits mobiles* if their connecting elements are defined factually or legally alterable and are not determined at a moment prior to the change (starting on p. 411). Unlike the Rome I Regulation, unilateral changes are considered, as well as mutual changes (starting on p. 297, 362, and 408).

4. Effects of *Conflits Mobiles*

In principle, *conflits mobiles* have prospective effect under the Rome II Regulation (*ex nunc*). They split the legal assessment of a case into two or more segments. This is labelled temporal mosaic solution by some academics. Retrospective effect is the exception and reserved for an explicit or reasonably certain choice of law. These results correlate with the effects of *conflits mobiles* under the Rome I Regulation. The implications of the prospective effect are also similar to the Rome I Regulation with one exception: A tort/delict, an unjust enrichment, a *negotiorum gestio*, or a *culpa in contrahendo* is either formed or not and cannot be healed through a *conflit mobile*. The applicable law of their obligations is set separately at the time of the obligations' formation – like under the Rome I Regulation. Specifically, in continuing legal relationships, obligations can form after the formation of the tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*. Secondary obligations, defenses, or objections follow the applicable law of the primary or affected obligations (starting on p. 409 and 414).

5. Proposal for Future Amendment of the Rome II Regulation

Based on the above results, I propose the following amendment to the Rome II Regulation (starting on p. 414):

Article 23a Rome II Regulation
Conflits Mobiles

(1) [1]A change to an element of a conflict-of-law rule in this Regulation after the formation of a tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo* shall result in a different law being applicable to this legal relationship than the law that was previously applicable ("*conflit mobile*") if the element is alterable and if no earlier point in time, in particular the occurrence of the damage, is decisive for the determination of the element. [2]In particular, a *conflit mobile* may occur if one tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo* involves several acts or outcomes.

(2) A *conflit mobile* shall only result in an earlier choice of law becoming valid, unless a later choice of law leads to the *conflit mobile*.

(3) [1]The law applicable to the formation of a tort/delict, an unjust enrichment, a *negotiorum gestio*, or a *culpa in contrahendo* shall be the law that

was in force at the time when it formed. [2]The law applicable to an obligation arising from such a legal relationship shall be the law that was applicable at the time when the obligation formed. [3]Obligations relating to the consequences of the complete or partial non-performance of another obligation, or to the consequences of defenses, or to the consequences of objections shall be governed by the law that was applicable at the time when the other or the affected obligation formed. [4]A *conflit mobile* shall only alter the applicable law of previously formed contracts, obligations, defenses, and objections if a corresponding choice of law is expressed or demonstrated with reasonable certainty by the circumstances of the case.

V. Brussels Ia Regulation

1. Unchangeable Connecting Elements

The Brussels Ia Regulation includes factually, explicitly, and implicitly unchangeable connecting elements. The only factually unchangeable connecting element is the connecting factor "place in which the immovable property is situated" (Art. 8(4) and Art. 24(1) Brussels Ia Regulation, starting on p. 436). In addition, the regulation shows a few explicitly unchangeable connecting elements (starting on p. 438). First, the connecting factor "place where the cultural object is situated" is explicitly fixed "at the time when the court is seized" (Art. 7(4), starting on p. 436). Second, according to the prevailing opinion the connecting factor "place where the business which engaged the employee is or was situated" is explicitly fixed at the time of the engagement, which is the time of the conclusion of the contract (Art. 21(1)(b)(ii), starting on p. 437). Third, the regulation includes an explicitly unchangeable connecting person: The person sued – at the time when the court is seized (Art. 4(1) in conjunction with Art. 32, starting on p. 438).

The interpretation of the Brussels Ia Regulation's jurisdiction rules reveals several implicitly unchangeable connecting elements (starting on p. 521): First, the "the place where the harmful event occurred or may occur" is regularly fixed at the time when the harmful event occurred or may occur (Art. 7(2), starting on p. 439). However, all primary damages must be considered if continuous torts, delicts, or quasi-delicts result in multiple damages. Then, each primary damage establishes jurisdiction for the facts that led to the damage, provided that they occurred in different Member States (starting on p. 441). This temporal mosaic solution is similar to the result under the Rome II Regulation (starting on p. 394 and 406). Yet,

under the Brussels Ia Regulation the temporal mosaic solution is not solely based on an harmonious interpretation with the Rome II Regulation. Such an interpretation usually fails due to the different structures and purposes of both regulations (starting on p. 433), but it works in this instance. On the one hand, the prevailing opinions answer many questions under the Rome II and Art. 7(2) Brussels Ia Regulation parallelly and more voices than usual demand a harmonic interpretation. On the other hand, I believe that the same or at least very similar considerations are decisive under both regulations – consideration of each place of success, foreseeability, and the principle of the closest or close connection (starting on p. 394, 404, 439, 719, and 720). Furthermore, the wording and structure of Art. 7(2) Brussels Ia Regulation independently speak in favor of respecting every place of primary damage. Lastly, the foreseeability requirement in Rec. 15 and 16 Brussels Ia Regulation supports this interpretation because every place of primary damage establishes "a close connection between the court and the action" (starting on p. 439).

In contrast to the Rome II Regulation, Art. 7(2) Brussels Ia Regulation justifies a centralized jurisdiction for all primary damages in all Member States at the place of the main place of success, the most severe primary damage. This illustrates the remaining differences between the two regulations: Art. 7(2) Brussels Ia Regulation does not aim to establish the closest connection, but rather a close connection while balancing the purpose of granting comprehensive jurisdiction to the harmed person.

The connecting category "tort, delict or quasi-delict" pursuant to Art. 7(2) Brussels Ia Regulation is unchangeable – also like Art. 4–9 Rome II Regulation. Once fulfilled, the tort, delict or quasi-delict cannot change, its existence is fixed at the time of the damage (starting on p. 442). Furthermore, the connecting category "conclusion of a contract" pursuant Art. 7(1), Art. 8(3), Art. 10–23, Art. 24(1) Brussels Ia Regulation is unchangeable. Once a contract is concluded, it is perpetuated under the regulation, even if it is subsequently considered invalid with retrospective effect (starting on p. 443).

The pursuing or directing of commercial or professional activities pursuant to Art. 17(1)(c) the Brussels Ia Regulation is principally unchangeable (starting on p. 471). This is due to two factors. First, the professional may not unilaterally thwart the application of Art. 17–19. Second, it must be able to reliably foresee its jurisdiction (starting on p. 446). An exception to this principle is only applicable if the conditions outlined in Art. 17(1)(c) were met at the time the contract was concluded, and a subsequent shift in the focus of the business coincides with a new or additional place of domicile

of the consumer. In my opinion, the restrictive function of the requirement was realized at the time of the conclusion of the contract and in relation to the original place of residence. Furthermore, the professional is only allowed to jointly controlling the places of jurisdiction of Art. 17–19 for both existing and prospective contracts because the pursuing or directing of commercial or professional activities is a general element detached from an individual contract (starting on p. 471). In contrast, the Rome I Regulation does not consider unilateral changes, hence the pursuit or direction of commercial or professional activities is completely unchangeable (starting on p. 134).

The implications of an assignment of a right or a substitution/addition of a debtor are manifold under the Brussels Ia Regulation – in contrast to the Rome I and II Regulations where they cannot cause a *conflit mobile* (starting on p. 139, 143, 365, and 471). Under the general jurisdiction of Art. 4(1) and the jurisdiction for torts of Art. 7(2) Brussels Ia Regulation, such a change does not cause a *conflit mobile* because it does not change the connecting factors of the place of damage and the defendant's domicile (starting on p. 472 and 479).

Under the contractual jurisdiction of Art. 7(1), an assignment of right can only cause a *conflit mobile* if the place of performance is defined by the *lex causae* pursuant to Art. 7(1)(c) and (a). In this context, the laws of most Member States define the place of performance for the payment obligation at the domicile of the creditor. Therefore, an assignment of right can shift the place of performance (starting on p. 474). In contrast, Art. 7(1)(b) defines the place of performance for contracts on the sale of goods or the provision of services based on the contractual agreement, not the holder of the claim or debt. Consequently, under this alternative, an assignment of right cannot cause a *conflit mobile* (starting on p. 473). However, a substitution of the debtor can cause a *conflit mobile* under Art. 7(1)(b) if it requires consensus and thus amends the contractual place of performance, which usually is the case (starting on p. 476). Similarly, a substitution of the debtor can shift the place of performance under Art. 7(1)(c) and (a) for non-payment obligations (starting on p. 477). In contrast, an addition of a debtor does not shift the contractual place of performance and is not necessarily consensual (starting on p. 476 and 477).

Under the protective jurisdictions of Art. 10–23 Brussels Ia Regulation, a change of right or debt may lead to *conflits mobiles* in some cases (starting on p. 482 and 503). In relation to the old creditor, old debtor, or remaining debtor, the original protective jurisdictions remain in place because these parties continue to fulfill the contractual party and contract type require-

ments (starting on p. 482, 489, and 499). In relation to the new creditor, new debtor, or joining debtor, the protective jurisdictions are generally not relevant if the structurally weaker party carries out the change of right or debt (starting on p. 482, 486, 493, 496, and 499). However, an exception must be made for changes of debt by the employee. In this case, Art. 20–23 Brussels Ia Regulation apply in favor of the substituting or joining employee because it assumes the characteristic contractual performance and should therefore be protected. In addition, s *conflit mobile* is foreseeable for the employer because it must agree to a transfer of debt and the employment of the substituting or joining employee is only possible with their consensus (starting on p. 500). If the change of right or debt is exercised by the structurally stronger party, the protective jurisdictions are to be applied to the new creditor, new debtor, or joining debtor. This is required by the protection of the weaker party and foreseeability (starting on p. 487, 497, and 502).

The counter-claim jurisdictions of Art. 8(3), Art. 14(2), Art. 18(3), Art. 22(2) Brussels Ia Regulation are changeable through a change of right or debt, if they establish, shift, or remove the connexity ("same contract or facts"). In addition, the old and new creditor or debtor must have a close connection (starting on p. 480).

The concurrence between a change of right or debt and a jurisdiction agreement does not normally lead to a *conflit mobile* because third-party effects must be taken into account not only pursuant to the Brussels Ia Regulation but also pursuant to the *lex causae*. If, in rather exceptional cases, both do not declare a third-party effect, a *conflit mobile* to the detriment of the jurisdiction agreement occurs (starting on p. 517).

2. Changeable Connecting Elements

The Brussels Ia Regulation does not include an explicitly changeable connecting element. However, this does not suggest that the entire regulation is unchangeable (starting on p. 521 and 525). Instead, an interpretation of the regulation's jurisdiction rules reveals that many connecting elements are changeable (starting on p. 521, 616, and 649). Above all, this holds true for the regulation's most prominent connecting factor – the domicile. It is generally accepted to be changeable under the general jurisdiction of Art. 4(1) until the court is seized pursuant to Art. 32 Brussels Ia Regulation (starting on p. 521, 533, and 569). This view should be endorsed because of the purpose of Art. 4(1) to privilege the defendant with a physically, cultur-

ally, and linguistically close jurisdiction in the sense of Rec. 16 sent. 1. Fixing the jurisdiction at a former domicile would contradict this purpose – even for facts that occurred while the defendant was domiciled in a different Member State. Moreover, Rec. 15 sent. 1 shows that the defendant's domicile is generally considered predictable. In my opinion, the predictability of the Brussels Ia Regulation initially shares the same issue as the foreseeability of the Rome I Regulation: The standard cannot be established without quantitative studies on whether average parties expect a *conflit mobile* or not. However, Rec. 15 provides clear indications on the definition of predictability, rendering it determinable in significantly more cases than the foreseeability of the Rome I and II Regulations. Another argument for the domicile's changeability until the time the court is seized pursuant to Art. 32 Brussels Ia Regulation is that the regulation rarely explicitly fixes connecting elements before that time – only in Art. 21(1)(b)(ii) Brussels Ia Regulation (starting on p. 437).

The changeability of the domicile illustrates that the Brussels Ia Regulation respects unilateral changes of jurisdiction – in contrast to the Rome I Regulation and in line with the Rome II Regulation (starting on p. 525, 569, 577, 583, 605 and 616). The domicile's changeability can be transferred from Art. 4(1) to Art. 8(1), Art. 18(2) and Art. 22(1) Brussels Ia Regulation because the teleological aspects are the same: Predictability and close connection in favor of the defendant in the sense of Rec. 15 sent. 1 and 16 sent. 1 (starting on p. 534 and 568).

The jurisdictions at the claimant's domicile do not share these teleological aspects (Art. 11(1)(b) and Art. 18(1) alt. 2). In fact, they regulate a diametrically different solution. Still, in principle, their domicile is equally changeable because the protection of the structurally weaker party – policyholder, insured, beneficiary, and consumer – demands so. However, the changeability of the connecting factor "domicile" can be overridden by elements of the connecting category. This holds true for the pursuing or directing of commercial or professional activities pursuant to Art. 17(1)(c), which is the situational element of the connecting category of Art. 17–19. In my opinion, however, this requirement only further restricts the jurisdiction at the consumer's domicile (Art. 18(1) alt. 2). It is necessary that the professional pursued or directed its commercial or professional activities not only in/to the consumer's original habitual residence at the time of conclusion of the contract, but also in/to the new habitual residence at the time the court is seized. The new domicile must coincide with the professional's activities at one point in time between the conclusion of the contract and the bringing of the action before the court (starting on p. 564 and 566).

If this requirement is not met, the consumer's claimant jurisdiction at its original domicile remains open pursuant to Art. 18(1) alt. 2 (starting on p. 564). In contrast, the consumer's domicile of its defendant jurisdiction pursuant to Art. 18(2) is changeable without additional alignment of the professional (starting on p. 555). If the professional does not align its activities with the consumer's domicile at the time of conclusion of the contract, Art. 18 and 19 are not relevant at all (starting on p. 565). The professional's domicile pursuant to Art. 18(1) alt. 1 is also changeable without further restriction besides the initial pursuing/directing at the conclusion of the contract (starting on p. 567). In the case of contracts for the sale of goods on instalment credit terms, for a loan repayable by instalments or for any other form of credit made to finance the sale of goods, both the consumer's and the professional's domicile are always changeable (starting on p. 567).

The connecting factor and the connecting category "establishment" are unilaterally changeable under the Brussels Ia Regulation (Art. 7(5), Art. 10, Art. 11(2), Art. 17(1), (2), Art. 20(1), (2)). They fulfil the requirement of a close connection in the sense of Rec. 16 sent. 1 and 2. Therefore, they consider changes of the connecting factor and category "establishment" (starting on p. 569 and 575). However, it should be noted that the objective appearance of an establishment suffices under Art. 11(2), Art. 17(2), and Art. 20(2) (starting on p. 575).

The connecting factor "place of performance" in Art. 7(1) Brussels Ia Regulation is largely changeable. It can be changed by mutual agreement, whereby the factual bilateral place of performance takes precedence over the contractual place of performance (starting on p. 578). The place of performance is even partially unilaterally changeable, provided that the *lex causae* applicable under Art. 7(1)(c) and (a) takes into account unilateral changes of residence. This is proposed in particular by Art. III. 2:101 DCFR (starting on p. 583). Assignments of a right or substitutions/additions of a debtor must also be considered in this respect (starting on p. 474 and 477). However, within the framework of the autonomous places of performance under Art. 7(1)(b), unilateral changes are excluded and only mutual changes are relevant (starting on p. 581 and 584).

Art. 21(1)(b)(i) Brussels Ia Regulation contains another implicitly changeable connecting factor – the habitual place of work (starting on p. 585). It is defined factually and mutually. Contractual agreements solely provide indications (starting on p. 588). Temporary changes of the place of work are irrelevant. The changeability is justified by the wording of Art. 21(1)(b)(i), *a fortiori* by the circumstance that the regulation even considers unilateral changes, by its purpose of protecting the employee, and

the general requirement of a close connection. A change in the habitual place of work is also predictable for the parties because it requires mutual agreement and individual employment contracts are particularly influenced by their current socio-cultural environment (starting on p. 587).

The Brussels Ia Regulation includes several changeable connecting categories besides the operation of an establishment of Art. 7(5), 10, 11(2), 17(1), (2), 20(1), and (2) (starting on p. 589 and 616). On the one hand, factual or contractual changes can establish, shift, or remove the connexity of a counter-claim in the sense of Art. 8(3), 14(2), 18(3), and 22(2) ("same contract or facts"). The jurisdictions for counter-claims aim to represent connected claims. This purpose is not limited to a certain moment but considers changes (starting on p. 589). On the other hand, some personal components of the connecting categories of the protective jurisdictions pursuant to Art. 10–23 are changeable. The statuses as employer and employee of Art. 20–23 are completely changeable because they depend on a factual agreement between both parties (starting on p. 615). In contrast, the potential consumer and professional of Art. 17–19 unilaterally determine their status by purpose of the contract conclusion. Therefore, changes after the conclusion of the contract should only be recognized if they do not undermine the protective purpose of Art. 17–19. Consequently, the consumer can subsequently abandon its status while the professional cannot unilaterally influence the application of Art. 17–19 (starting on p. 592 and 610). Lastly, the status as insurer and policyholder is not changeable in an isolated way because it solely rests on the existence of an insurance obligation (starting on p. 591).

Finally, contract amendments can change many connecting elements of the Brussels Ia Regulation (starting on p. 617 and 649). They can cause a *conflit mobile* by establishing, shifting, or removing a place of performance or a jurisdiction agreement because these elements are defined mutually and legally (Art. 7(1) and Art. 25, starting on p. 617 and 618).

The connecting persons of the protective jurisdictions are largely open to contract transfers because they regularly refer to the contract holders (Art. 10–23, starting on p. 623 and 633). In insurance matters, the insured and the beneficiary are even transferable based on a simple contract amendment (Art. 11(1)(b), Art. 13, Art. 14(1), and Art. 15(2)). The injured party in insurance matters cannot be changed by contract amendment because the Brussels Ia Regulation defines them factually (Art. 13(1) and (2), starting on p. 624, 626, and 633). Only a few protective jurisdictions do not feature a connecting person and are therefore unaffected by contract transfers (Art. 12 and Art. 21(1)(b)(ii), starting on p. 625). The connecting

person is linked to the connecting factor. After a change in the connecting person, the connecting factor of the new connecting person must therefore generally be considered (starting on p. 626). However, this only applies to unilateral connecting factors such as domicile. Conversely, mutually agreed connecting factors such as the habitual place of work are not shifted simply by a change in the connecting person. They require a separate agreement (previously from p. 625).

The change of the connecting person updates the connecting moment of the conclusion of the contract and thus the personal components of the connecting category (starting on p. 629). These are the consumer, professional, employee, and employer status, and the professional's pursuing/directing of its commercial/professional activities. If the contract transfer shifts, fulfills, or eliminates these criteria, then this shifts, opens, or closes the places of jurisdiction under Art. 17–23 (starting on p. 626 and 628). In contrast, a contract transfer can only shift the places of jurisdiction under Art. 10–16, since the status of policyholder and insurer are defined purely in terms of an insurance obligation (starting on p. 626 and 628).

Contract amendments can also change the connecting categories of the Brussels Ia Regulation (starting on p. 634 and 648). This applies to the types of obligations and contracts referred to in Art. 7(1), 10–23, and 24(1). In this respect, the EU legislator has made the connecting categories of the Brussels Ia Regulation obligation-related, contractual and therefore subject to contract amendments. Nonetheless, the subsequent termination of the contract is irrelevant (starting on p. 639). Furthermore, the connexity between the claim and the counterclaim can be changed because of a contract amendment. For instance, it can amend a framework agreement in such a way that two previously independent contracts now show connexity. The reverse scenario is also plausible – the connexity between the individual contracts ceases to exist because of the amendment to the framework agreement (starting on p. 638). Furthermore, a jurisdiction agreement can be changed by a subsequent amendment to the contract (starting on p. 635).

In contrast, the connecting categories in the Brussels Ia Regulation also contain some components that cannot be changed by an amendment to the contract. These are primarily the status of insurer, policyholder, consumer, professional, employee, and employer. They are personal and defined in factual terms. This means that they must be assessed objectively and are not subject to subjective contractual agreements. The same applies to the pursuing/directing of commercial/professional activities in consumer matters. An exception is the status of the insured and the beneficiary in insurance matters. These can be changed by contract amendment (starting on p. 644).

A shift in the contract types of Art. 7(1), 10–23, and 24(1) Brussels Ia Regulation updates the connecting moment "conclusion of the contract". As a result, changes to unchangeable connecting elements between the original conclusion of the contract and the contract amendment must be considered (starting on p. 646).

3. Requirements of Changeability

The analysis of the Brussels Ia Regulation delivers two abstract requirements for a jurisdiction rule to be changeable and a *conflit mobile* to be possible (starting on p. 436, 438, 521, 616 and 649). First, the connecting element must be defined as factually or legally alterable. Second, the connecting element must not be fixed to a point in time prior to the change. In this context, the Brussels I Regulation generally considers unilateral changes (starting on p. 525, 569, 577, 583, 605 and 616). The requirements of changeability under the Brussels I Regulation thus correspond to those under the Rome II Regulation (starting on p. 411). Unlike the Rome I Regulation, the Rome II Regulation also takes unilateral changes into account. However, its connecting factors are mostly fixed in time (starting on p. 297, 362, and 408).

4. Effects of *Conflits Mobiles*

A *conflit mobile* has prospective effect under the Brussels Ia Regulation (*ex nunc*). This means that the competent court changes for the future from the moment of the change. In addition, the old court generally loses its jurisdiction, and the new court has jurisdiction without any restrictions. A *conflit mobile* therefore does not segment the facts of the case in terms of jurisdiction (starting on p. 651). The legal effects of a *conflit mobile* under the Brussels Ia Regulation thus differ from those under the Rome I and II Regulations. In my opinion, they also have prospective effect. However, they regularly segment the facts of the case in terms of conflict of laws (starting on p. 345 and 409). Under the Rome II and Brussels Ia Regulation, the jurisdiction of the new court is limited only in the case of continuing torts/delicts (starting on p. 409 and 651).

5. Proposal for Future Amendment of the Brussels Ia Regulation

Based on the above results, I propose the following amendment to the Brussels Ia Regulation (starting on p. 661):

Article 6a Brussels Ia Regulation
Conflits Mobiles

(1) [1]A change to an element of a jurisdiction rule in this Regulation shall result in a different or additional court becoming competent than the court that was previously competent ("*conflit mobile*") if the element is alterable and if no earlier point in time, in particular the conclusion of the contract or the occurrence of the damage, is decisive in determining the element. [2]Otherwise, a *conflit mobile* shall only occur if the change results in a different type of contract under this Regulation becoming relevant or if the contracting parties change, in which case the date of the change shall be decisive. [3]After a court has been seized, as defined in Article 32 of this Regulation, a *conflit mobile* shall only be considered if the court seized thereby becomes competent.

(2) [1]A *conflit mobile* shall only result in a previous jurisdiction agreement becoming valid, unless a subsequent agreement on jurisdiction leads to the *conflit mobile*. [2]The assignment of a right, or the substitution or addition of a debtor shall not result in the agreed court no longer having jurisdiction if the agreement is binding for the third party pursuant to Article 25 of this Regulation or pursuant to the law applicable to the assignment, substitution or addition.

VI. Key Considerations of (Un)Changeability under the Rome I, Rome II, and Brussels Ia Regulation

1. Foreseeability and Predictability

The Rome I, Rome II, and Brussels Ia Regulations aim to establish foreseeable and predictable conflict-of-law and jurisdiction rules in the interest of legal certainty (Rec. 16(1) Rome I Regulation, 14(1), 16(1) Rome II Regulation, 15(1) Brussels Ia Regulation, starting on p. 114, 235, 362, 368, 394, 406, 430, 458, 468, 552, and 562). The parties to a contractual or non-contractual obligation should be able to reliably foresee/predict the applicable law and the competent courts. This consideration is frequently raised against the changeability of connecting elements, particularly in the

context of the Rome I Regulation (starting on p. 95 and 98). However, this objection is regularly not valid because the parties' expectations are indeterminable, because they argue in favor of changeability in the case of consensual changes, or because other considerations prevail. In the absence of empirical studies, the parties' expectations regarding *conflits mobiles* can only be determined in exceptional cases. This means that the considerations of foreseeability and predictability are in principle indeterminable. Particularly in the case of consensual and significant changes, such as transfers of contractual positions and contract type shifts, they even tend to argue in favor of changeability (starting on p. 115, 235, 244, and 278). Conversely, however, foreseeability and predictability initially argue against considering unilateral changes to the applicable law or competent court (starting on p. 297, 360, 406, 437, 451, 458, and 529). Finally, the aspects of predictability and foreseeability are often superseded by the principle of the closest or close connection (starting on p. 118, 125, 144, 235, 261 535, 552, and 612).

2. Closest and Close Connection

The Rome I and II Regulations seek to realize the principle of the closest connection to a large extent (Rec. 16(2), 21(1), Art. 4(3), (4), Art. 5(3), Art. 7(2) subpara. 2 sent. 2, and Art. 8(4) Rome I Regulation and Rec. 14 sent. 3, Art. 4(3), Art. 5 para. 2, Art. 6 para. 2, Art. 10 para. 4, Art. 11 para. 4, Art. 12 para. 2 lit. c Rome II Regulation, starting on p. 108, 118, 144, 230, 235, 261, 394, and 406). They seek to identify the one legal system with the closest connection to the facts (starting on p. 108 and 430). In contrast, the Brussels Ia Regulation generally accepts several possible places of jurisdiction (starting on p. 430 and 525). Furthermore, it initially gives greater weight to the protection of the defendant than to the intensity of the connection between the facts and the jurisdiction, because it determines the defendant's domicile as the general jurisdiction (Rec. 15 sent. 1 and Art. 4(1) Brussels Ia Regulation). It only seeks to establish a close connection as a priority in the case of its special jurisdictions. Here, the Brussels Ia Regulation ranks proximity to the subject matter and evidence higher than the protection of the defendant (Rec. 16 sent. 1 and Art. 7–9 Brussels Ia Regulation, starting on p. 441, 474, 480, 525, 550, 578, 587, 589, and 608). However, these jurisdictions are only alternatives to the general jurisdiction. They do not replace it or the underlying protection of the defendant. Furthermore, even under the special jurisdictions, the standard is only a close connection, not the closest connection (Rec. 16 sent. 1 and

2 Brussels Ia Regulation). The approach of the Brussels Ia Regulation can therefore be described as the "principle of close connections."

As a result, both principles have the same effect in the context of (un)changeability – only with different momentum: The conflict-of-law and jurisdiction rules are intended to maintain the closest or close connection and thus reflect the changes as *conflits mobiles*. Both principles therefore argue in favor of changeability. The principle of the closest connection has a greater impact under the Rome I and II Regulations, and the principle of close connections has a lesser impact under the Brussels Ia Regulation. Both principles often conflict with the foreseeability or predictability of the conflict-of-law and jurisdiction rules. They must then be reconciled as best as possible. This means that both considerations should be given the greatest possible weight (starting on p. 118, 125, 144, 235, 261 535, 552, and 612). In this context, the principle of the closest or a close connection often prevails because foreseeability or predictability is itself indeterminable in view of indeterminable party expectations or, in view of consensual changes, even argues in favor of changeability (starting on p. 682).

3. Protection of Structurally Weaker Parties

One thing that Rome I, Rome II, and the Brussels I Regulation have in common is that they all aim to protect structurally weaker parties (Rec. 23 Rome I Regulation, Rec. 31 sent. 4 in conjunction with Art. 14(3) and Art. 18 Rome II Regulation, Rec. 14 sent. 2 and 18 Brussels I Regulation, starting on p. 430). However, they do so with varying degrees of intensity: While the protection of weaker parties is a central concern under the Rome I and the Brussels Ia Regulation, it is a marginal issue under the Rome II Regulation (Art. 3(3), (4), Art. 5–8 Rome I Regulation, and Art. 10–23, 25(4) Brussels Ia Regulation, as opposed to Art. 14(3) and Art. 18 Rome II Regulation). As a result, the protection of weaker parties influences the changeability of the protection standards of the Rome I and Brussels Ia Regulations to the detriment of the structurally stronger party and in favor of the structurally weaker party. This can result in both changeability and unchangeability, depending on what is advantageous for the structurally weaker party (starting on p. 127, 134, 137, 223, 239, 272, 274, 276, 444, 482, 538, 591, 615, 624, 639, and 644).

Nevertheless, the protective provisions of the Rome I and Brussels Ia Regulations do not seek to provide comprehensive protection of the structurally weaker party, but merely extensive protection (starting on p. 223,

272, 457, 482, 591, 615, 624, 639, and 644). Furthermore, they balance the far-reaching protective provisions in various ways: They link the protection of the consignor, the passenger, the policyholder, the insured, the beneficiary, or the injured party to a very specific obligation – the transport or insurance obligation (Art. 5, 7 Rome I Regulation and Art. 10–16 Brussels Ia Regulation, starting on p. 223, 272, 482, and 639). The same applies to the protection of consumers in contracts for the sale of goods on instalment credit terms, for a loan repayable by instalments or for any other form of credit made to finance the sale of goods (Art. 17(1)(a), (b), Art. 18 and 19 Brussels Ia Regulation, starting on p. 642). Otherwise, however, the obligation type requirement of consumer protection is extremely broad and has little restrictive effect (Art. 6 Rome I Regulation and Art. 17(1)(c), Art. 18 and 19 Brussels Ia Regulation, starting on p. 274 and 639). In these constellations, however, the Rome I and Brussels Ia Regulations require a twofold qualified personal connection: On the one hand, in the form of the private and professional/commercial purpose of the contract. On the other hand, in the form of the pursuing or directing of commercial or professional activities. The professional can unilaterally prevent the realization of both elements (starting on p. 274, 448, and 457). The obligation type requirement of employee protection is also very broad because it merely requires a service to be provided. Its personal requirement restricts this insofar as the service of the employee must be dependent, subject to instructions, permanent, and remunerated. Nevertheless, these additional characteristics must only factually exist and do not have to be contractually agreed. This weakens their restrictive effect. However, the standards protecting employees are not linked solely to the employee's location, but to the mutually agreed usual place of work (Art. 8 Rome I Regulation and Art. 20–23 Brussels I Regulation, starting on p. 155, 276, 588, 615, 639, and 644). Against this background, it seems justified that their personal reference makes them less restrictive than consumer protection standards.