Yearbook of Private International Law

Vol. X
2008

Founding Editor
Petar Šarčević †

Editors
Andrea Bonomi and Paul Volken

Published in Association with
Swiss Institute of Comparative Law

sellier.elp

YEARBOOK OF PRIVATE INTERNATIONAL LAW

YEARBOOK OF

PRIVATE INTERNATIONAL LAW

VOLUME X – 2008

FOUNDING EDITOR
PETAR ŠARČEVIĆ †

EDITORS

ANDREA BONOMI
Professor at the
University of Lausanne

PAUL VOLKEN
Professor at the
University of Fribourg

PUBLISHED IN ASSOCIATION WITH

SWISS INSTITUTE OF COMPARATIVE LAW
LAUSANNE, SWITZERLAND

sellier.elp

ISBN 978-3-86653-114-7

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

Production: Karina Hack, Munich. Printing and binding: Friedrich Pustet KG, Regensburg.
Printed on acid-free, non-ageing paper. Printed in Germany.

TABLE OF CONTENTS

The New Hague Maintenance Convention and Protocol

National Reports

FOREWORD

This is a very special volume of the *Yearbook* as it represents the celebration of the 10th anniversary of its first publication. Although it may not initially appear impressive when compared to other well-known specialized periodicals in our area, some of which were created several decades or even more than a century ago, reaching the ten-year mark is a significant achievement for a new publication and it is a sign that the *Yearbook* will be a permanent fixture in the landscape of legal periodicals in the field.

At the end of the XXth century, when Petar Šarčević and Paul Volken, the founding editors of the *Yearbook*, and the Swiss Institute of Comparative Law decided to launch the first publication in English devoted entirely to private international law issues, the undertaking appeared rather risky, considering the growing number of legal periodicals being published throughout the world. That daring decision has proven to be fruitful and, ten years later, we are here to celebrate an editorial success. The *Yearbook* has survived the challenges of a competitive market and the number of copies sold has been increasing every year. Even more important, every year enhances its solid reputation in the world of private international lawyers as an international platform for discussion and a reliable source of information on recent developments around the world.

Throughout these first ten years, we have had the privilege of publishing contributions of both young talents and internationally reputed scholars from more than fifty countries on all continents. We have reported on the most important developments, not only on the international and European levels, but also in the legislation and case law of more than forty national legal systems. Volume after volume, the *Yearbook* has become richer, growing from 400 to more than 700 pages, while maintaining its original quality.

During this past decade, private international law has experienced several significant and sometimes dramatic changes. The emergence of a Community conflict-of-laws system has brought the European States much closer to the ideal of harmony of decisions, which has always been one of the fundamental goals of our field of law. This development will most probably affect conflict-of-laws methodology, by favouring the recourse to some techniques (party autonomy, the use of residence as a connecting factor, the recognition of foreign personal status) and the decline of other traditional approaches (the characterisation *lege fori*, the use of nationality as a connecting factor in family and succession law, the national understanding of public policy). In our opinion, it is very likely that these regional trends will also have a significant impact outside Europe, by spontaneous adoption by other jurisdictions or through the influence of international conventions. The decades to follow will reveal the accuracy of this prediction but, whatever the result, the *Yearbook* will be there to report on the future evolution.

The current volume is once again particularly rich. The Doctrine section includes three contributions concerning the European judicial area: a first on the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments of 30 October 2007, a second on the European jurisdiction rules applicable to commercial agents and a third on the recent decision of the European Court of Justice in *Grunkin-Paul*, a seminal case that opens new perspectives for the application of the recognition principle as opposed to classical conflict rules in the field of international family law. Other interesting and original contributions concern damages for breach of choice-of-forum agreements, accidental discrimination in conflict of laws and the recent Spanish regulation of arbitration agreements.

Two special sections of this volume are devoted, respectively, to the EC Regulation on the law applicable to contractual obligations (Rome I) and to the new Hague Convention and Protocol on maintenance obligations.

The Rome I Regulation was adopted by the Council of the EU and by the European Parliament on 17 June 2008 and will replace the Rome Convention as of 17 December 2009. Together with the Brussels I and the Rome II Regulations – see this *Yearbook* 2007 –, it constitutes a fundamental pillar of the new unified EC system of jurisdictional and conflict rules in the field of obligations. In addition to several contributions of general nature, the special section includes detailed analyses of the impact that the Regulation will have on the connection of specific categories of contracts (contracts relating to intellectual and industrial property rights, distribution and franchise contracts, financial market and insurance contracts), as well as some remarks from a Japanese perspective.

The special section on maintenance obligations includes insider commentaries on the two instruments adopted by the Hague Conference on 23 November 2007. The Convention on the International Recovery of Child Support and other Forms of Family Maintenance mainly regulates administrative cooperation and the recognition and enforcement of foreign support orders with the goal of improving the system under the 1965 Washington Convention and the 1973 Hague Recognition Convention. The Protocol includes rules on the law applicable to maintenance obligations and aims to replace the 1973 Hague Applicable Law Convention. It is worth noting that these texts have had an important influence on the recent EC Regulation No 4/2009 on maintenance obligations; to determine the applicable law the Regulation simply refers to the Hague Protocol.

The National Reports section includes the second part of a detailed study on private international law before African courts, a critical analysis of the new Spanish adoption system and of the conflict of laws issues raised by the Panamanian business company, two articles on arbitration (in Israel and Romania), and several contributions concerning recent developments in Eastern European countries (Macedonia, Estonia, Lithuania and Belarus). Africa is also at the centre of the report on UNCITRAL activities for international trade law reform in that continent.

The section on court decisions includes – together with commentaries on the *Weiss und Partner* and the *Sundelind López* decisions of the ECJ – very detailed analyses of a recent interesting ruling of the French *Cour de cassation* on

overriding mandatory provisions and of two Croatian judgments on copyright infringements.

Last but not least, this year, the Forum section is devoted to various fascinating subjects, namely the recognition of trusts and their use in estate planning, the juridicity of the *lex mercatoria* and the use of nationality as a connecting factor for the capacity to negotiate.

In conclusion, we would like to express our gratitude to all the authors who contributed to this impressive result, as well as to our indispensable Production Editor Gian Paolo Romano and to the precious Assistant Editors Eva Lein and Bart Volders. Many sincere thanks to our English revisers, Charles Tabor and Natasha Pittet, to Karen Druckman, for her translation, revision and editorial support, to Annelot Peters for helping to review the footnotes as well as to Cécile Fornerod, for her highly professional and effective assistance to the production of this volume.

Andrea Bonomi Paul Volken

ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
ECR	European Court Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

DOCTRINE

THE NEW LUGANO CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Fausto POCAR*

* Professor of International Law, University of Milan.

Yearbook of Private International Law, Volume 10 (2008), pp. 1-17

I. Introduction

On 30 October 2007, in Lugano, the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation signed as contracting parties the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Lugano Convention' or 'the Convention') which is designed to replace the Convention bearing the same name of 16 September 1988 ('the Lugano Convention of 1988'), which was concluded between the Member States of the European Community and certain Member States of the European Free Trade Association ('EFTA').[1] The text of the new Convention reflects to a large extent the outcome of the joint revision of the Lugano Convention of 1988 and the Brussels Convention of 27 September 1968, which was initiated in 1997 by the Council of the European Union with the aim of fully harmonising the two legal instruments and incorporating changes to resolve certain problems that had emerged in the course of the application of the two Conventions and the interpretation of the Brussels Convention by the EC Court of Justice.[2] It further reflects some additional changes which were introduced by the European Community into Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation'),[3] as well as the outcome of a subsequent round of negotiations which took place at a diplomatic conference held in Lugano in October 2006 with the participation of the contracting parties to the new Lugano Convention.[4] The new Lugano Convention will therefore continue to be a parallel instrument to the Brussels Regulation: Unlike the Regulation, the Convention will be accompanied by an explanatory report,[5] which will deal with all of its provisions. However, even if such provisions are substantially identical to the parallel provisions of the Regulation, the explanatory report is concerned only with the Lugano Convention and does not reflect the position of the States or the Community with regard to the Regulation.

The structure and scope of the Convention are basically unchanged, and reflect the structure and scope of the Brussels I Regulation. The parallelism with the latter shows the substantial link that exists between the two acts despite the fact that they remain distinct from one another.

---

[1] *O.J.* L 319 of 25 November 1988.

[2] See the revised text agreed upon by the working party established by the Council, Council document No. 7700/99, 30 April 1999.

[3] *O.J.* L 12 of 16 January 2001.

[4] The identification of the contracting parties of the new convention was possible only after the ruling of the EC Court of justice expressing the view that the conclusion of the new convention fell entirely within the sphere of exclusive competence of the European Community. See ECJ, opinion 1/03, operative part. See also POCAR F. (ed), *The External Competence of the European Union and Private International Law. The EC Court's Opinion on the Lugano Convention*, Padua 2007.

[5] Not yet published.

Attention should however be drawn to two aspects.

First, the rules that the Convention lays down on jurisdiction are comprehensive, meaning that the system of the Convention includes even the rules that regulate jurisdiction only indirectly, by referring a matter to the national law of the State of the court seised, as happens, with some exceptions, in the case where a defendant is domiciled in a country which is not a contracting party of the Convention. In other terms, the defendant's domicile is a criterion delimiting the scope of the rules in the Convention that govern jurisdiction directly and independently, but is not a general criterion delimiting the regulation of jurisdiction by the Convention. The correctness of this understanding of the matter, which had already been asserted in the literature on the 1988 Convention, was confirmed by the EC Court of Justice in Opinion 1/03, where the Court, speaking of Regulation No. 44/2001, said that 'that Regulation contains a set of rules forming a unified system which apply (…) also to relations between Member States and a non-member country', and that 'Article 4(1) (…) must be interpreted as meaning that it forms part of the system implemented by that regulation since it resolves the situation envisaged by reference to the legislation of the Member State before whose court the matter is brought'.[6]

Second, the expression 'contracting States' has been replaced throughout the Convention by the new expression 'States bound by the Convention'. The previous expression appeared unsatisfactory in light of the conclusion of the Convention by the Community on behalf of its Member States (with the exception of Denmark). The expression 'contracting Parties' looked also inappropriate, since the application of the Convention, both in relation to jurisdiction and to the recognition and enforcement of judgments, is normally the responsibility of the Community's Member States, rather than of the Community as such. The new wording covers both the States that are contracting parties to the Convention – *i.e.* the non-Community States of Iceland, Norway and Switzerland plus Denmark – and the Community Member States which are bound to apply the Convention in their respective national legal systems. Article 1(3) however specifies that the expression may also mean the European Community as a party to the Convention in its own right, since certain obligations may apply directly to the Community itself, or may concern the recognition and enforcement of judgments delivered by the Court of Justice or by other Community courts associated with it, such as the Court of First Instance or the Civil Service Tribunal.

According to Article 64(1), the Convention does not prejudice the application by European Community Member States of the Brussels I Regulation, the Brussels Convention and its Protocol of Interpretation of 1971, or the EC-Denmark Agreement. This means that the scope of these instruments remains unaltered, and is not in principle limited by the Lugano Convention. However, according to paragraph 2, the Lugano Convention is applicable in certain situations in any event, whether by the courts of a State bound both by the Brussels I Regulation and by the Lugano Convention, or by the courts of a State bound only by the Lugano Con-

[6] ECJ, opinion 1/03, paragraphs 144 and 148.

vention. In matters of jurisdiction, this is the case if the defendant is domiciled in the territory of a State where the Convention applies and the Regulation does not. The same occurs when jurisdiction is conferred on the courts of such a State by Articles 22 or 23 of the Convention, as these are exclusive jurisdictions which must always be respected. In matters of recognition and enforcement of judgments, the Lugano Convention is to be applied in all cases where either the State of origin or the State addressed does not apply the Brussels I Regulation. Consequently, the Convention applies when both States are parties to the Lugano Convention alone or when only one of the States is a party to the Convention and the other is bound by the Regulation.

II. Jurisdiction

A. General Rule

The Convention does not provide for substantial variations of the general rule of jurisdiction, which remains based on the principle of *actor sequitur forum rei*, and on the domicile of the defendant in a State bound by the Convention, while the defendant's nationality plays no role in this regard. Furthermore, as in the 1988 Convention, the general rule assigns jurisdiction to the State in whose territory the defendant is domiciled without prejudice to the determination of a specific court with jurisdiction in that State on the basis of the national law of that State.

As far as the notion of 'domicile' is concerned, some consideration was given to providing an independent definition, instead of referring the matter to national law, but ultimately a definition was not found to be necessary for natural persons. Their domicile continues therefore to be determined by the domestic law of the State in which they are domiciled.

As to companies and legal persons, however, it was felt that a reference to domestic rules of private international law of the State of the court seised in order to determine their 'seat' might create difficulties in the future. Therefore, an independent notion is now provided, which lists as alternatives the statutory seat, the central administration, or the principal place of business of the company or other legal person. Although this definition is open to a degree of *forum shopping*, it can be justified by the consideration that if a company decides to keep its central administration in a place separate from its principal place of business, it chooses to expose itself to the risk of being sued in both places. Thus, the definition will ensure that if a company is incorporated in a State bound by the Convention, or does business there, any dispute regarding its activities will fall within the jurisdiction of the States bound by the Convention, so that the plaintiff will not be deprived of a 'Convention' court. Such a possibility would not have been ensured by a mere reference to the statutory seat, the central administration, or the place of business alone. It has to be noted that, in order to take into account the particular features of the law in the United Kingdom and Ireland, the term 'statutory seat' has

been replaced for those two countries by a reference to the registered office or, if there is no registration, the place of incorporation, or, if there is no place of incorporation, the place under the laws of which the formation of the company or legal person took place.

The concept of domicile under consideration here relates to the *forum generale* of companies and legal persons, without prejudice to the definition of the domicile of a company for purposes of the *forum speciale* for particular categories of disputes, such as those which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons having their seat in a State bound by the Convention, or the validity of the decisions of their organs. In their respect, the previous rule which referred to domestic rules on conflict of laws remains unchanged (Article 22(2) of the Convention).

Alongside and as an alternative to the general rule of the domicile of the defendant in a State bound by the Convention, the Convention keeps unchanged the existing structure that provides for special jurisdictions which, at the plaintiff's choice, allow the plaintiff to bring the action in another State bound by the Convention. These bases for jurisdiction remain, to a large extent, unchanged in substance. Some amendments in some areas deserve however to be briefly discussed hereafter.

B. Contracts

Article 5(1) of the Lugano Convention of 1988, like the corresponding provision in the Brussels Convention, permits a person domiciled in a State bound by the Convention to be sued in another State bound by the Convention 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'. It has been the source of a number of problems of interpretation regarding the definition of 'matters relating to a contract', the determination of the obligation to be performed, and the determination of the place of performance. These problems have generated a large body of case-law of the Court of Justice, which has arrived at independent solutions or referred the matter back to national law as appropriate, without overcoming all the difficulties generated by the Convention. It is not necessary here to refer specifically to the solutions offered by the Court of Justice, nor is it possible to mention all the proposals that have been put forward for the amendment of the provision. It is worth mentioning, however, that they all moved in the direction of reducing the role of the reference to the place of performance of the obligation, safeguarding the unity of jurisdiction over the contract at least to some extent, and making it easier to ascertain and foresee the place of performance which is to serve as the basis of jurisdiction in the case.

Notwithstanding all these proposals, Article 5(1) of the new Lugano Convention does not make any radical change to the previous text, but adjusted it so as to indicate, in the case of a contract of sale or a contract for the provision of services, which obligation was the one whose place of performance could provide a basis for a jurisdiction alternative to the forum of the defendant, and to exclude any reference to the place of payment under such contracts, while leaving the existing

provision unchanged for all other contracts and for cases in which the new rules proved inapplicable. In this perspective, the new text of Article 5(1)(a) takes over the corresponding provision of the 1988 Convention, conferring jurisdiction on the court of the place of performance of the obligation in question. The scope of the rule is not left entirely to the interpretation of whoever is called upon to apply it, as it was before: for the application of point (a), point (b) specifies that in the case of contracts for the sale of goods or the provision of services, the place of performance of the obligation in question is to be the place – in a State bound by the Convention – where, under the contract, the goods were delivered or should have been delivered, or the services were provided or should have been provided. Thus point (b) identifies the obligation whose place of performance serves as a basis for establishing jurisdiction in respect of such contracts irrespective of the obligation whose performance is the subject of the dispute. Without using the word, it adopts the principle of the characteristic obligation, and consequently excludes a reference to the obligation to make payment, even when that obligation is relied upon in the application. For the determination of the place of performance, point (b) adopts a factual test intended to avoid recourse to private international law, stating that unless the parties have agreed otherwise the place of delivery of the goods or of provision of the services must be identified 'under the contract'. But the provision cannot entirely prevent the rules of conflict of laws of the court hearing the dispute from coming into play where the parties have not indicated with sufficient precision the place of delivery or of provision of the service, so that this has to be established with the help of the law applicable to the contract, or where the subject of the dispute is in fact the place where the goods were delivered or should have been delivered, or the place where the services were provided or should have been provided.

Point (b), then, acts as a special rule, limited to contracts of sale and contracts for the provision of services, for the application of the general principle of the place of performance of the obligation in question laid down in point (a). It does not apply to contracts that do not fall into either of those categories nor to those contracts where the place of performance is in a State not bound by the Convention. Whenever point (b) is found to be inapplicable, point (a) applies; this is in fact stated in point (c), which clarifies and confirms a conclusion that could be drawn from points (a) and (b) even without it.

C. Torts

The issue of establishing jurisdiction in torts was largely debated at the working party which elaborated the new Lugano Convention, but it was eventually felt that the clarifications provided by the Court of Justice in its significant case law on the matter allowed for a smooth application of the existing rules. No substantial change was therefore suggested to Article 5(3). However, it was felt that there was a need to further clarify the applicability of this provision to actions aimed at an injunction protecting collective interests, in particular consumers' interests, or seeking to prevent a defendant from infringing the plaintiff's intellectual property

rights. Therefore, a specific provision was included in Article 5(3) conferring jurisdiction on the courts of the place or the harmful event in respect of threatened future harm. The amendment is intended to clarify the scope of the law, and not to change its substance, as the inclusion of actions for cessation can clearly be derived by interpretation from the previous wording.[7]

D. Insurance

In order to protect the weaker party in an insurance relationship, the Convention keeps the previous structure, distinguishing between the position of the insurer on one side, and that of the policyholder, the insured or a beneficiary, on the other, and providing various criteria for jurisdiction depending on whether one or other assumes the position of plaintiff or defendant. There was some doubt, however, whether such wide protection was justified with respect to commercial insurance contracts. The option was therefore considered of increasing the role of the freedom of the parties by distinguishing between insurance contracts concluded by consumers and contracts entered into in the course of industrial, commercial or professional activities, and allowing the latter a choice of forum. The preferred option, however, was that the contracts in respect of which the parties could be allowed greater freedom should be identified by reference not to the policyholder, but to the risks covered by the contract, with additional risks being added to those that already appeared in Article 12 of the 1988 Convention. This solution has the advantage that it does not modify the structure of the Convention, so that the section on insurance remains separate from the section on consumer contracts. Furthermore, it continues to offer protection not just to consumers but also to individual entrepreneurs, to small and medium-sized enterprises, and to professionals who, even though they carry on an industrial, commercial or professional activity, deserve the same protection as that given to consumers. Therefore, the risks already listed in Article 14 remain as they are, and to these the new Convention adds 'all large risks'.[8]

[7] As in SCHLOSSER Report, paragraph 134.

[8] The expression used to define the risks differs from the corresponding Article 14(5) of the Brussels I Regulation. The latter speaks of all large risks 'as defined in Council Directive 73/239/EEC, as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended', and thus refers to Community legislation both present and future. The wording is different here because it would not have been appropriate to make a precise reference to Community rules in a Convention to which States that are not members of the European Community are party. Effectively, however, the general reference to 'large risks' in the Convention is to be understood to designate the same risks as those referred to in the Directives listed. Any problems that may emerge as a result of changes in the Community rules are to be considered within the context of the Standing Committee set up under Protocol 2.

E. Consumer Contracts

In matters of consumer contracts, the Convention confirms the preceding rules protecting the weaker party to a contract in the same terms as the 1988 Convention. While the system of protection does not change, the Convention further widens the range of the contracts falling under it. While Article 13(1)(3) of the 1988 Convention speaks of 'any other contract for the supply of goods or a contract for the supply of services', Article 15(1)(c) of the new Convention uses the words 'in all other cases', referring to any contract, other than a contract for the sale of goods on instalment credit terms or for a loan repayable by instalments, which is concluded with a person who pursues commercial or professional activities, provided the contract falls within the scope of such activities. This broad concept of consumer contracts encompasses all the contracts regulated as consumer contracts by the Community directives, including contracts whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, in so far as they are regulated by Directive 87/102/EEC on consumer credit.[9] Further, there is no longer any doubt that the concept includes contracts relating to the purchase of the right to use immovable properties on a timeshare basis, which are the subject of Directive 94/47/EC,[10] although this conclusion is already warranted in light of the judgment whereby the Court of Justice has held that timeshare contracts that are subject to Directive 94/47/EC are also covered by Directive 85/577/EC if the conditions for the application of that directive are otherwise fulfilled, and that that interpretation must be taken into account for the purposes of the interpretation of the Convention, given the link between the Convention and the Community legal order.[11]

The Convention also extends the scope of the rules on consumer contracts as regards the connection with the State in which a consumer is domiciled. Indeed, it requires that the commercial or professional activities of the person with whom the consumer concludes a contract be pursued in the State of the consumer's domicile, or that they be directed to that State or to several States including that State.The new connection with the State of domicile of the consumer can be applied to a contract of any kind, and is intended in particular to meet the need for

[9] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *O.J.* L 42 of 12 February 1987, subsequently replaced by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *O.J.* L 133 of 22 May 2008.

[10] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, *O.J.* L 280 of 29 October 1994.

[11] ECJ, case C-423/97 (*Travel Vac*) [1999] ECR I-2195, paragraph 22, ECJ, case C-73/04 (*Klein*) [2005] ECR I-8667, paragraphs 22 *et seq.*

protection arising out of electronic commerce.[12] Finally, the sphere of application of the rules of jurisdiction protecting consumers has been further expanded to include contracts of transport, which were excluded from it by the 1988 Convention, where they were made subject to the general rules on contracts. represents a single commercial transaction. Article 15(3) now limits that exclusion to contracts of transport that do not provide for a combination of travel and acommodation for an inclusive price; this provision is thereby aligned on the provision for consumer contracts in the Convention on the law applicable to contractual obligations.

F. Individual Contracts of Employment

Individual contracts of employment were made the subject of special rules in the 1988 Convention (the second part of Article 5(1) and Article 17(5)); and they are now dealt with by special rules in Section 5 of Title II, which comes after the sections on insurance and consumer contracts, completing the rules protecting the weaker party to a contract. The new section follows the same scheme and the same solutions as the others, departing in some respects from the arrangements in the 1988 Convention.

G. Exclusive Jurisdiction

Only the exclusive bases for jurisdiction referred to in Article 22(1), (2) and (4) have been modified. However, only the latter provision dealing with intellectual property rights was a major point of discussion. Exclusive jurisdiction is conferred on the courts of the State bound by the Convention in whose territory the deposit or registration has been applied for, has taken place or is deemed to have taken place under the terms of an international convention or, as the new wording makes clear, a Community instrument. This last point has been added to remove any doubt about the equivalence of Community law concerning intellectual and industrial property rights with the law of the international conventions in force. The question of an exception to the exclusive jurisdiction conferred by Article 22(4) on the courts of the Member States has remained a live issue, however, as a result of efforts to pursue the creation of a Community patent by means of Community legislation, and to confer jurisdiction on the Court of Justice in disputes relating to the Community patent. The diplomatic conference held from 10 to 12 October 2006 discussed whether it would have been advisable to append to the

[12] As defined in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *O.J.* L 178 of 17 June 2000, Article 1(4) of which expressly provides that it does not 'deal with the jurisdiction of Courts', which is consequently left to the Brussels I Regulation and, in parallel, to the Lugano Convention.

Lugano Convention a protocol conferring exclusive jurisdiction on the Court of Justice in matters of Community industrial property rights, but it proved impossible to arrive at a satisfactory formulation, and the diplomatic conference consequently preferred to defer consideration of such a protocol to a later date, when a Regulation on the Community patent had been adopted. The need for such a protocol has been in fact at least partially satisfied by the subsequent case-law of the Court of Justice, which held that where an action was brought for infringement, the court seised could not find indirectly that the patent at issue was invalid, even if the effects of the judgment were limited to the parties to the proceedings, as happened under the national laws of some of the States bound by the Convention.[13] If the European Community were to adopt a Regulation on the issue of a Community patent, and to confer exclusive jurisdiction over the registration and validity of patents on the Court of Justice, a court of a State bound by the Convention which was called upon to hear an action for infringement of a Community patent could not rule even indirectly on the validity of the patent, and for that question would have to recognise the exclusive jurisdiction of the Court of Justice, and treat that court as it would another national court.[14]

H. Prorogation of Jurisdiction

The interpretation by the courts of the rule on choice of court agreements in the 1988 Convention has not revealed any need for radical changes in the drafting of the new Lugano Convention. The main issue that had to be considered was the question whether or not Article 23 could accommodate the development of electronic communications, bearing in mind that e-commerce should not be obstructed by inappropriate formal requirements. There can be no doubt that points (b) and (c) of paragraph 1 are indeed capable of applying to electronic communications, because they refer to practices established by the parties and usage in international trade or commerce. It is more problematic to determine whether point (a) can apply, that is to say whether the written form it requires is present in the case of electronic communications. To resolve any doubt that might arise, it was felt advisable to adopt an express rule. Article 23(2) therefore now states that any communication by electronic means is equivalent to 'writing' if it 'provides a durable record of the agreement'. The test of whether the formal requirement in Article 23(1) is met, is therefore whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way. The rule excludes only such electronic communications as do not provide a durable record. Those communications consequently cannot be used to conclude a choice of forum clause that is formally valid for purposes of point (a), though they may be relevant for purposes of points (b) and (c) if the requirements of those provisions are met.

[13] ECJ, case C-4/03 (*GAT*) [2006] ECR I-6509.

[14] Article 1(3) of the Convention.

I. *Lis pendens* - Related Actions

The 1988 Convention was based on the criterion of the prior jurisdiction of the court first seised: any court before whom the matter was brought thereafter was to stay the proceedings until such time as the jurisdiction of the first court had been established, and if it was so established was to decline jurisdiction in favour of that court.

That solution posed quite a few problems. In particular, its formulation, according to the interpretation given it by the Court of Justice, failed to establish an independent concept of *lis pendens* covering every aspect of the matter. On one hand, it laid down a number of substantive conditions as components of a definition of *lis pendens* – e.g., that the cases pending simultaneously must have the same parties, cause of action, and subject-matter – thereby permitting the Court to affirm that the terms used in order to determine whether a situation of *lis pendens* arose must be regarded as independent.[15] On the other hand, however, the rule failed to give an independent, uniform indication of how it was to be determined which court was addressed previously, i.e. at which moment an action should be considered to be pending before the court. Noting that an independent definition was lacking, the Court of Justice held that the conditions under which a dispute could be said to be pending before a court were to be appraised in accordance with the national law of each court.[16] One consequence of referring to national law in order to determine the moment at which a court should be considered to have been seised of a case is that the question will be decided in significantly different ways depending on the court seised. The laws of the States bound by the Convention show significant differences in that regard, facilitating forum shopping and encouraging parallel litigation. To avoid such situations, Article 30 distinguishes between cases in which, according to the national law, the document instituting proceedings or the equivalent document is lodged with the court, and cases in which the document must be served before being lodged with the court. If the time at which the court is deemed to be seised is determined by the lodging of the document instituting proceedings with the court, the court is considered to be seised at that moment, provided that the plaintiff has not subsequently failed to take the steps that he was required to take to have service effected on the defendant; if, on the other hand, the time at which the court is deemed to be seised is determined by service on the defendant, the court is considered to be seised when the authority responsible for service receives the document instituting proceedings, provided that the plaintiff has not subsequently failed to take the steps that he was required to take to have the document lodged with the court.

The provision on related actions represents an important aspect of the coordination of jurisdiction in the States bound by the Convention. Article 28 therefore establishes procedures intended to facilitate the handling of related cases in a single set of proceedings or in coordinated proceedings.

---

[15] ECJ, case 144/86 (*Gubisch v Palumbo*) [1987] ECR 4861.

[16] ECJ, case 129/83 (*Zelger* v *Salinitri*) [1984] ECR 2397.

Provided that the tests of Article 28(3) are satisfied, a court seised subsequently is entitled – but not obliged – to stay the proceedings and await the decision of the court first seised before deciding the case before it. The new wording of Article 28(1) no longer requires, as the previous version did, that the related actions be pending at first instance. The reason given for that requirement, namely that 'otherwise, the object of the proceedings would be different and one of the parties might be deprived of a step in the hierarchy of the courts',[17] does not appear convincing. The stay of the proceedings by the court subsequently seised has no effect whatsoever on the proceedings in that court, which it is free to resume once the proceedings on the related action pending before the foreign court have been concluded. But the requirement that both sets of proceedings be pending at first instance is nevertheless essential, and has been maintained and specifically formulated in Article 28(2), where the court subsequently seised decides to decline jurisdiction in favour of the court previously seised of the related action. Otherwise, if the case before the court first seised were at the appeal stage, one of the parties would indeed be deprived of a step in the hierarchy of the courts.

III. Recognition and Enforcement

A. Background

The simplification of the procedures for the recognition and enforcement of judgments that fall within its scope is a fundamental aspect of the Lugano Convention. In a single judicial area, such as the one which is called for by the EC Treaty and which lends itself so well to extension to the EFTA countries referred to in the Lugano Convention, the most natural solution would be to abolish any *exequatur* proceeding in States bound by the Convention for judgments coming from other States bound by the Convention, so that such judgments could be enforced directly, without any need for verification. This possibility was however regarded as premature, in the light of the prerogatives of national sovereignty that still characterise the European States, an important element of which is the administration of justice. The changes made to the rules on the recognition and enforcement of decisions are nevertheless based on the view that the intervention of the authorities of the State of enforcement can be scaled down further, and that the declaration of enforceability of a judgment can be reduced to little more than a formality.

Title III of the Convention is accordingly founded on the principle that the declaration of enforceability must be in some measure automatic, and subject to merely formal verification, with no examination at this initial stage of the proceedings of the grounds for refusal of recognition provided for in the Convention. Examination of the grounds for refusal of recognition is deferred until the second

[17] JENARD report, p. 41.

stage, at which a party against whom a declaration of enforceability has been obtained, and who decides to challenge it, must show that such grounds exist. This simplification of the procedure for the declaration of enforceability is accompanied by a review of the grounds for refusal, which are narrowed by comparison with the 1988 Convention, without however eroding the principle whereby the proceeding in the State of origin must be in keeping with the requirement of due process and the rights of the defence.

B. Public Policy

The European Commission proposed that the reference to the public policy of the State addressed as a ground for refusal of recognition should be deleted, as it had been applied only very rarely in the judgments of national courts with regard to the Brussels and Lugano Conventions, and the Court of Justice had never been asked to clarify its scope. Despite some support, this proposal was finally rejected, but the exceptional nature of recourse to this ground for refusal has been further stressed: the provision now specifies that recognition may be refused only when it would be 'manifestly' contrary to public policy.

C. Infringement of the Rights of a Defendant in Default of Appearance

According to the 1988 Convention, a judgment given in default of appearance is not to be recognised if the application or equivalent document instituting the proceedings before the original court was not 'duly' served on the defendant 'in sufficient time to enable him to arrange for his defence'.[18] Establishing that these tests are satisfied has given rise to some difficulties in practice, and has repeatedly triggered the intervention of the Court of Justice, especially as regards the second test and the cumulative effect of the two of them. For this reason Article 34(2) no longer expressly requires service in due form, but treats the question in connection with the opportunity given to the defendant to arrange for his defence, in the same way as the time that may be needed. Service must now be effected on the defendant 'in such a way as to enable him to arrange for his defence'. Unlike the previous wording, the new one merely requires an assessment of fact, in which compliance with the rules governing service will not play a decisive role. Irregularity of service is consequently a ground for refusal under Article 34(2) only if it injured the defendant by preventing him from defending himself, and is not relevant if the defendant could have appeared in court and conducted his defence in the State of origin. This assessment of fact is to be accompanied, as in the 1988 Convention, by another assessment of fact to establish whether the time allowed to the defendant to arrange for his defence was sufficient, for which purpose the court may consider any relevant circumstances, including the provision in Article 26(2), which the court of the State of origin is required to comply with in

[18] JENARD report, p. 44; SCHLOSSER report, paragraph 194.

any event. The protection given to a debtor by Article 34(2) in the event that service was irregular has been restricted in another way too: even if service was not effected in sufficient time and in such a way as to enable the defendant to arrange for his defence, the judgment is to be recognised if the defendant did not challenge it in the State of origin when it was possible for him to do so. The rule seeks to require the defendant to raise any objection in the State of origin, and to exhaust all remedies there, rather than keeping them in reserve for the following stage when the judgment has to be recognised in another State bound by the Convention.

D. Abolition of Review of the Law Applied by the Court of Origin

Article 27(4) of the 1988 Convention allowed recognition to be refused if the court of origin, in order to decide a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession (all matters outside the scope of the Convention), had applied a rule different from the rule of private international law of the State in which the recognition was sought; it was felt that this rule was now superfluous, and it has not been included in the new Convention, so that it will not be possible in future to rely on this ground of refusal, which was a vestige of the review of the merits of a foreign judgment.

E. Enforcement

The rules on enforcement have been greatly changed by the revision, in order to further simplify the procedures on the basis of which judgments are declared enforceable in the State addressed. Nevertheless, the principle whereby enforcement is subject to a declaration of enforceability remains unchanged, and is stated in Article 38 in the same terms as in Article 31 of the 1988 Convention. Article 1(3) makes it clear that the section on enforcement also applies to judgments of the Court of Justice of the European Communities when they are to be enforced in countries that are not Community Member States. Judgments of the Court of Justice are therefore to be enforced in those States in the same way as national judgments delivered in States bound by the Convention.

F. Declaration of Enforceability: First Stage

As previously, the Convention expressly indicates the courts or authorities competent in the States bound by the Convention to receive applications to have foreign judgments declared enforceable. As regards the local jurisdiction of the courts designated, the 1988 Convention made reference to the place of domicile of the party against whom enforcement was sought, and, if he was not domiciled in the State in which enforcement was sought, to the place of enforcement. The new Convention adopts the approach that the creditor should be given a choice between

the place of the debtor's domicile and the place of enforcement, and allowed to go directly before the court of the place of enforcement. As in the 1988 Convention, the procedure for making the application is to be governed by the national law of the State addressed, taking account, however, of the rules laid down directly in the Convention. The list of documents to be appended to the application has changed, however. Articles 46 and 47 of the 1988 Convention listed a number of documents which were intended to show that the judgment satisfied the requirements for recognition; but the new Article 40(3) refers to the documents listed in Article 53, which confines itself to calling for the production of a copy of the judgment which satisfies the conditions necessary to establish its authenticity, and a certificate regulated in the succeeding Article 54. The certificate, drafted on the basis of a form in Annex V, must indicate the State of origin of the judgment, the court or other authority issuing the certificate, the court that delivered the judgment, the essential particulars of the judgment (date, reference number, parties, and, where judgment was given in default of appearance, date of service of the document instituting the proceedings), the text of the judgment (in the strict sense, *i.e*. only the full text of the operative part of the judgment), the names of any parties to whom legal aid has been granted, and a statement that the judgment is enforceable in the State of origin. The certificate will normally be issued by the court that delivered the judgment, but not necessarily so. The certificate merely states facts, so that it could well be issued by another person at the court, or by another authority authorised to do so in the State of origin.

The court or competent authority must decide without delay on an application lodged under the Convention, and if the formalities referred to in Article 53 are met, it must declare the decision enforceable. The wording of Article 41 leaves no doubt in this regard: it states that the judgment is to be declared enforceable 'immediately' on completion of these formalities. Article 41 does not allow the court addressed to carry out any review to establish whether there are grounds for refusing recognition under Articles 34 and 35. The information that must be shown on the certificate is not designed for such a review, but is intended merely to facilitate the work of the court addressed in deciding whether or not to declare enforceability. To verify the correctness of the certificate would be contrary to the principle that the first stage of the procedure should be confined to a formal examination. Given the merely formal nature of the verification carried out at this stage by the court addressed, the debtor's active participation is not necessary. Article 41 therefore reiterates that the party against whom enforcement is requested cannot make submissions at this stage.

The decision on the application for a declaration of enforceability is to be brought to the notice of the applicant immediately, in accordance with the procedure laid down by the law of the State in which enforcement is sought. If the decision declares enforceability, it must also be served on the party against whom enforcement is sought.

G. Declaration of Enforceability: Second Stage

The decision on the application for a declaration of enforceability may be appealed against by either party, to the court listed in Annex III to the Convention. The two kinds of appeals against the decision closing the first stage of proceedings which existed under the 1988 Convention have thus been unified. Article 43 now provides that 'either party' may lodge an appeal, regardless, therefore, of whether the decision allows or rejects the application. Thus while the two appeals may be unified in terms of legislative drafting, they remain distinct in substance, as in the 1988 Convention.

They are also distinct in terms of the time within which they must be brought. The Convention lays down no time-limit for an applicant's appeal against an application for a declaration of enforceability. In the case of an appeal against a declaration of enforceability, Article 43(5) sets a time-limit of one month from the date of service of the declaration of enforceability (two months if the party against whom enforcement is sought is domiciled in a State bound by the Convention other than the one in which the declaration of enforceability is issued). No time-limit is indicated in the Convention in the event that the party against whom enforcement is sought is domiciled in a State not bound by the Convention. In the absence of any such indication, the determination of the time allowed is left to the national law of the State addressed.

Both kinds of appeal are to be dealt with in adversary proceedings. Article 43(3) merely specifies 'the rules governing procedure in contradictory matters'. In the absence of any further indication, the procedure to be followed is the ordinary one provided for by the national law of the court addressed, provided that it is such as to ensure that both parties are heard. The court hearing an appeal against a decision on a declaration of enforceability has to consider the judgment in the light of the grounds that would prevent it from being recognised and consequently declared enforceable. At this stage too there is a presumption in favour of recognition, in that the court does not rule on whether conditions for recognition are met, but rather on whether any of the grounds for refusal laid down in Articles 34 and 35 is present. The issue can be raised whether the appeal court might consider all or any of the grounds for refusing recognition of a foreign judgment of its own motion, especially where recognition might be manifestly contrary to public policy. Article 45(1) limits itself to stating that the court 'shall reject [if the appeal is brought by the applicant] or revoke [if the appeal is brought by the party against whom enforcement is sought] a declaration of enforceability only on one of the grounds specified in Articles 34 and 35'. The absence of any further indication in the Convention means that the question whether the court may consider the grounds for refusal of its own motion, or at the initiative of a party, will have to be resolved by the court itself, in the light of the public interest which in the legal order to which the court belongs may justify intervention in order to prevent the recognition of the judgment. An assessment of this kind can be carried out only on the basis of national law.

The judgment concluding the second stage, given on an appeal by the applicant or by the party against whom enforcement is sought, may be contested only by

the appeal referred to in Annex IV to the Convention, which for each State bound by the Convention specifies a form of appeal to a higher court or indeed precludes any such appeal entirely. Article 44 of the Convention gives no indication of how this further appeal available to the parties is to proceed. It may be inferred that appeal is governed by the national law of the particular State where enforcement is sought.

H. Provisional and Protective Measures

Article 47 contains a significant innovation with respect to Article 39 of the 1988 Convention, which stated that during the time specified for an appeal and until any such appeal had been determined, no measures of enforcement could be taken other than protective measures against the property of the party against whom enforcement was sought. That provision is still applicable, but Article 47(1) makes it clear that protective measures may be ordered before the declaration of enforceability is served and until such time as a decision has been taken on any appeals.

IV. Conclusion

This brief overview of the main issues dealt with by the revision of the Lugano Convention of 1988 shows that the Convention has been largely aligned to the Brussels I Regulation and that the entry into force of the Convention will contribute to establish a common European judicial area that goes beyond the boundaries of the European Union. This conclusion is also supported by Protocol 2 on the uniform interpretation of the Convention and by the role it gives to the EC Court of Justice in that respect. Although the judgments of the Court of Justice do not constitute a binding precedent for the courts of the States which are not members of the European Union, the obligation of domestic jurisdictions to 'pay due account to' such judgments will facilitate the prevention of divergent interpretations. Furthermore, the Standing Committee established under the Protocol will have functions that are broader than those of the corresponding committee under the 1988 Convention. It will decide certain issues requiring amendments of the Convention and its Annexes, thus also facilitating the alignment of the Convention to the Brussels I Regulation, should the European Community vary any of its provisions. Finally, the new Convention may serve as catalyst for other countries to join the system: the Convention is indeed open to the accession of third countries, including non-European States, provided that the conditions set forth in Article 70 are met. The Convention may therefore become the basis for an enlarged international judicial cooperation.

COMMERCIAL AGENTS UNDER EUROPEAN JURISDICTION RULES

THE BRUSSELS I REGULATION PLUS THE PROCEDURAL CONSEQUENCES OF *INGMAR*

Peter MANKOWSKI*

* Professor at the University of Hamburg.

Yearbook of Private International Law, Volume 10 (2008), pp. 19-55

I. Introduction

Commercial agents are a well-known and indispensable institution both in national and in cross-border trade. Distribution via commercial agents plays a vital and most crucial role in distributing goods and services. Exporters very often have to rely on commercial agents abroad who travel in their local or national markets. Commercial agents are local net-workers, and they assemble plenty of local knowledge. They broker information and serve extremely valuable functions as intermediaries. Often it is only their effort that triggers transactions that would otherwise not be concluded or realised. They bridge gaps between principals and customers. They turn mere opportunities into concrete transactions. They are genuine deal-makers and, thus, raise GNP.

Compared to establishing branches or subsidiaries, employing commercial agents can be simultaneously less cost-intensive and more efficient. On the other hand, disputes between commercial agents and their principals are common occurrences. The most prominent case in recent years (if not ever) was the famous (if not notorious) Ingmar case,[1] which battled with the scope of the Commercial Agents

[1] ECJ, *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, Case C-381/98, in: *ECR* 2000, I-9305; annotations *i.a.* by: REICH N., Case note, in: *EuZW* 2001, 51; THUME K.-H., *RIW* 2001, I; JAYME E., 'Zum internationalen Geltungswillen der europäischen Regeln über den Handelsvertreterausgleich', in: *IPRax* 2001, 190; RAYNARD J., Case note, in: *JCP E* 2001, *supp.* n°. 2, 12; IDOT L., Case note, in: *Rev. cr. dr. int. pr*. 2001, 112; VAN HOEK A., Case note, in: *SEW* 2001, 195; FREITAG R., Case note, in: *EWIR*, § 89b HGB 4/2000, 1061; MICHAELS R. / KAMANN H.-G., 'Grundlagen eines allgemeinen gemeinschaftlichen Richtlinienkollisionsrechts – «Amerikanisierung» des Gemeinschafts-IPR?', in: *EWS* 2001, 301; LEIBLE S. / FREITAG R., 'Internationaler Anwendungsbereich der Handelsvertreterrichtlinie – Europäisches Handelsvertreterrecht weltweit?', in: *RIW* 2001, 287; SCHWARZ S., 'Das internationale Handelsvertreterrecht im Lichte von Ingmar', in: *ZVglRWiss* 2002, 45; OFNER H., 'Ausgleichsansprüche des Handelsvertretrers und Rechtswahl', in: *ecolex* 2001, 715; NOURISSAT C., 'La loi nationale de transposition d'une directive communautaire peut-elle être qualifiée de loi de police dans l'ordre international?', in: *Les petites affiches* 2001, n° 124, 14; ROTH W.-H., Case note, in: *C.M.L. Rev*. 2002, 369; VERHAGEN H.L.E., 'The Tension between Party Autonomy and European Union Law', in: *ICLQ* 2002, 135; NEMETH K. / RUDISCH B., 'Ingmar - Wichtige Klärungen im europäischen IP', in: *ZfRV* 2001, 179; HÖLLER A., 'Rechtswahl für Vertriebsverträge? – EuGH schützt

Directive.[2] Yet there are plenty of other cases with cross-border elements.[3] A look to France in particular reveals the underlying battle: whether authorised dealers should be treated like commercial agents or whether they can avail themselves of special (more or less judge-made) rules in conflicts law.[4] The connoisseur licks his lips when he hears about the *arrêt Optelec*.[5] In Germany, the Oberlandesgericht

---

Richtlinienrecht', in: *RdW* 2001, 396; STAUDINGER A., 'Die ungeschriebenen kollisionsrechtlichen Regelungsgebote der Handelsvertreter-, Haustürwiderrufs- und Produkthaftungsrichtlinie', in: *NJW* 2001, 1974*;* JACQUET J.-M.*,, Rev. trim. dr. comm.* 2001, 1067; FONT I SEGURA A., Case note, in: *EuLF* 2000/2001, 179; *id*., 'Reparación indemnizatoria tras la extinción de contrato internacional de agencia comercial: imperatividad poliédrica o el mito de Zagréo', in: *Rev. der. com. eur*. 2001, 259; ADOBATI E. / GIANGROSSI I., 'Necessaria applicabilità della normativa comunitaria in tema di contratto di agenzia indipendentemente dalla legge che regola in contratto', in: *Dir. comm. int.* 2001, 725; BITTERICH K., 'Die analoge Anwendung des Art. 29 Abs. 1, 2 EGBGB auf Verbraucherschutzrichtlinien ohne kollisionsrechtlichen Rechtssetzungsauftrag', in: *VuR* 2002, 155; SCHWARTZE A., 'Die Ingmar-Entscheidung des Europäischen Gerichtshofs – Randprobleme aus dem Handelsvertreterrecht oder Weichenstellung für das Internationale Vertragsrecht der Gemeinschaft?', in: *Festschrift Wolfgang Kilian*, Baden-Baden 2004, 783; SCHURIG K., '«Ingmar» und die «international zwingende» Handelsvertreter-Richtlinie – oder: Die Urzeugung einer Kollisionsnorm', in: *Festschrift Erik Jayme*, München 2004, 837; EZQUERRA UBERO J.J., 'La sentencia «Ingmar» y la evolución del Derecho internacional privado europeo de los contratos', in: CALVO CARAVACA A.L. / AREAL LUDEÑA S. (dir.), *Cuestiones actuales del derecho mercantil internacional*, Madrid 2005, 193.

[2] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, in: *OJ* 1986 L 362/17.

[3] For instance, AP Barcelona 28 April 2000, in: *AEDIPr* 2002, 679 with note DE MIGUEL ASENSIO P.; Hof Antwerpen 8 June 2004, in: *TBH* 2007, 977; CA Bruxelles 3 December 2004, in: *TBH* 2007, 980.

[4] Article 4 (1) lit. h of the Rome I Regulation aims at settling this quarrel by legislative means, in the wake of Article 4 lit. h of the Proposal for a Rome I Regulation (COM [2005] 650 final of 15 December 2005).

[5] Cass. com. 15 May 2001, in: *Rev. crit. dr. int. pr.* 2002, 86 with note LAGARDE P. = *Clunet* 2001/128, 1121 with note HUET A. = *JCP G* 2001 II 10634 with note RAYNARD J., = *D.* 2002, 198 with note DILOY C. = *Lamy Dr. aff.* n°. 2898 (févr. 2002), 5 with note KENFACK H. (further annotations include AUDIT B., Case note, in: *D.* 2002, 1397 and KINDLER P., 'L'arrêt Optelec – Deutsch-Französisches zur objektiven Anknüpfung des Vertragshändlervertrags', in: *Festschrift Hans Jürgen Sonnenberger*, München 2004, 433); following suit the arrêt Amman-Yanmar Cass. com. 25 November 2003, in: *Rev. crit. dr. int. pr*. 2004, 102 with note LAGARDE P. = *Clunet* 2004/131, 1179 with note ANCEL M.-E. = *D.* 2004, 474 with note KENFACK H. = *JCP G* 2004 II 10046 with note RAYNARD J. and Cass. 1ere civ. 23 January 2007, in: *Bull. civ.* 2007 I n°. 30 = *JCP G* 2007 II 10074 with note AZZI T. = *D.* 2007, 511 with note CHEVRIER E. = *D.* 2007, 1575 with note KENFACK H. = *D.* 2007, 2571 with note BOLLÉE S. *Cf.* to the opposite avail e.g. OLG Koblenz 16 January 1992, in: *IPRax* 1994, 46 at 47; OLG Düsseldorf 4 June 1993, in: *RIW* 1993, 761 at 762; OLG Düsseldorf 11 July 1996, in: *RIW* 1996, 958 (noted by ADEN M., in: *DZWir* 1997, 81); OLG Hamm 5 November 1997, in: *IPRspr.* 1997, 323 at 326; OLG Stuttgart 7 August 1998, in: *RIW* 1999, 782.

(OLG) München[6] had to decide whether Ingmar should get a sidekick in the area of international procedural law, or to phrase it differently: whether Ingmar should get procedural teeth also preventing the effectivity of a jurisdiction clause in favour of a court in a Third State outside the EU. Hence, the treatment commercial agents receive under the Brussels I Regulation clearly deserves closer examination. To proceed down this avenue combines a sense for commercial reality, the recognition of a burning issue, and some kind of case study.

II. Characterisation and Classification

It is necessary to first identify the respective set of jurisdictional rules that may possibly apply. Or in private international law terminology: An issue of characterisation arises. Commercial agents have to be distinguished from employees. Self-employed commercial agents are commercial agents in the proper sense. Employed persons are dependent; they could and should be employees as defined by Community law.[7]

A. The Meaning of 'Employee' under Primary and Secondary EC Law

The source of this characterisation and classification must be the European law term 'employment contract' and the accompanying term 'employee.' These terms are used in Article 18 of the Brussels I Regulation. The interpretation of Article 18 must comply with the general autonomous interpretation rules under the entire body of Community law.[8] For this reason, recourse must be made to the

[6] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 with note THUME *K.H. = WM* 2006, 1556. Further annotations comprise EMDE R., Case note, in: *EwiR*, § 89b HGB 1/06, 621; RÜHL G., 'Die Wirksamkeit von Gerichtsstands- und Schiedsvereinbarungen im Lichte der Ingmar-Entscheidung des EuGH', in: *IPRax* 2007, 294; *ead.*, 'Extending *Ingmar* to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?', in: *ERPL* 2007, 891; QUINKE D., 'Schiedsvereinbarungen und Eingriffsnormen', in: *SchiedsVZ* 2007, 246.

[7] MANKOWSKI P., 'Handelsvertreterverträge im Internationalen Prozess- und Privatrecht', in: HOPT K. / TZOUGANATOS D. (eds.), *Europäisierung des Handels- und Wirtschaftsrechts*, Tübingen 2006, 131 at 132.

[8] *Cf.* for the autonomous characterisation as the solely appropriate method for the purposes of the Brussels I Regulation e.g. KROPHOLLER J., 'Die Auslegung von EG-Verordnungen zum Internationalen Privat- und Verfahrensrecht', in: *FS 75 Jahre Max-Planck-Institut für Privatrecht*, Tübingen 2001, 583; BARIATTI S., 'Qualificazione e interpretazione nel diritto internazionale privato comunitario: prime reflessioni', in: *Riv. dir. int. priv. proc.* 2006, 361.

interpretation of the synonymous term in Article 39 of the EC Treaty.[9] The secondary law may create its own terminology employing the same wording as primary law but with a different meaning. But as long as the secondary law does not create such terminology expressly, the secondary law must be interpreted in accordance with the primary law. The primary law demands attention because of the hierarchy of statutes and its systematic statutory interpretation.

The ECJ has rendered an overwhelming wealth of decisions concerning the term of employee, because it is relevant for labour mobility – one of the fundamental freedoms.[10] The decisions contain the following elementary definitions:[11] (1) An individual contract of employment is a contract between an employer and employee, and (2) the employee is a person receiving or entitled to wages for work performed for the employer's business during a defined period. The employee carries no entrepreneurial risk and no decision-making authority. Yet, the employer is a person who has control over an employee. Specific social or economic dependence may occur, but is not mandated. This definition is assisted by similar definition of 'employment contract' under Article 5 (1) cl. 2 of the Brussels Convention.[12] In

[9] OLG Hamburg 14 April 2004, in: *NJW* 2004, 3126 at 3127 *et seq.*; MANKOWSKI P., 'Ausländische Scheinselbständige und Internationales Privatrecht', in: *BB* 1997, 465 at 467 *et seq.*; *id.*, in: RAUSCHER T. (ed.), *Europäisches Zivilprozessrecht*, München 2006, 2nd ed., Art. 18 Brüssel I-VO note 3; TRENNER C., *Internationale Gerichtsstände in grenzüberschreitenden Arbeitsvertragsstreitigkeiten*, Konstanz 2001, 84 *et seq.*; MOSCONI F., 'La giurisdizione in materia di lavoro nel regolamento (CE) n 44/2001', in: *Riv. dir. int. priv. proc.* 2003, 5 at 11.

[10] In particular ECJ, *D.M. Lewin v. Staatssecretaris van Justitie*, Case 53/81, [1982] *ECR*, 1035 at 1048 paragraph 9; ECJ, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, Case 66/85, [1986] *ECR*, 2121 at 2144 paragraph 17; ECJ, *Steven Malcolm Brown v. Secretary of State for Scotland*, Case 197/86, [1988] *ECR*, 3205 at 3244 paragraph 21; ECJ, *V.J.M. Raulin v. Minister van Onderwijs en Wetenschapen*, Case C-357/89, [1992] *ECR*, I-1027 at I-1059 paragraph 10; ECJ *C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, Case C-377/97, [1999] *ECR*, I-3289 at I-3310 paragraph 13; ECJ, *Ghislain Leclere and Alina Deaconescu v. Caisse nationale des prestations familiales*, Case C-43/99, [2001] *ECR*, I-4265 at I-4313 paragraph 55; ECJ *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, Case C-413/01, [2003] *ECR*, I-13187 at I-13228 paragraph 24; ECJ *Brian Francis Collins v. Secretary of State for Work and Pensions*, Case C-138/02, [2004] *ECR*, I-2703 at I-2743 *et seq.* paragraph 26; ECJ, *Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)*, Case C-456/02, [2004] *ECR*, I-7573 at I-7604 paragraph 15; ECJ *Karl Robert Kranemann v. Land Nordrhein-Westfalen*, Case C-109/04, [2005] *ECR*, I-2421 at I-2438 paragraph 12.

[11] OGH 20 January 1999, in: *ÖJZ* 1999, 504 at 505; OLG Hamburg 14 April 2004, in: *NJW* 2004, 3126 at 3127; MANKOWSKI P. (note 9), 465 at 469; *id.*, Case note, LAGE Art. 30 EGBGB no. 7 at 15 and 18 (March 2004); *id.*, in: RAUSCHER T. (note 9), Art. 18 Brüssel I-VO note 4.

[12] ECJ, *H. Shenavai v. K. Kreischer*, Case 266/85, [1987] *ECR*, 239 at 255 *et seq.* paragraph 16.

addition, comparative law further supports this definition.[13]

Having independent contractors work under a contract of services, but in some degree of subordination and continuing economic dependence like small, authorised dealers, does not exist in the light of Article 5 (1) (b) Brussels I Regulation.[14] National notions must cease and are irrelevant to define certain notions of Community law. So, national discussion about bogus self-employment and alike cannot be transferred onto the Community.[15] But of course, their material content can however give valuable indications and hints.[16]

B. The Meaning of 'Employee' under Article 6 of the Rome Convention

The terms 'employment contract' and 'employee' as used in Article 18 of the Brussels I Regulation also appear in Article 6 of the Rome Convention.[17] Defining these terms under Article 6 necessitates recourse to the understanding of the parallel terms in primary law, although the Rome Convention is not genuine Community law but a treaty in the context of primary law. However a definition taking primary law into account is appropriate. Moreover there are no other divergent rules that have been seriously discussed in this context. Using primary law to define these terms is not so specific as it provides an unsatisfactory definition. As a result, the definition is consistent with the meaning given to the terms 'employment contract' and 'employee' in the legal systems of the Member States. Thus the definition can be substantiated and supported by comparative law.[18]

C. Self-Employed Status under the Commercial Agents Directive

In the concrete field of commercial agents, the Commercial Agents Directive and its interpretations may also be taken into account. The Directive restricts its own scope of application to *self-employed* commercial agents and thus relates directly to the question of whether or not a commercial agent is self-employed, i.e.

---

[13] In more detail SPRINGER S., *Virtuelle Wanderarbeit*, Darmstadt 2003, 91 and 125; MAGNUS U., in: VON STAUDINGER J. (ed.), *BGB, Arts. 27-37 EGBGB*, Berlin 2002, Art. 30 EGBGB note 36.

[14] RAUSCHER T., 'Arbeitnehmerschutz – ein Ziel des Brüsseler Übereinkommens', in*: FS Rolf A. Schütze*, München 1999, 695 at 708 *et seq.*; MANKOWSKI P. (note 7), 131 at 133. Not decided in OGH, 20 January 1999, in: *ÖJZ* 1999, 504 at 505. Tentatively *contra* CZERNICH D., in: CZERNICH D. / TIEFENTHALER C. / KODEK G., *Europäisches Gerichtsstands- und Vollstreckungsrecht*, Wien 2003, Art. 18 Brussels I Regulation note 5.

[15] OLG Hamburg 14 April 2004, in: *NJW* 2004, 3126 at 3127 *et seq.*

[16] *Cf.* OLG Hamburg 14 April 2004, in: *NJW* 2004, 3126 at 3128.

[17] *Cf.* only MANKOWSKI P. (note 9), 465 at 467; GEIMER R., in: GEIMER R. / SCHÜTZE R.A., *Europäisches Zivilverfahrensrecht*, München 2004, Art. 18 Brussels I Regulation note 23.

[18] MANKOWSKI P. (note 9), 465 at 468 *et seq*.

employed by another person. Unfortunately, Article 1 (2) of the Commercial Agents Directive – which provides the general definition of 'commercial agent' for the Directive – does not contain any trace of a sub-definition for 'self-employed' nor can such a sub-definition be detected elsewhere in the Directive. Obviously, 'self-employed' is regarded as the opposite, or counterpart, to 'not self-employed.' Or in other words, it means 'employed.'[19] The definition of 'employed' also has to be imported from primary law.[20] Hence, the Commercial Agents Directive does not add a new or specific colour to the blend.

D. Classification and Characterisation in the Individual Case

Whether a concrete commercial agent is an employee for purposes of Article 39 of the EC Treaty depends of course on the individual case. Yet, commercial agents organised as companies cannot be employees, because an employee must be a natural person.[21] Legal entities are excluded. This is a clear-cut rule and a good starting point to resolve a great number of cases: Any 'Agent Ltd.' or 'Agent GmbH' is outside the realm of Article 18 of the Brussels I Regulation. The Commercial Agents Directive however operates under a different set of criteria, so that legal entities are included under the term self-employed commercial agents.[22] But this only confirms (if indirectly) that persons who are not self-employed need to be natural persons.

On the other hand, a natural person commercial agent can be economically and socially similar to an employee.[23] A normative and purposive approach to

[19] *Cf.* only HOPT K., *Handelsvertreterrecht*, München 2003, § 84 HGB note 35. To the same avail in PIL KNÖFEL O., 'Ausländische Scheinselbständige, Grundfreiheiten und Qualifikation', in: *IPRax* 2006, 552 at 553.

[20] *Cf.* only HOPT K., 'Neue Selbständigkeit und Scheinselbständigkeit', in: *Festschrift für Dieter Medicus*, Köln/Berlin/Bonn/München 1999, 235 at 246.

[21] *Nota bene* that Article 6 of the Rome Convention is entitled '*Individual* employment contracts' (emphasis added).

[22] *Cf.* only HESSELINK M. W. / RUTGERS J. W. / BUENO DÍAZ O. / SCOTTON M. / VELDMAN M., *Commercial Agency, Franchise and Distribution Contracts*, München 2006, 160 note 2.

[23] OGH, 20 January 1999, in: *ÖJZ* 1999, 504 at 505; CZERNICH D., in: CZERNICH D. / TIEFENTHALER C. / KODEK G. (note 14), Art. 18 Brussels I Regulation note 7; LANGE K. W. in: EBENROTH T. / BOUJONG K.-H. / JOOST D. (eds.), in: *HGB, vol. I: §§ 1-342a HGB*, München 2007, Anh. § 92c HGB note 16 referring to HERSCHEL W., 'Die arbeitnehmerähnliche Person', in: *DB* 1977, 1185; KLIMA P., in: *RIW* 1987, 796; PREIS U. / STOFFELS, M., 'Die Inhaltskontrolle der Verträge selbstständiger und unselbständiger Handelsvertreter', in: *ZHR* 1996, 442 at 446 *et seq.*; HOPT K., 'Die Selbständigkeit von Handelsvertretern und anderen Vertriebspersonen – Handels- und arbeitsrechtliche Dogmatik und Vertragsgestaltung', in: *DB* 1998, 863 and ArbG Lübeck 26 October 1995, in: *BB* 1996, 177.

classification is therefore necessary.[24] Classification must not depend on the denomination of the contract; otherwise the floodgates would be opened in favour of the stronger contracting party who generally could dictate the names attached to issues.[25] Subsequently, this article does not focus on employee-commercial agents. It will consider only objective self-employed commercial agents. Self-employed commercial agents are the general rule,[26] since commercial agents normally are not subject to orders or instructions from their principals.[27] In particular, commercial agents working for a multiplicity of principals, or at least for more than a single principal, enjoy the more freedom, as the principals are competitors or at least not part of the same group of companies co-operating network.[28] Therefore, the regime created by Articles 18-21 of the Brussels I Regulation is tailor-made for, and restricted to, genuine labour contracts. It is not applicable to the vast majority of commercial agents[29] except in rare and exceptional circumstances. Its scope of application is complementary to that of the Commercial Agents Directive. This might serve as the best confirmation that both regimes neither overlap nor interfere with each other.

III. General Jurisdiction under Art. 2 Brussels I Regulation

In the absence of a jurisdiction agreement, Article 2 of the Brussels I Regulation is often ignored and neglected as the general rule of jurisdiction. That must not happen. To the contrary, Article 2 should be the starting point.[30] One additional aspect must also not be neglected. It stems from the realm of contract planning and

---

[24] LANGE K. W., in: EBENROTH T. / BOUJONG K.-H. / JOOST D. (note 23), Anh. § 92c HGB note 16; MANKOWSKI P. (note 7), 131 at 134.

[25] Hessisches Landesarbeitsgericht (LAG) 20 March 2000, *Entscheidungen der Landesarbeitsgerichte (LAGE)* § 611 BGB Arbeitnehmerbegriff no. 41, 6 with note MANKOWSKI P. (March 2001); MAGNUS U., in: *Staudinger* (note 13), Art. 30 EGBGB note 37; MANKOWSKI P. (note 7), 131 at 134.

[26] MANKOWSKI P., 'Der Ausgleichsanspruch des international tätigen Handelsvertreters', in: *MDR* 2002, 1352 at 1353.

[27] RUDISCH B., in: CZERNICH D. / HEISS H., *EVÜ*, Wien 1999, Art. 6 EVÜ note 20.

[28] *Cf.* OLG Hamburg 14 April 2004, in: *NJW* 2004, 3126 at 3128.

[29] MANKOWSKI P. (note 26), in: *MDR* 2002, 1352 at 1353; VON HEIN J., in: HOPT K., *Handelsvertreterrecht*, München 2003, § 92c HGB note 1. *Contra* EMDE R., 'Handelsvertreterrecht – Relevante Vorschriften bei nationalen und internationalen Verträgen', in: *MDR* 2002, 190 at 198.

[30] *Cf.* e.g. MAGNUS U., 'Internationalprivatrechtliche Fragen des Vertriebs aus der Schweiz in die EU', in: ARTER O. (ed.), *Vertriebsverträge*, Bern 2007, 221 at 225 and 228-229.

drafting: the general jurisdiction granted by Article 2 is the core yardstick against which the pros and cons of a particular jurisdiction agreement must be discussed and measured. One has to know their position without any agreement before starting to battle over a jurisdiction clause.[31]

IV. Special Jurisdiction under Art. 5 (1) (b) Brussels I Regulation

A. Agency Contract as a Contract for the Provision of Services

Among the particular heads of special jurisdiction, Article 5 (1) (b) of the Brussels I Regulation is exceptionally significant. This rule comes into play if the place of performance is not specifically stipulated in a contract.[32] Under Article 5 (1) (b), the law of characteristic performance's location covers all contractual issues. For all claims based on provision of service contracts (including the entitlement to remuneration), the place of performance is where the services were provided or should have been provided.[33] The notion of 'services' bears an autonomous meaning independent from that established by the laws of the Member States.[34] Once again the EC Treaty provides the most valuable guidelines. As an act of Community law, the Brussels I Regulation should conform to the interpretation of the EC Treaty wherever possible. Hence, it is most appropriate to adopt the meaning given to 'services' under Articles 49 and 50 of the EC Treaty,[35] to the

[31] MANKOWSKI P. (note 7), 131 at 137.

[32] A so called abstract agreement on the place of performance that aims exclusively at influencing jurisdiction, and therefore names a place which has no genuine connection whatsoever with the real activities, must be treated as an agreement on jurisdiction; *cf.* LG Trier 17 October 2002, in: *IHR* 2004, 115 and 116 with further references and note HERBER R.

[33] See for further details *infra* IV D.

[34] OLG Düsseldorf 30 January 2004, in: *IHR* 2004, 108 at 110 with further references; OLG Köln 14 March 2005, in: *RIW* 2005, 778 at 779; Rb. Kh. Antwerpen 25 February 2005, in: *ETL* 2005, 657 at 667; OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200; KROPHOLLER J., *Europäisches Zivilprozessrecht*, Frankfurt 2005, Art. 5 note 42.

[35] OGH 18 November 2003, in: *ÖJZ* 2004, 388 at 390; BGH 2 March 2006, in: *NJW* 2006, 1806; OLG Düsseldorf 30 January 2004, in: *IHR* 2004, 108 at 110; OLG Saarbrücken 27 October 2006, *OLG-Report Koblenz/Saarbrücken/Zweibrücken* 2007, 77 at 78 = *IPRspr*. 2006 Nr. 137; OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200; Rb. Kh. Hasselt 26 February 2003, in: *TBH* 2003, 623 with note KRUGER T.; MARKUS A., 'Revidierte Übereinkommen von Brüssel und Lugano: Zu den Hauptpunkten', in: *SZW* 1999, 205 at 211; BAJONS E., 'Der Gerichtsstand des Erfüllungsortes: Rück- und Ausblick auf eine umstrittene Norm', in: *FS Reinhold Geimer*, München 2002, 15 at 55 fn. 118; FACH GÓMEZ K., 'El reglamento 44/2001 y los contratos de agencia comercial internacional: aspectos jurisdiccionales', in: *Rev. der. com. eur.* 2003, 181 at 207 *et seq.*; IGNATOVA R., *Der*

extent the Brussels I system itself does not demand otherwise. Additional help can also be provided by the interpretation of 'services' under Article 13 of the Brussels Convention and Article 5 of the Rome Convention.[36]

'Services' should be given a broad meaning.[37] The notion of services encompasses every activity rendered in the interest of another person. In general, this coincides with, and is fostered by, an economic understanding and underpinning: Services are acts of production. As economic goods they are not perfected products but activities that could be the object of a demand.[38] Beyond any possible doubt, agency contracts are contracts for the provision of services.[39] They

---

besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO), Frankfurt etc. 2006, 195.

[36] *Cf.* only OGH 18 November 2003, in: *ÖJZ* 2004, 388 at 390; OLG Düsseldorf 30 January 2004, in: *IHR* 2004, 108 at 110; LEIPOLD D., 'Internationale Zuständigkeit am Erfüllungsort – das Neueste aus Luxemburg und Brüssel', in: *Gedächtnisschrift Alexander Lüderitz*, München 2000, 431 at 446; HAU W., 'Der Vertragsgerichtsstand zwischen judizieller Konsolidierung und legislativer Neukonzeption', in: *IPRax* 2000, 354 at 359; MICKLITZ H.-W. / ROTT P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', in: *EuZW* 2001, 325 at 328; DE LIMA PINHEIRO L., *Direito Internacional Privado, Vol. III: Compêtencia internacional e reconhecimento de decisões estrangeiras*, Lisboa 2002, 84 *et seq*.; FACH GÓMEZ K. (note 35), *Rev. der. com. eur*. 2003, 181 at 207; GANSSAUGE T., *Internationale Zuständigkeit und anwendbares Recht bei Verbraucherverträgen im Internet*, Tübingen 2004, 26; KLEMM T., *Erfüllungsortvereinbarungen im Europäischen Zivilverfahrensrecht*, Jena 2005, 67; LYNKER T., *Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO)*, Frankfurt etc. 2006, 59.

[37] *Cf.* only OGH 18 November 2003, *ÖJZ* 2004, 388 at 390; OGH 8 May 2008, *ZfRV*, 2008, 173; OLG Köln 14 March 2005, *RIW*, 2005, 778 at 779; OLG Karlsruhe 12 June 2008, *IHR* 2008, 194 at 195; BRENN, C., *Europäischer Zivilprozess*, Wien 2005, paragraph 72.

[38] WEGNER, H., *Internationaler Verbraucherschutz beim Abschluss von Timesharingverträgen: § 8 TzWrG*, Frankfurt etc. 1998, 104; MANKOWSKI, P., in: G. Spindler/A. Wiebe (eds.), *Internet-Auktionen und Elektronische Marktplätze*, Köln 2005, ch. 11 note 13; *id*., 'Verbraucherkreditverträge mit Auslandsbezug: Kollisionsrechtlicher Dienstleistungsbegriff und sachliche Abgrenzung von Eingriffsrecht', in: *RIW* 2006, 321 at 322 *et seq*; *id*., 'Der europäische Erfüllungsortsgerichtsstand bei grenzüberschreitenden Anwaltsverträgen', in: *AnwBl* 2006, 806 at 807.

[39] Cass. 1re civ. 11 July 2006, *Bull. civ*. 2006 I n°. 373 at 320; Cass. 1re civ. 3 October 2006, *Bull. civ*. 2006 I n°. 423, 365; Cassaz., s.u., 19 December 2007, *Riv. dir. int. priv. proc.* 2008, 795 at 799; OGH 8 May 2008, in: *ZfRV* 2008, 173; Hof Gent 28 April 2004, in: *TBH* 2005, 70; OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200; HOLLANDER N., 'L'arrêt Leathertex: Shenavai revisitée?', in: *TBH* 2000, 175 at 178; GAUDEMET-TALLON H., Case note, in: *Rev. crit. dr. int. pr*. 2000, 84 at 88; MICKLITZ H.-W. / ROTT P. (note 36), 325 at 328; ANCEL M.-E., Case note, in: *Rev. crit. dr. nt. pr.* 2001, 158 at 162; COUWENBERG I. / PERTEGÁS SENDER M., 'Recente ontwikkelingen in het Europees bevoegdheids- en executierecht', in: VAN HOUTTE H. / PERTEGÁS SENDER M. (eds.), *Het nieuwe Europese IPR: van verdrag naar verordening*, Antwerpen/Groningen 2001, 31 at 47 paragraph 3-28; IBILI F., Case note, *NILR* 2002, 114 at 115; EMDE R., 'Heimatgerichtsstand für Handelsvertreter

also function as classical examples for this category of contracts, if there ever has been such a category[40] with authorised dealers, distributors,[41] and franchisees.[42]

B. The Minor Importance of the Jurisdiction at the Place of Performance for Lawsuits Brought by the Principal

As long as the place of performance is identical to the residence or seat of the commercial agent, jurisdiction at the place of performance is of no avail to the principal. All special jurisdictions listed in Article 5 of the Brussels I Regulation demand as a strict prerequisite that the state of residence or seat of the commercial agent must be different from the state designated by the special connection factor. General jurisdiction and special jurisdiction cannot be situated in the same state. A place of performance in the commercial agent's state of residence therefore does not give the principal any special jurisdiction there.[43]

C. *Forum actoris* for the Commercial Agent as Claimant

Jurisdiction at place of performance is highly attractive to the commercial agent. It gives the commercial agent, as the party rendering services, a *forum actoris* for any and all claims based on the contract – particularly claims for remuneration and compensation or indemnity[44] for lost clientele after the termination of the agency

---

und andere Vertriebsmittler?', in: *RIW* 2003, 505 at 508; *id*., in: STAUB, H., *HGB, vol. II: §§ 48-104 HGB*, Berlin 2008, 5th ed., Vor § 84 HGB note 391; TAGARAS H., Chronique, in: *CDE* 2003, 717 and 745 *et seq*.; FACH GÓMEZ K. (note 35), 181 at 206-208; LUPOI M.A., 'Il «nuovo» foro per le controverse contrattuali', in: *Riv. trim. dir. proc. civ.* 2007, 495 at 508; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (eds.), *Brussels I Regulation*, München 2007, Art. 5 Brussels I Regulation note 89; *id*. (note 7), 131 at 138; MAGNUS U. (note 30), 221 at 232.

[40] MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 89.

[41] Protodikeio Thessaloniki 11862/2004 (quotation taken from VASSILAKAKIS E., 'Die Anwendung des EuGVÜ und der EuGVO in der griechischen Rechtsprechung', in: *IPRax* 2005, 279 at 280); BAJONS E., in: *FS Reinhold Geimer*, München 2002, 15 at 55; DE LIND VAN WIJNGAARDEN-MAACK M., 'Internationale Zustellung nach der EuZVO und internationale Zuständigkeit bei Klage auf Feststellung des Nichtbestehens eines Exklusivvertriebsvertrags', in: *IPRax* 2004, 212 at 219; WURMNEST W., 'UN-Kaufrecht und Gerichtsstand des Erfüllungsortes bei Nichterfüllung einer Alleinvertriebsvereinbarung durch den Lieferanten', in: *IHR* 2005, 107 at 113.

[42] EMDE R. (note 39), 505 at 511; MANKOWSKI P. (note 40), Art. 5 Brussels I Regulation note 89.

[43] MANKOWSKI, P. (note 7), 131 at 138.

[44] *Cf.* e.g. on calculation of indemnity or compensation: 1) ECJ, *Honyvem Informazioni Commerciali sarl v. Mariella de Zotti*, 23 March 2006, Case C-465/04, [2006] *ECR*, I-2879; ECJ, *Chevassus-Marche v. Groupe Danone Ste.*, 17 January 2008, Case C-19/07, nyr, D. 2008, 409 with note CHEVRIER E. 2) in England and Scotland *Lonsdale v.*

contract.[45] Such special jurisdiction at the place of performance applies not only to the claims specifically calling for the special performance of providing services but also to every claim based on the agency contract.[46]

Article 5 (1) (b) establishes unitary jurisdiction for the entire contract and all claims based on it,[47] including the person rendering services' claim for payment.[48] In particular, the claim for compensation after termination of the agency contract is covered.[49] This claim is contractual in nature and must not be regarded as a *sui generis* claim, which possibly could feature outside the realm of contractual jurisdiction. In the past, in France, some doubts were cast in this direction,[50] but these respective clouds have been recently dispersed.[51] Whether national law

---

Howard & Hallam Ltd. [2007] UKHL 32, [2008] 1 *Lloyd's Rep*. 78 (H.L.); ~ [2006] EWCA Civ 63, [2006] 1 *WLR*, 1281 (C.A.) (comments by SAINTIER S., 'Guidelines for Compensation of Commercial Agents', in *LQR* 2006, 379; PARKER HOOD N., 'Commercial Agents' Compensation: England vs. Scotland', in: *LMCLQ* 2007, 144); *King v. Tunnock Ltd.* 2000 SC 24 (Ct. Sess., Extra Div.); *McKenzie v. Escada (UK) Ltd.* [2001] *EuLR*, 567 (Q.B.D., *Bowers* J.); *Smith, Bailey,Palmer v. Howard & Hallam Ltd.* [2006] *EuLR*, 578 (Q.B.D., *Overend* J.). 3) in France: Cass. com., 23 January 2007, *Bull. civ*. 2007 IV n°. 5 = D. 2007, 439 with note CHEVRIER E. = D. 2007, 1308 with note SALOMON D. = *RTD* com 2007, 588 with note BOULOC B. = *JCP* E 2007 n°. 9, 28 with note BERLIOZ G. = *JCP* E 2007 n°. 50, 21 with note FAURE-ABBAD M.; CA Paris 8 November 2000, D. 2001, 232 with note CHEVRIER, E. 4) in Italy: Cassaz, sez. lav., 3 October 2006, *Mass. giur. lav.* 2007, 98 with note BORTOLOTTI F.; Cassaz, sez. lav., 12 March 2007, *Lav. prev. oggi* 2007, 1659 with note FRAIOLI A.; Cassaz, sez. lav., 24 July 2007 - n. 16347; App. Cagliari 26 June 2006, *Mass. giur. lav*. 2006, 816; App. Milano 25 October 2006; Trib. Ancona 11 July 2006, Agenti & rappr. 2006, 5; Trib. Venezia 25 January 2007; Trib. Trento 29 January 2007.

[45] EMDE R. (note 39), 505 at 508 with reference to LG Köln 19 September 2002 – Case 83 O 53/01; *cf.* also OLG Saarbrücken 27 October 2006, *OLG-Report Koblenz/Saarbrücken/Zweibrücken* 2007, 77 at 78 = *IPRspr*. 2006 Nr. 137.

[46] *Cf.* only OGH 2 September 2003, in: *JBl* 2004, 186 at 187; OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200.

[47] *Cf.* only OGH 2 September 2003, *JBl* 2004, 186 at 187; OGH 8 May 2008, in: *ZfRV* 2008, 173; OLG Düsseldorf 30 January 2004, in: *IHR* 2004, 108 at 110; VON DER SEIPEN C., 'Italienische Aktionäre vor deutschen Gerichten – Treuepflicht des Gesellschafters und Art. 5 Nr. 1 EuGVVO', in: *Festschrift Erik Jayme*, München 2004, 859 at 865.

[48] *Cf.* only EMDE R. (note 39), 505 at 508; *id.*, in: STAUB, H. (note 39), Vor § 84 HGB note 391; VON DER SEIPEN C. (note 47), 859 at 865.

[49] *Cf.* only *ECJ*, *SPRL Arcado v. SA Haviland*, 8 March 1988, Case 9/87, [1988] ECR 1539; Cassaz. 15 March 2006, in: *Riv. dir. int. priv. proc*. 2007, 201 at 203.

[50] *Cf.* Cass. 1re civ. 8 February 2000, in: *Rev. crit. dr. int. pr.* 2000, 473 and also CA Paris 21 May 1997, *D*. 1997, 149; CA Paris 17 February 1999, *D.* 1999, 289.

[51] Cass. 1re civ. 3 October 2006, in: *Clunet* 134 (2007), 132 at 133 = *JCP G*, 2006 II 10028 with note ASFAR C.; POILLOT-PERUZZETTO S., 'La compétence internationale en matière de contrat d'agence commerciale', in: *Rev. jur. comm.* 2007, 48 *et seq.*; ÉGÉA V. / MARTEL D., Note, in: *Clunet* 2007, 133 at 138; GAUDEMET-TALLON H., 'Quelques réflexions à propos de trois arrêts récents de la Cour de Cassation française sur l'art. 5-1 et de l'avis 1/03 de la Cour de justice des Communautes sur les compétences extrenes de la

might particularly characterise the agent's claims for compensation or indemnity as so called *obligations autonomes*[52] is devoid of meaning in the context of Article 5 (1) (b).[53] Because such claims are accessory to the characterisation of the original claims, any claims from a subsequent settlement between the agent and principal also qualify as stemming from a contract for services.[54] The jurisdiction in the place of performance is in most instances connected to the commercial agent;[55] at least it is closer to him than to the principal. Hence, Article 5 (1) (b) of the Brussels I Regulation is very advantageous to the commercial agent and presents him in many instances with a procedural 'home game.'[56]

D. Activity in More than One State

Jurisdiction in the *place* of performance bears additional delicacies if the commercial agent is called upon to render his services in a number of countries under a uniform contract. Not less than six alternative solutions can be identified.

1. The ECJ's Favourite: the Most Factually Relevant Place

The first alternative is to search for the most factually relevant part of the activities.[57] One has to weigh the activity in quantity, according to the time spent on it, and in quality, according to its importance. On the one hand, this alternative may become difficult and take a lot of time to assert. It might run into numerous factual problems, least in hard cases.[58] Weighing contacts is not the easiest task, as PIL illustrates.[59] However, it may lead to appropriate results, least in the cases where the commercial agent acts mainly at the same place, e.g. at the place where he has

---

Communauté', in: BONOMI A. / CASHIN RITAINE E. / ROMANO G. (dir.), *La Convention de Lugano – passé, présent et devenir*, Zürich 2007, 97 at 99.

[52] As French law does in Art. L 134-12 C.com.

[53] *Cf.* the references in the penultimate note.

[54] OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200.

[55] *Cf.* MAGNUS U. (note 30), 221 at 233.

[56] MANKOWSKI P. (note 7), 131 at 139.

[57] E.g. OGH 8 May 2008, in: *ZfRV* 2008, 173; MAGNUS U., 'Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO', in: *IHR* 2002, 45 at 49; LEIBLE S., in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 55; WURMNEST W. (note 41), 107 at 114; KREUZER K. / WAGNER R., in: DAUSES M. (ed.), *Handbuch des EU-Wirtschaftsrechts*, München looseleaf 1993 ongoing, ch. Q note 443 (2007); OBERHAMMER P., in: DASSER F. / OBERHAMMER P., *Kommentar zum Lugano-Übereinkommen*, Bern 2008, Art. 5 LugÜ note 67; WIPPING F., *Der europäische Gerichtsstand des Erfüllungsortes – Art. 5 Nr. 1 EuGVVO*, Berlin 2008, 205; OFNER H., Case note, in: *ZfRV* 2008, 173.

[58] *Cf.* similarly LYNKER T. (note 36), 114.

[59] MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121.

his office. If the commercial agent pursues his activity under the contract solely and exclusively in a certain country, the place of performance should obviously be located in that country, as the lack of a sensible alternative becomes a very convincing reason.[60] Beyond that, looking for a centre of gravity spares any recourse to *lex causae* or substantive law, whilst it employs economic criteria.[61] Furthermore, it is very much in line with the concentrating effect that Article 5 (1) (b) is intended to exert, as contrasted to Article 5 (1) Brussels Convention.[62] Certainly this solution can be predicted as one that the ECJ would feel inclined to pick, least if it does not deviate from the reasoning of the ECJ[63] in *Color Drack*.[64]

In *Color Drack*, the ECJ supported and preferred this solution,[65] but, unfortunately, it expressly restricted the decision to venue and local jurisdiction while also avoiding presenting any opinion on how to treat the matter with regard to international jurisdiction.[66] Yet, there is hardly any reason to treat international jurisdiction and venue differently.[67] On a more general level, searching for a single

---

[60] *Cf.* only Cassaz., s.u., 19 December 2007, in: *Riv. dir. int. priv. proc.* 2008, 795 at 799.

[61] NADAUD M., Case note, in: *JCP* E 2008 I 112, at 25.

[62] WIPPING F. (note 57), 205.

[63] ECJ, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C-386/05, [2007] *ECR* I-3699; annotations include i.a. LEIBLE S. / REINERT A., Case note, in: *EuZW* 2007, 373; PILTZ B., 'Gerichtsstand bei Verkauf beweglicher Sachen mit mehreren Lieferorten in einem Mitgliedstaat', in: *NJW* 2007, 1802; SUJECKI B., 'Bestimmung des zuständigen Gerichts gem. Art. 5 Nr. 1 lit. b EuGVVO bei mehreren Erfüllungsorten in einem Mitgliedstaat', in: *EWS* 2007, 398; MANKOWSKI P., 'Mehrere Lieferorte beim Erfüllungsortsgerichtsstand unter Art. 5 Nr. lit. b EuGVVO', in: *IPRax* 2007, 404; HARRIS J., 'Sale of Goods and the Relentless March of the Brussels I Regulation', in: *L.Q.R.* 2007, 522; DE FRANCESCHI A., 'Compravendita internazionale di beni mobili con pluralità di luoghi di consegna', in: *Int'l. Lis* 2007, 120; LUZI CRIVELLINI R. / SAMBURGARO G., 'Quale giudice competente in caso di pluralità di luoghi di consegna?', in: *Giur. it.* 2008, 148; HUBER-MUMELTER U. / MUMELTER K., 'Mehrere Erfüllungsorte beim forum solutionis: Plädoyer für eine subsidiäre Zuständigkeit am Sitz des vertragscharakteristisch Leistenden', in: *JBl* 2008, 561.

[64] *Cf.* MANKOWSKI, P, (note 63), in: *IPRax* 2007, 404 at 411 *et seq.*; HARRIS J. (note 63), 522 and 527; WIPPING F. (note 57), 205; HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 577. Clearly proceeding down the extended line of *Color Drack* OLG München 16 May 2007, in: *NJW-RR* 2007, 1428; OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 and 200 and in advance BGH 2 March 2006, in: *NJW* 2006, 1806; *cf.* also OLG Frankfurt 8 September 2004, in: *RIW* 2004, 864.

[65] ECJ, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C-386/05, [2007] *ECR* I-3699 at I-3738 paragraphs 40-42; applauded by MARKUS A., 'Der Vertragsgerichtsstand gemäss Verordnung 'Brüssel I' und revidiertem LugÜ nach der EuGH-Entscheidung Color Drack', in: *ZSR* 2007, 319 at 333.

[66] ECJ, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C-386/05, [2007] *ECR* I-3699 at I-3734 paragraph 16 and at I-3736 paragraph 31.

[67] *Cf.* in more detail MANKOWSKI P. (note 63), in: *IPRax* 2007, 404 at 411 *et seq.*; SUJECKI B. (note 63), in: *EWS* 2007, 398 at 402.

centre of gravity would certainly be consistent with the general tendency towards unitary jurisdiction under Article 5 (1) (b).[68] Hence, investing some thought in analysing and rethinking this approach seems quite justified, since it is the one most likely to be used in practice.

One should not however overlook or underestimate the difficulties in this approach. Imagine that – however this might be measured – 28 % of the performance is effectuated in one country, 25 % is spent in both in a second and third country respectively, and the remainder of the performance, 22 %, takes place in a fourth country. By sheer mathematics, 28 % is more than either 25 % or 22 %. But 28 % alone is not a significant percentage; it is not even close to reaching 72 % and can thus hardly be said to dominate or identify the focus of the contract's execution.[69] Anyone relying on *accessorium sequitur principale*[70] is wrong.[71]

Furthermore, how shall one reach the ground for such a calculation? Economic motivation and (on top of it) comparative relevance are not the easiest things to handle.[72] As to goods, would it be objective value, contract price, or resale price that matters?[73] With regard to commercial agents, first glance a variety of factors may be feasible: (1) time spent in the individual countries ; (2) distribution of the agents gross earnings; (3) distribution of the agents net earnings; (4) distribution of the principal's gross earnings from customers who were brokered by the agent; and (5) distribution of the principal's net earnings from customers who were brokered by the agent. At least in the internal relationship between agent and principal, information problems regarding the latter three figures should not occur, as one party would not have the figures the other party would be obliged to produce them. Such vital information should not be kept absolutely private.

Time spent should however be the relevant factor. Commercial agents provide services, and it is these services that should matter regardless of how important the eventual results might be. Also, a parallel with the determination of the employee's habitual place of work should be kept,[74] since service rendered (if only in a not self-employed, but economically dependent manner) is calculated by time units, and the rule of thumb for the habituality[75] relates to percentage of time spent.

---

[68] OBERHAMMER P. (note 57), Art. 5 LugÜ note 67.

[69] MANKOWSKI, P. (note 63), in: *IPRax* 2007, 404 at 410.

[70] Like OBERHAMMER P. (note 57), Art. 5 LugÜ note 67.

[71] A-G BOT Y., Opinion of 15 February 2007 in Case C-386/05, [2007] ECR I-3702 at I-3723 to I-3725 paragraphs 120-126; CZERNICH D. (note 14), Art. 5 Brussels I Regulation note 15; FRANZINA P., *Giurisdizione in materia contrattuale*, Padova 2006, 409; MANKOWSKI P. (note 63), 404 at 410.

[72] *Cf.* HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 568.

[73] HARRIS J. (note 63), 522 at 526; LEIN E., 'La compétence contractuelle en matière contractuelle: un regard critique sur l'article 5 § 1er de la nouvelle Convention de Lugano', in: BONOMI A. / CASHIN RITAINE E. / ROMANO P. (dir.) (note 51), 41 at 58.

[74] *Cf.* on a more general level WIPPING F. (note 57), 205.

[75] *Cf.* MANKOWSKI P., 'Der gewöhnliche Arbeitsort im Internationalen Prozeß- und Privatrecht', in: *IPRax* 1999, 332, 334 at 336; *id.*, in: RAUSCHER T. (note 9), Art. 18 Brüssel

To rely on external relations would create incentives to manipulate the collusive co-operation of either side with external partners. Time spent could be evidenced by time-sheets or diaries, with the opportunity to check the plausibility of the results possibly by contacting external partners. Yet such internal documentation on the agent's part might appear suspicious. But in most instances, principals might have enough opportunity to cross-check with the reports the agents have submitted.

Any factor based on time spent raises another query: How far back should the period go? Should it really be the entire duration of the contract? Or should it be, let's say, only the previous year? Any limitation in time might appear arbitrary. Why the last year and not the last two years, or why not the last six months?

Generally, the *principal* place of performance approach may work in easy cases where the most important and dominant place where the services were rendered is evident. It might also work where specific services are performed with one place of business being dominant and the others serving as mere auxiliaries.[76] But this approach may run into deep and widening trouble when matters become a little more complicated. In the really hard cases it could be prone to generating an almost intolerable level of uncertainty and insecurity.[77] The principal place of performance approach definitely needs a default rule, some kind of back-up. The ECJ has established the plaintiff's choice between where services are rendered or the goods are delivered, as back-up rule.[78] Another feasible[79] (and more convincing) candidate appears to be the mosaic principle.[80]

2. The Second Alternative: Plaintiff's Free Choice from the Menu

The second alternative is to let every place of performance have jurisdiction over the entire contract.[81] But this is not convincing.[82] It attempts to increase the jurisdic-

---

I-VO note 6 and Advocaat-Generaal STRIKWERDA L., Opinion, in: *Ned. Jur.* 1997, 3943 at 3947; *id.*, Opinion, in: *Ned. Jur.* 1998, 3126.

[76] MANKOWSKI P., 'Der europäische Erfüllungsortsgerichtsstand bei grenzüberschreitenden Anwaltsverträgen', in: *AnwBl* 2006, 806 at 809 *et seq.*; HUBER-MUMELTER U. / MUMELTER K. (note 63), in: *JBl* 2008, 561 at 569.

[77] LYNKER T. (note 36), 71; MUMELTER F., *Der Gerichtsstand des Erfüllungsortes im Europäischen Zivilprozessrecht,* Wien/Graz 2007, 174 *et seq.*

[78] ECJ, *Color Drack GmbH v. Lexx International Vertriebs GmbH,* Case C-386/05, [2007] *ECR* I-3699 at I-3738 *et seq.* paragraphs 42-43.

[79] As outlined *infra* IV D 5.

[80] *Cf.* STADLER A., in: MUSIELAK H.J., *ZPO*, München 2008, Art. 5 EuGVVO note 18 and if only in a slightly different combination TAKAHASHI K., 'Jurisdiction in Matters Relating to Contract: Art. 5 (1) of the Brussels Convention and Regulation', in: 27 *Eur. L. Rev.* 2002, 530 at 539; WIPPING F. (note 57), 206.

[81] DROZ G. A., 'Delendum est forum contractus?', *D.*, 1997 *chron.*, 351 at 356; TAKAHASHI K. (note 80), in: *Eur. L. Rev.* 2002, 530 at 539; GOTTWALD P., in: *Münchener Kommentar zur ZPO, Aktualisierungsband zur 2. Auflage,* München 2002, Art. 5 EuGVVO

tional liability on the part of the defendant –and this is in the vast majority of lawsuits involving commercial agents: to the principal's detriment.[83] Eventually it would amount to an invitation to forum shop.[84] Furthermore, one would abandon weighing the contract and search for local connecting factors. But this is the very rationale underlying, and the core of, a head of special jurisdiction. Thus, this alternative contradicts the concept of uniform jurisdiction. Article 5 (1) (b) of the Brussels I Regulation purports to avoid a wealth of jurisdiction (even if the several *fora* are only applicable to a single obligation). This choice unduly favours the plaintiff and unfairly ignores the justified interests of the defendant.[85] As such, it allows the possibility of commencing a lawsuit for one instalment at a place where only another, different instalment was to be delivered.[86] This reaches the level of absolute absurdity.

In the relevant cases, the commercial agent filing suit would be far better off. Imagine that 1% of the contract's performance takes place in a certain country. Now imagine that 1 % is allowed to trigger jurisdiction for 100 % of the claims under the contract. That would be grossly unfair to the principal,[87] all the more so because the Brussels regime does not employ a *de minimis* rule or any kind of *forum non conveniens* doctrine as an escape device. Furthermore, this alternative multiplies the number of possible jurisdictions, contrary to some general tendencies to restrict such numbers.[88] It would harm the maximum and damage general jurisdiction under Article 2 of the Brussels I Regulation. Basically, it would unhinge the entire system of checks and balances.

---

note 8; *id.*, in: *Münchener Kommentar zur ZPO*, München 2008, Art. 5 EuGVVO note 21; GEIMER R., in: GEIMER R. /SCHÜTZE R. (note 17), Art. 5 EuGVVO note 87.

[82] FACH GÓMEZ K. (note 35), 181 at 210; DE FRANCESCHI A. (note 63), 120 at 123.

[83] FACH GÓMEZ K. (note 35), 181 at 210; LEIBLE S., in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 55. More sympathetically HUBER-MUMELTER U. / MUMELTER K., (note 63), 561 at 569-571.

[84] LYNKER T. (note 36), 114.

[85] MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121; MARKUS A. (note 65), 319 at 332; WIPPING, F. (note 57), 202.

[86] LYNKER, T. (note 36), 114; MANKOWSKI P. (note 63), 404 at 406; WIPPING, F. (note 57), 202.

[87] *Cf.* only MANKOWSKI P. (note 63), 404 at 406; WIPPING F. (note 57), 202.

[88] KROPHOLLER J. (note 34), Art. 5 note 50; LYNKER T. (note 36), 114; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121.

3. The Third Alternative: Back to the Normative Approach under Art. 5 (1) (a) of the Brussels I Regulation via (c)

The third alternative is to give up any attempt to ascertain a place of performance[89] and fall back on Article 5 (1) (a) Brussels I Regulation *via* (c).[90] This solution would be consistent with Article 5 (1) cl. 2, 3 of the Brussels Convention and the original Lugano Convention, as well as with Article 19 (2) (a) and (b) of the Brussels I Regulation concerning employment matters. One could always fall back on a subsidiary complementary rule, as far as the primary connecting factor is deemed indeterminate. Indeed, Article 5 (1) (c) of the Brussels I Regulation ordinarily means that the place of performance, as determined in (b), is not situated in the Community.[91] However, the wording is broad enough to include a stopgap solution for other scenarios.

Admittedly, one would give up the intended unitary jurisdiction,[92] because (a) follows the *de Bloos*- and *Tessili*-doctrines of the ECJ[93] and determines the place of performance for only the single matter in dispute by using the applicable substantive law.[94] Rashly employing subsection (c) would foster an unwarranted tendency to stick to this method, which should be rendered obsolete for the types of contracts covered by subsection (b).[95] A further disadvantage is the threat of

[89] With a similar tendency LEIBLE S. in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 55 in the event of duties to act unlimited in geographic regards.

[90] *Cf.* ANCEL M.-E., Case note, in: *Rev. crit. dr. int. pr*. 2001, 135 and 160; FACH GÓMEZ K. (note 35), 181 at 210.

[91] *Cf.* only the Explanatory Note of the Commission to the Proposal for a Brussels I Regulation, BR-Drs. 534/99, 14.

[92] HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 564 *et seq*.

[93] ECJ *Industrie Tessili Italiana Como v. Dunlop AG*, Case 12/76, [1976] *ECR* 1473 at 1486 paragraphs 13-15; ECJ *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH*, Case C-288/92, [1994] *ECR* I-2913 at I-2958 paragraph 26; ECJ *GIE Groupe Concorde v. Master of the vessel 'Suhadiwarno Panjan'*, Case C-440/97, [1999] *ECR*, I-6307 at I-6349 to I-6352 paragraphs 17-30 on the one hand and ECJ *Établissements A. de Bloos SPRL v. Société en commandite par actions Bouyer*, Case 14/76, [1976] *ECR*, 1497 at 1508 paragraphs 9/12-13/14; ECJ *Leathertex Divisione Sintetici SpA v. Bodetex BVBA*, Case C-420/97, [1999] *ECR*, 1999, I-6747 at I-6790 paragraph 31 on the other hand.

[94] *Cf.* only the Explanatory Note of the Commission to the Proposal for a Brussels I Regulation, in: *BR-Drs*. 534/99, 14; KROPHOLLER J. / HINDEN M. VON, 'Die Reform des europäischen Gerichtsstands am Erfüllungsort', in: *GS Alexander Lüderitz*, München 2000, 401 at 408 *et seq*.; LEIPOLD D. (note 36), 431, 445 and 451; HAUSMANN R., 'Die Revision des Brüsseler Übereinkommens von 1968', in: *EuLF* 2000-01, 40 at 44; ANCEL M.-É., Case note, in: *Rev. crit. dr. int. pr*. 2001, 158 at 159; KROPHOLLER J. (note 34), Art. 5 note 50; MANKOWSKI P., Case note, in: *EWiR*, Art. 5 EuGVÜ 1/02, 519 and 520; *id.*, (note 38), ch. 12 note 33; SCHLOSSER P., *EU-Zivilprozessrecht*, München 2003, Art. 5 Brussels I Regulation note 10c; LEIBLE S., in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 41; VON DER SEIPEN C. (note 47), 859 and 867.

[95] HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 565.

friction between the yardsticks applied to venue or local jurisdiction.[96] At least the inapplicability can not be deducted from the use of the singular 'place' instead of the plural 'places,' since Article 5 (3) of the Brussels I Regulation is similarly phrased and clearly covers a majority of places.[97]

The ECJ's decision in *Besix* does not provide overwhelming support either.[98] In *Besix*, the ECJ denied that Article 5 (1) of the Brussels Convention becomes operative when a duty to refrain from certain activities was not subject to geographical limitations.[99] This *Besix*-doctrine should not be applied, because it clearly contradicts the principle underlying the notion of jurisdiction at the place of performance.[100] Technically, *Besix* is guided by peculiarities inherent when there is a duty to refrain from some activity.[101] The lack of geographical limitations and, thus, the ubiquity are a core element. [102] This core element is not repeated with regard to instalment deliveries in different locations or services to be rendered in a variety of named States.[103] The problem is distinguishable: *Besix* battled the problem of making any location determination, here the issue involves reconciling activities that are clearly located but in a number of States.[104]

4. The Fourth Alternative: Denying any Place of Performance

At least the third solution is preferred to yet another alternative: denying any place of performance altogether. [105] Such an approach deprives the prospective claimant of an option. But an option is in principle guaranteed by Article 5 (1) (b) of the

---

[96] MANKOWSKI P. (note 64), 404 at 407.

[97] MANKOWSKI P. (note 63), 404 at 407; LEIN E. (note 73), 41 and 58; HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 563.

[98] *Contra* GA BOT Y., Opinion of 15 February 2007 in Case C-386/05, [2007] *ECR* I-3702 at I-3722 paragraph 115 Fn. 30.

[99] ECJ, *Besix AG v. WABAG*, Case C-256/00, [2002] *ECR* at I-1699 at I-1733 paragraph 55; following suit Rb. ´s-Hertogenbosch, in: *NIPR* 2005, 234.

[100] *Cf.* MANKOWSKI P., Case note, in: *EWiR* Art. 5 EuGVÜ 1/02, 519; HESS B., 'Vertragspflichten ohne Erfüllungsort? Die Besix-Entscheidung des EuGH vom 19.2.2002', in: *IPRax* 2002, 376; DE FRANCESCHI A. (note 63), 120 at 122.

[101] MANKOWSKI, P. (note 63), 404 at 407; HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 572.

[102] *Cf.* FRANZINA P., 'Obbligazioni di non fare e obbligazioni esigibili in più luoghi nella Convenzione di bruxelles del 1968 e nel Regolamento (CE) n. 44/2001', in: *Riv. dir. int. priv. proc*. 2002, 391 at 402; *id*. (note 71), 409 *et seq*.

[103] MANKOWSKI P. (note 63), 404 at 407.

[104] MANKOWSKI P. (note 63), 404 at 407.

[105] Favouring this: RODRIGUEZ R., *Beklagtenwohnsitz und Erfüllungsort im europäischen IZVR*, Zürich 2005, paragraph 676.

Cf. also tentatively as some kind of default rule of last resort MAGNUS U. (note 57), 45 and 49.

Brussels I Regulation.[106] There would be no better justification for this approach than being unable to decide whether one place of performance outweighs another.[107] Such a 'non-solution' is contrary to the overall structure of the regulation[108] and is bound for disaster. It resembles committing suicide for fear of death. It should at least give way to the application of Article 5 (1) (a), since the latter is consistent with the internal structure of Article 5 (1).[109] It is just short of a very desperate attempt of *ultima ratio*.[110]

5. The Fifth Alternative: the Mosaic Principle

The fifth alternative splits jurisdiction: A forum can be located at any place where activity is displayed but for only the part of the activity taking place there.[111] This method could be vaguely aligned with the approach taken by the ECJ in *Shevill*,[112] yet in tort.[113] In substantive law, Article 73 of the CISG and Article 9:302 of the PECL also provide an indication in the same direction.[114] The fact that obligations arise not under a single contract but under a bunch of separate contracts may also be used in support.[115] It could be wise to keep the two possible groups that in practice are to a certain degree interchangeable as far in line as possible; the main

[106] MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 118.

[107] RODRIGUEZ R. (note 105), paragraph 676.

[108] IGNATOVA R. (note 35), 236; MANKOWSKI P. (note 63), 404 at 408.

[109] MANKOWSKI P. (note 63), 404 at 408.

[110] MAGNUS U. (note 57), 45 and 49; KROPHOLLER J. (note 34), Art. 5 note 50; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121; *cf.* also LYNKER T. (note 36), 117.

[111] CZERNICH D., in: CZERNICH D. / TIEFENTHALER C. / KODEK G. (note 14), Art. 5 Brussels I Regulation note 15; IGNATOVA R. (note 35), 236; LYNKER T. (note 36), 116 *et seq.*; SUJECKI B. (note 63), 398 at 401; MUMELTER K., *Der Gerichtsstand des Erfüllungsortes im Europäischen Zivilprozessrecht*, Wien/Graz 2007, 175; tentatively so FAWCETT J.J. in: FAWCETT J.J. / HARRIS J. / BRIDGE M., *International Sale of Goods in the Conflict of Laws*, Oxford 2005, paragraph 3.207; HARE C., Book review, in: *LMCLQ* 2007, 566 at 569.

[112] *Fiona Shevill v. Presse Alliance SA*, (Case C-68/93) [1995] *ECR* I-415 at I-461 *et seq.* paragraphs 28-33.

[113] *Cf.* FACH GÓMEZ, K. (note 35), 181 at 210; SUJECKI B. (note 63), 398 at 401; WIPPING F. (note 57), 203.

[114] MANKOWSKI P. (note 63), 404 at 406; HUBER-MUMELTER U. / MUMELTER K., (note 63), 561 at 573.

[115] *Cf.* HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 574.

reason being that it might be rather fortuitous that parties conclude a number of separate contracts or a single contract with an almost identical economic avail.[116]

A mosaic principle, meaning that in the state of activity only the part of the contract connected with the state is relevant, can avoid neither parallel proceedings nor contradictory results in those proceedings.[117] But fairness should also consider that portions of the dispute being fought in different Member States are at least connected in a way sufficient to trigger Article 28 of the Brussels I Regulation, so that either Article 27 (1) (if one feels inclined to regard such portions as dealing with the same cause)[118] or Article 28 could prevent inconsistent results.[119] As a matter of principle, any attempt at concentrating lawsuits would implode.[120] But such a split can be said to be consequential, prompted by the factual split between the instalments to be delivered in different States.[121] Another time, the issue of a minimum requirement might arise to mitigate the jurisdictional risk.[122]

The most severe – and eventually insurmountable – problems relate to remuneration and compensation.[123] The agent's claims might be deemed as establishing a bond around the entire contract. Yet in the specific event of commercial agents, one could perhaps argue that both remuneration and compensation can be attributed to certain portions of the agent's work and effort. The claimant agent would be left with the severe burden of either commencing several lawsuits in a number of jurisdictions to recover the entirety of the compensation owed or to let go part of what he believes to be entitled to. This would not be the most promising prospect, with the result being a severe and heavy a burden placed on the prospective claimant's shoulders.[124] In tort cases, there is an alternative option that provides some consolation – go for the place of activity instead of the multiple places where the primary damage was sustained. Such means of calming the waves are missing in contract cases[125] where only general jurisdiction at the defendant's domicile is another option at hand.[126]

---

[116] MANKOWSKI P. (note 63), 404 at 406 *et seq.*; *cf.* also OBERHAMMER P., in: DASSER F. / OBERHAMMER P. (note 57), Art. 5 LugÜ note 68.

[117] LEIBLE S., in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 55; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121.

[118] *Contra* LYNKER T. (note 36), 117; MANKOWSKI P. (note 63), 404 at 406. But *cf.* MAGNUS U. (note 30), 221 at 233.

[119] MANKOWSKI P. (note 63), 404 at 406; HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 573 *et seq.*

[120] HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 574.

[121] WIPPING F. (note 57), 204.

[122] HUBER-MUMELTER U. / MUMELTER K. (note 64), 561 at 574.

[123] LYNKER T. (note 36), 116; MANKOWSKI P. (note 63), 404 at 406; *id.*, in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 119.

[124] MARKUS A. (note 65), 319 at 332.

[125] MARKUS A. (note 65), 319 at 332.

[126] MANKOWSKI P. (note 63), 404 at 406.

6. The Sixth Alternative: an Auxiliary Presumption in Favour of the Commercial Agent's Principal Place of Business

The sixth and final alternative is a presumption. One would presume to equate the commercial agent's place of performance with the commercial agent's principal place of business or, if the commercial agent is an individual, with his habitual residence.[127] After all, the commercial agent probably does most of his organisational work (such as completing orders, registering contracts, and notifying and informing his principal) at this place.[128] The criterion of the principal place of business would create a welcome parallel and synchrony with the assessment that the PIL produces under Article 4 (2) cl. 2 Var. 1 of the Rome Convention and Articles 4 (1) (b); 19 (1) subpara. 2 of the Rome I Regulation.[129]

If activity by a certain branch or place of business can be positively ascertained, the presumption is open enough to take that fact into account. Generally, by proceeding down this avenue one would instrumentalise the typical subsidiary by filling up factors based on factual approaches by the alternate use of normative elements in case of need.[130] Normative starting points are always feasible and available. Factual starting points however can result in problems with determination. Additional support might be provided by Article 31 (c) of the CISG, which indicates a similar subsidiary solution where there is doubt.[131] In general, Article 7:101 (1) (b) of the PECL and Article 6.1.6 (1) (b) of the UNIDROIT Principles reach the same result and give further credibility to this solution.[132] To the extent one allows normativity to slip in through resort to Article 31 of the CISG,[133] the approach could be reformulated by leaning on Article 31 (c) of the CISG.

---

[127] MANKOWSKI P. (note 7), 131 at 141; *id*., in: MAGNUS U. / MANKOWSKI P. (note 40), Art. 5 Brussels I Regulation note 121; HUBER-MUMELTER U. / MUMELTER K., (note 64), 561 at 575 *et seq*.; EMDE R., in: STAUB, H. (note 39), Vor § 84 HGB note 394; tentatively also MAGNUS U. (note 30), 221 at 233 and in the result OLG Koblenz 13 March 2008, in: *IHR* 2008, 198 at 200.

[128] To the same avail EMDE R., in: STAUB, H. (note 39), Vor § 84 HGB note 395.

[129] MANKOWSKI P. (note 63), 404 at 408; HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 576.

[130] *Cf.* in more detail MANKOWSKI P., 'Das Internet im Intenationalen Vertrags- und Deliktsrecht', in: *RabelsZ* 1999, 203 at 257 *et seq*.

[131] HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 576.

[132] HUBER-MUMELTER U. / MUMELTER K. (note 63), 561 at 576.

[133] Cassaz., s.u., 27 September 2006, *Giust. civ.* 2007 I p. 1393 with note FERRARI F. = *NGCC* 2007 I at 534 with note FRANZINA P. = *Riv. dir. int. priv. proc.* 2007, 759 = *Riv. dir. proc.* 2007, 1303 = *ZEuP* 2008, 165 with note RÜFNER T.; Cassaz., s.u., 3 January 2007, *Riv. dir. int. priv. proc.* 2007, p. 1105; Cassaz., s.u., 14 March 2007, *Riv. dir. int. priv. proc.* 2008, 221; Cassaz., s.u., 20 June 2007 – n. 13991, *Riv. dir. int. priv. proc.* 2008, 505; Cassaz., s.u., 20 June 2007 – n. 14299, *Riv. dir. int. priv. proc.* 2008, 511; Trib. Padova, sez. distaccata di Este, 10 January 2006, *Riv. dir. int. priv. proc.* 2007, 147 at 153 et seq.; RAGNO F., '*Forum destinatae solutionis* e regolamento (CE) n. 44 del 2001: alcuni spunti innovativi dalla giurisprudenza di merito', in: *Giur. mer.* 2006, 1413; FERRARI F., 'Remarks on the

This rescues the factual approach to the full extent possible. First, it gives due weight to the factual setting of the individual case, insofar as it allows for a rebuttal of the presumption. Normativity does not gain prevalence as such and does not dispose of the facts single-handedly, but serves as a last resort, of *ultima ratio*.[134] Second, it conforms to the general approach of filling factual connecting points with autonomous normativity in cases of need.[135] The approach chosen prioritises and accentuates – In accordance with the overall system – the question of whether a factually determinative place exists. It is not until this question is answered 'No' that the approach advocated for comes to the rescue. This second-best approach preserves the general concept that connecting factors are primarily fact-orientated as far as possible and avoids the worse event of rendereding such connecting factor nugatory. Construing this presumption allows for the evaluation of individual cases and eliminates any excessive rigidity. The presumption basically develops a certain net weight, but neither in excess nor back-breaking. It is consciously conceived as only a back door, an escape device from a dilemma. One has to accept its comparative weakness, because its self-perception does not extend beyond being just an escape device and some kind of *ultima ratio*.[136]

Yet the rule's plain language requires that a respective place of business also be a place where services are rendered. The case is even more problematic when a contract for the sale of goods is involved, since then it is necessary that the respective place of business be the same as the place of delivery – merely being the place where the delivery was organised would probably not suffice.[137] Hence, merely organising services might not do the trick, either. But it will only rarely happen that commercial agents acting at their principal place of business could not be considered to render any services under a contract. Organising, re-arranging, and, in particular administrating contracts, keeping (electronic files) *à jour* are relevant activities under the agency contract and not mere auxiliary elements. Organisational work is more relevant to services than the outbound delivery of goods.[138] In the rare event that such work is not performed at the agent's principal place of business, one would feel

---

Autonomous Interpretation of the Brussels I Regulation, in Particular of the Concept of «Place of Delivery» under Article 5 (1) (b), and the Vienna Sales Convention', in: *RDAI* 2007, 83; *id*., 'Zur autonomen Auslegung der EuGVVO, insbesondere des Begriffs des «Erfüllungsortes der Verpflichtung» nach Art. 5 Nr. 1 lit. b', in: *IPRax* 2007, 61; SALERNO F., *Giurisdizione ed efficacia delle decisioni stranieri nel. Regolamento n. 44/2001*, Padova 2006, 142; LEIN E. (note 73), 41 and 55-57; WIPPING F. (note 57), 196 *et seq*.; MANKOWSKI P., 'Der Erfüllungsortsbegriff unter Art. 5 Nr. 1 lit. b EuGVVO – ein immer größer werdendes Rätsel?', in: *IHR* 2009 issue 2.

[134] MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121.

[135] MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 121.

[136] MANKOWSKI P. (note 7), 131 at 141.

[137] MANKOWSKI P. (note 63), 404 at 408.

[138] MANKOWSKI P. (note 63), 404 at 409.

forced to part with Article 5 (1) (b) and to proceed to Article 5 (1) (c), (a) of the Brussels I Regulation as a subsidiary solution.[139]

E. Local Jurisdiction (or Venue) and Activity at Several Places in a Single State

Upon closer inspection, even local jurisdiction (venue) poses a problem if the commercial agent is acting at numerous locations or simply travelling within a single state. The starting point of the analysis in such a situation is as follows: International jurisdiction must not become inapplicable or unsuitable just because a local venue does not exist. An auxiliary release is necessary. By the way, similar questions are well-known in international procedural employment law. There, the main point of emphasis is on the relevant location.[140] An alternative could be to raise every field of activity as place of performance. But this is no more persuasive here than it is in the international sphere. Otherwise, one would multiply the local court obligation at the principal's expense.

As opposed to international jurisdiction, here it is logically impossible to fall back on Article 5 (1) (c) of the Brussels I Regulation. Instead, one would have to split the standards for international and local jurisdiction; an action contrary to the system. Local venues prefer to presume that the place of performance is at the commercial agent's principal place of business. This presumption is of course rebuttable. In this way one can establish harmony with international jurisdiction's preferred result[141] at the same time.

F. Divergences under the Brussels and Original Lugano Conventions

Significant divergences exist between the Brussels Convention (thus in relation to Denmark) and the original Lugano Convention in two areas. First, special jurisdiction at the place of performance under Article 5 (1) cl. 1 of the original Lugano and Brussels Conventions is not a single jurisdiction for all claims under a contract. Rather, the special jurisdiction applies only to the primary cause of the action at stake.

Second, jurisdiction at any place of performance cannot be established by following an autonomous Community approach, but only by considering the substantive *lex causae* determined by intermitting application of the PIL of the forum state.[142] This also applies to commercial agency agreements, which do not form any

[139] *Cf.* MANKOWSKI P. (note 63), 404 at 408 *et seq.*

[140] BAG 29 May 2002, in: *AP* issue 12/2002 Nr. 17 zu § 38 ZPO – Internationale Zuständigkeit folio 2 with note MANKOWSKI P.

[141] *Cf. supra* IV D 6.

[142] See the references in note 94.

kind of exception to the general rule.[143] If the *lex causae* dictates that the place of performance is the seat of settlement or the seat of debtor, such as under German law in § 269 (1) BGB, this result is quite disadvantageous for a commercial agent; is such a situation, a claimant commercial agent cannot find jurisdiction at his own seat or place of establishment for a claim to recover his commission or compensation, rather he must sue the principal at the principal's seat under general jurisdiction.[144]

G. Defendant's Domicile within the EU as a Prerequisite

One general qualification has to be made with regard to parties who do not reside within the EU, which is of particular significance if the defendant principal is domiciled in the USA: Article 5 of the Brussels I Regulation presumes, as a prerequisite, that there is general jurisdiction within the EU. Article 5 only applies if the defendant is domiciled within the EU,[145] i.e. when the general requirements of Article 2 of the Brussels I Regulation are fulfilled. The Article's opening language makes this abundantly and unmistakeably clear, as it emphasises the defendant's domicile in a Member State as a prerequisite. If the defendant is not domiciled in any Member State, Article 5 is inapplicable, and by virtue of Article 4 (1) of the Brussels I Regulation, the *forum* state's national rules on jurisdiction apply.[146]

V. Special Jurisdiction under Art. 5 (5) of the Brussels I Regulation

Beside special jurisdiction at the place of performance, under Article 5 of the Brussels I Regulation any place of business could be relevant for establishing special jurisdiction. Such jurisdiction is not hard to ascertain if a commercial agent is engaged and managed by the establishment of the principal. One further question is, upon first glance, startling: Can the commercial agent create a place of business on the principal's part? However, this question turns out to be incorrectly posed if one restricts Article 5 to external clashes of business and, therefore, does not apply this rule to internal relations within the sales organisation. The agent's operation

[143] MAGNUS U. (note 30), 221 at 230 *et seq*.

[144] *Cf.* only BGH 22 October 1987, in: *NJW* 1988, 966; EMDE R. (note 39), 505 at 507; MANKOWSKI P. (note 7), 131 at 143.

[145] *Cf.* only BG 25 August 2003, in: *BGE* 129 III 738; OGH 1 August 2003, in: *ZfRV* 2004, 77 at 79; Rb. Rotterdam 5 April 2001, in: *NIPR* 2002, 90; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 5 Brussels I Regulation note 9.

[146] *Cf.* only CARRASCOSA GONZÁLEZ J., in: CALVO CARAVACA A., *Convenio de Bruselas*, Madrid 1994, Art. 5.1 CB note 3; MANKOWSKI P., in: MAGNUS U. / MANKOWSKI P. (note 40), Art. 5 Brussels I Regulation note 9.

may be an establishment or place of business of the principal in the external relationship to customers, so that it creates an additional head of special jurisdiction against the principal.[147] Yet, that does not mean that his own actions establish jurisdiction at his place of business against the principal, because he himself would be any place of business on the principal's side (and thus part of the principal's organisation).[148] Two different markets are concerned and ought to be clearly distinguished: the external product market, with regard to customers, and the market for activities between the commercial agent and the principal.[149]

VI. Jurisdiction Clauses

A. Ratio of Jurisdiction Clauses

The self-employed commercial agent does not act as consumer. He acts in his own commercial and entrepreneurial capacity and interests. Thus, the personal scope of application of Article 15 of the Brussels I Regulation is not invoked.[150] Article 15 determines the scope of application for all provisions of section 4. Hence, the permissibility of jurisdiction clauses is not limited to the three situations listed in Article 17 of the Brussels I Regulation. There is no special procedural regime protecting self-employed commercial agents. Hence, the general rules apply, first and foremost the extremely important Article 23 of the Brussels I Regulation: The principal and the commercial agent are free to stipulate for jurisdiction and to conclude an agreement as to jurisdiction.[151] The agreement on jurisdiction is *the*

[147] *Cf.* MANKOWSKI P., 'Zu einigen internationalprivat- und internationalprozeßrechtlichen Aspekten bei Börsentermingeschäften', in: *RIW* 1996, 1001 at 1005; GOTTWALD P. in: *Münchener Kommentar zur ZPO*, vol. III: *§§ 803-1066 ZPO; GVG*; *IZPR*, München 2001, 2nd ed., Art. 5 EuGVÜ note 53; LEIBLE S. in: RAUSCHER T. (note 9), Art. 5 Brüssel I-VO note 106.

[148] Cassaz. 23 December 1997, in: *Riv. dir. int. priv. proc.* 1998, 160 at 162; LINKE H., 'Der «klein-europäische» Niederlassungsgerichtsstand (Art. 5 Nr. 5 EuGVÜ)', in: *IPRax* 1982, 46 at 48 *et seq.*; SORIANO V. / GARCIMARTÍN A., *Derecho procesal civil internacional*, Madrid 2000, 100; FACH GÓMEZ K. (note 35), 181 at 237; KINDLER P., 'Gesellschafterinnenhaftung in der GmbH und internationale Zuständigkeit nach der Verordnung (EG) Nr. 44/2001', in: *FS Peter Ulmer*, Berlin/New York 2003, 305 and 321; MANKOWSKI P. (note 7), 131 at 142; MAGNUS U. (note 30), 221 at 237; with the same result but without differentiating between external and internal relationships OECHSLER J., in: MARTINEK M. / SEMLER F.-J. / HABERMEIER S. (eds.), *Handbuch des Vertriebsrechts*, München 2003, § 61 note 25.

[149] MANKOWSKI P. (note 7), 131 at 142 *et seq.*

[150] *Cf.* only MANKOWSKI P. (note 26), 1352 at 1353; *id.* (note 7), 131 at 135.

[151] *Cf.* only OECHSLER J., in: MARTINEK M. / SEMLER F.-J. / HABERMEIER S. (note 147), paragraph 61, 6; LANGE K.W. in: EBENROTH T. / BOUJONG K.-H. / JOOST D. (note 23), Anh. § 92c HGB note 28; EMDE R. (note 39), 505 at 508.

single most important instrument in procedural matters. The contracting parties get the opportunity to choose the court they may deem most appropriate. For instance, they may choose a court of high expertise that is often concerned with comparable cases. On the other hand, they may choose a court located close to at least one party to avoid an 'away game' for both of them. Moreover they may agree on a so called 'neutral' court outside both of their respective home countries, in the hope of attaining equal distance, least geographically. By exploiting jurisdiction clauses, each party regularly attempts to establish jurisdiction in a court located in its respective home country, thus, getting 'home field' advantage and simultaneously creating an 'away game' for the adverse party.[152]

By stipulating to jurisdiction, the parties gain a relative security. At least in theory, they know which court is competent. This reduces the risk of being sued abroad (or in an unwarranted jurisdiction) because all other jurisdictions are derogated. However, theory and reality may come apart. This delineation of jurisdiction cannot prevent one party from ignoring the agreement and bringing an action before an incompetent court. This party runs the risk that the international incompetent court may dismiss the case, meaning that it will bear the legal costs incurred by the other party pursuant to the rules of the court the party filed in. Nevertheless, this may be time intensive, causing the inconvenience of the action and the pressure to accept an arrangement to be sufficient to let the party achieve its aims. On the other hand, the defendant may not plead want of jurisdiction, so that pursuant to Article 24 of the Brussels I Regulation the court that would have venue under the jurisdiction clause becomes competent. Hence, tactics are of high significance in such proceedings.

B. National Law May Not Implement Limits on Choice of Forum within the EU

Under Article 23 of the Brussels I Regulation, national control of jurisdiction agreements is barred.[153] This Article conclusively regulates all questions of international jurisdiction agreements (insofar as covered) and takes precedence over any national law. Accordingly, further limitations by national law are not permitted.[154]

---

[152] *Cf.* in more detail on the advantages of a 'home game' and the corresponding disadvantages of an 'away game' MANKOWSKI P., 'Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse', in: OTT C. / SCHÄFER H.-B. (eds.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen*, Tübingen 2002, 118 at 121-123; *id.*, 'Die Lehre von den doppelrelevanten Tatsachen auf dem Prüfstand der internationalen Zuständigkeit', in: *IPRax* 2006, 454 at 456 *et seq*.

[153] *Contra* OLG Karlsruhe 30 December 1981, in: *NJW* 1982, 1950 *et seq*.; OLG Düsseldorf 6 January 1989, in: *NJW-RR* 1989, 1330 at 1331; LANDFERMANN G., 'AGB-Gesetz und Auslandsgeschäfte', in: *RIW* 1977, 445 at 448; EMDE R. (note 39), 505 at 508 *et seq*.

[154] *Cf.* only ECJ, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case C-159/97, [1999] *ECR*, 1999, I-1597 at I-1656 paragraph 51; OLG München 8 March 1989, in: *RIW* 1989, 901 at 902; OLG Stuttgart 9 November 1990, in: *EuZW* 1991,

In particular, § 38 (1) ZPO, which under German law limits the admissibility of a prorogation agreement to those commercial agents with merchant status, is not applicable.[155] Pursuant to Article 23 (1) cl. 1, any person – not just merchants – may enter into an agreement on jurisdiction. The protective provisions of the Regulation (Articles 14; 17; and 21) establish an exclusive control system. The protected persons are not *per se* disabled from stipulating to a competent jurisdiction, but agreements on jurisdictions are inadmissible under certain circumstances. For the sake of creating a uniform regime, establishing and reinforcing protective measures cannot be left to national law.[156] The boundaries to such a regime must also be uniform, without diverging from forum state to forum state.

C. Procedural Teeth for *Ingmar*

1. Protective Approach Favouring the Commercial Agent

The latest milestone is the *OLG München* decision rendered on May 17, 2006.[157] It highlights the current developments and is the judicial frontrunner in the line of cases so prominently starting with *Ingmar*. In *Ingmar*,[158] the ECJ was also concerned with the possible effects of a choice of law clause that opted for the law of a state outside of the EU. The instruments protecting the commercial agent, and in particular the central claim for compensation, were alien and unknown to the law chosen (California law). The ECJ held that the EU regime overrode the national law, stripping the choice of law clause of its effects insofar as the law chosen did not provide adequate and equivalent protection for the commercial agent providing services within the EU.[159] Yet the ECJ did not have to deal with the possible conse-

---

125 at 126; LG Darmstadt 2 December 1993, in: *NJW-RR* 1994, 684 at 686; LG Karlsruhe 31 October 1995, in: *NJW* 1996, 1417 at 1418; KOHLER C., 'Internationale Gerichtsstandsvereinbarungen, Liberalität und Rigorismus im EuGVÜ', in: *IPRax* 1983, 265 at 270 *et seq*.; GOTTWALD P., 'Grenzen internationaler Gerichtsstandsvereinbarungen', in: *FS Karl Firsching*, München 1985, 89 and 105; ROTH H., 'Gerichtsstandsvereinbarung nach Art. 17 EuGVÜ und kartellrechtliches Derogationsverbot', in: *IPRax* 1992, 67 at 68; JAYME E. / KOHLER C., 'Das Internationbale Privat- und Verfahrensrecht der EG nach Maastricht', in: *IPRax* 1992, 346 at 353; KRÖLL S., 'Gerichtsstandsvereinbarungen aufgrund Handelsbrauchs im Rahmen des GVÜ', in: *ZZP* 2000, 135 at 149 *et seq*.; LANGE K. W., in: EBENROTH T. / BOUJONG K.-H. / JOOST D. (note 23), Anh. § 92c HGB note 31; MANKOWSKI P., in: RAUSCHER T. (note 9), Art. 23 Brüssel I-VO note 12.

[155] *Contra* EMDE R. (note 39), 505 at 509.

[156] MANKOWSKI P. (note 7), 131 at 136.

[157] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR*, 2006, 166 with note THUME K.-H.

[158] ECJ, *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, Case C-381/98, [2000] *ECR*, I-9305.

[159] ECJ, *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, Case C-381/98, [2000] *ECR* I-9305 at I-9332-I-9335 paragraphs 14-26.

quences of applying the EU regime to a jurisdiction clause that chose a court of a non-Member State.

Contract planning thus could employ well-advised principals to circumvent *Ingmar*, by coupling the choice of law clause with a jurisdiction clause. Anglo-American attitude, and supposed wisdom, could claim that there is not (yet) a clear verdict, and that what is not clearly forbidden should be allowed for the sake of contractual freedom. A fine case of testing the inherent and proper strength of *Ingmar* would therefore arise. In fact, *Ingmar* is rendered null if a jurisdiction clause (or in American terminology: a choice of forum clause) is inserted in the contract.[160] Small print and a little effort would generate a huge result.

Accordingly, one conclusion can be firmly drawn: The purposes pursued by the substantive law of the European regime require procedural law to fall into line and to provide for the appropriate means to secure these purposes. Substantive law here requests procedural backing and affirmation.[161] If one wants to enforce the protective regime effectively, it is necessary to extend the protective approach to the area of jurisdiction.[162] When a choice of law clause must fail, falling victim to protective mechanisms, a similar jurisdiction clause must suffer the same fate and not be allowed to revitalise the doomed choice law clause through indirect means.[163] Mandatory law must become pre-eminent and dominant here, else it would be a semi-open invitation to attempt to circumvent it. In principle, such reasoning is generally recognised, acknowledged, and appreciated (particularly in the area of carriage of goods by sea under the auspices of the Hague Rules or the Hague-Visby Rules).[164] As early as 1996 the Commission operated under the assumption that the Commercial Agents Directive would prevent attempts to circumvent Article 17 through a choice of jurisdiction clause in favour of a court in a third state.[165] Although this assumption was at that time rather precipitous, since it lacked any backing in either the Community or national jurisprudence and it was

---

[160] MANKOWSKI P. (note 7), 131 at 149.

[161] MANKOWSKI P. (note 26), 1352 at 1355 and generally ROTH G.H., 'International zwingender Rechtsschutz – materiell und prozessual', in: *IPRax* 1985, 198 at 200; MANKOWSKI P., 'Neue internationalprivatrechtliche Probleme des Konnossements', in: *TranspR* 1988, 410 at 420.

[162] MANKOWSKI P. (note 26), 1352 at 1355; *id.*, *supra* note 7, 131 at 149 *et seq.* Still nurturing doubts HOPT K., *Handelsvertreterrecht,* München 1999, § 92c HGB note 11.

[163] MANKOWSKI P. (note 7), 131 at 149.

[164] *Cf.* only BGH 8 February 1968, in: *MDR* 1968, 474 at 475; BGH 21 December 1970, in: *NJW* 1971, 325; BGH 8 Febraury 1971, in: *NJW* 1971, 985; BGH 3 December 1973, in: *AWD* 1974, 221 with note VON HOFFMANN B. = *ZZP* 88 (1975), 318 with note WALCHSHÖFER A.; BGH 30 May 1983, in: *NJW* 1983, 2772; BGH 12 March 1984, in: *WM* 1984, 1245; BGH 15 June 1987, in: *NJW* 1987, 3193; BGH 21 September 1987, in: *WM* 1987, 1353; BGH 6 June 1991, in: *NJW* 1991, 2215; BGH 21 September 1993, in: *WM* 1993, 2121; *The 'Hollandia'* [1983] 1 AC 1 (H.L.).

[165] Report on the application of Article 17 of the Council Directive on the Co-Ordination of the Laws of the Member States Relating to Self-Employed Commercial Agents (86/653/EEC), COM (96) 364 final p. 12.

evidently flawed insofar as it believed Article 17 of the Brussels Convention could accomplish this feat, it clearly fell in line with *Ingmar* subsequently.[166]

Technically, the translation into the *lex lata* runs as follows:[167] Article 23 of the Brussels I Regulation does not inhibit or limit such transfers in the situation being discussed, since this rule is inapplicable if the jurisdiction clause opts for the jurisdiction of a non-Member State court.[168] It is for the national rules of the *fora*, possibly *derogata*, to decide as to whether they are inclined to enforce such jurisdiction clause. It is exactly at this level that the Commercial Agents Directive intervenes. It restricts the options that are open for the national rules of the Member States, since the Member States must comply with the Directive and have to implement it properly. National rules must bow to the Directive and must be interpreted in the light of the Directive as to ensure its *effet utile*. This rule of interpretation does not apply to rules specifically designed to implement the Directive but extends to the entire body of national law, insofar as the Directive itself extends its reign.[169] There is no clash within the overall system of Community law since procedural autonomy in these instances, outside Article 23 of the Brussels I Regulation, is not a product of Community law.[170] Insofar as effectiveness calls for enforcing the material regime of the Directive, courts have to answer this call, and they must do so in a manner that is not overly excessive or rigid.[171]

2. A Case Study: the Decision of the OLG München

The *OLG München* dismissed a jurisdiction clause that *in casu* tried to vest exclusive jurisdiction in the courts of Santa Clara, California. The commercial agent who resided in Germany performed activity in Germany and thus in the EU. The *OLG München* expressly referred to *Ingmar* and retold the story of that featured case in some detail.[172] It deliberately extended the *Ingmar* approach to cover the

---

[166] WELLER M., *Ordre-public-Kontrolle internationaler Gerichtsstandsvereinbarungen im autonomen Zuständigkeitsrecht*, Tübingen, 2005, 135 *et seq*.; *cf.* also HAUSMANN R. in: REITHMANN C. / MARTINY D., *Internationales Vertragsrecht*, Köln 2004, 6th ed., paragraph 3168.

[167] MANKOWSKI P. (note 7), 131 at 150; similar RÜHL G. (note 6), 294 at 298 *et seq.*

[168] *Cf.* only MANKOWSKI P., in: RAUSCHER T. (note 9), Art. 23 Brüssel I-VO note 3; MAGNUS U., in: MAGNUS U. / MANKOWSKI P. (note 39), Art. 23 Brussels I Regulation note 31.

[169] *Cf.* only ECJ, *Marleasing SA v. Comercial international de alimentacion SA*, Case C-106/89, [1990] *ECR* I-4135 at I-4159 paragraph 8.

[170] Disregarded and not properly taken into account by RÜHL G. (note 6), in: *IPRax* 2007, 294 at 299; *ead.* (note 6), in: *ERPL* 2007, 891 at 898 *et seq.*

[171] But *cf.* to the opposite avail RÜHL G. (note 6), in: *IPRax* 2007, 294 at 299; *ead.* (note 6), in: *ERPL* 2007, 891 at 899.

[172] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 167 *et seq*.

dismissal of jurisdiction clauses in favour of courts outside the EU.[173] To this avail, the *OLG München* drew support[174] from a cluster of earlier decisions by German courts that dismissed jurisdiction clauses in favour of foreign courts if they led to the result that excluded the application of German law.[175] These decisions covered many different areas, including the carriage of goods by sea,[176] financial services,[177] and non-compete agreements imposed on former employees or commercial agents.[178] These cases can be relied upon as establishing a general approach. Finally, the *OLG München* did not require water-tight proof that the *forum prorogatum* would not grant equivalent protection, but deemed if not an imminent risk,[179] so a likelihood that the *forum prorogatum* would do so, sufficient to dismiss the jurisdiction clause.[180]

3. First Restriction: Unequal Protection to the Commercial Agent Rendered by the forum prorogatum

Surely one restriction (which the *OLG München* truly observed) has to be made in order not to over-extend the approach: If and insofar as it can be said that in a particular situation the *forum prorogatum* would apply the European regime or grant equivalent protection to the commercial agent, the jurisdiction clause should be upheld and cannot be declared ineffective. If the principal does not attempt to circumvent the European regime, the jurisdiction clause should be enforced. This at once gives seized Member State courts an intricate and challenging task: They have to assess whether the said precondition is fulfilled. This implies, and encompasses, potentially extensive research on which substantive rules the *forum prorogatum* would apply.[181]

---

[173] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168.

[174] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168.

[175] BGH 30 January 1961, in: *NJW* 1961, 1061 at 1062; BGH 30 May 1983, in: *NJW* 1983, 2772; BGH 12 March 1984, in: *NJW* 1984, 2037; BGH 15 June 1987, in: *NJW* 1987, 3193; Hessisches LAG 14 August 2000, in: *NJOZ* 2001, 45 at 52.

[176] BGH 30 January 1961, in: *NJW* 1961, 1061 at 1062; BGH 30 May 1983, in: *NJW* 1983, 2772.

[177] BGH 12 March 1984, in: *NJW* 1984, 2037; BGH 15 June 1987, in: *NJW* 1987, 3193.

[178] Hessisches LAG 14 August 2000, in: *NJOZ* 2001, 45 at 52.

[179] *Contra* the translation of 'naheliegende Gefahr' with 'imminent risk': RÜHL G. (note 6), 891 at 894 fn. 6.

[180] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168.

[181] THUME K.-H., Case note, in: *IHR* 2006, 169 *et seq.*; *cf.* also if only from a different angle RÜHL G. (note 6), in: *IPRax* 2007, 294 at 298; *ead.* (note 6), in: *ERPL* 2007, 891 at 897. For a practical example *vide* OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168.

Perhaps choice of law considerations could serve as an escape device, least in some cases: If the contract contains a choice of law clause opting for the law of a non-Member State, it could be generally presumed that the European regime would not be applied,[182] particularly if the conflicts rules of the *forum prorogatum* puts special emphasis on party autonomy (as for instance, it could be supposed with regard to courts in most states of the USA). In a second step, the ECJ could even require a review of the applicable law of a non-Member State to determine whether it protects the commercial agent in a manner that is roughly equivalent to the protection the European regime would offer in such a case.[183] This might imply the very delicate task of comparing and evaluating the instruments employed on both sides of the comparison, if taken *verbatim* and seriously. The *OLG München* created a suitable escape device by referring to the imminent danger of protection not being granted, as opposed to requiring full proof regarding the possible outcome of a lawsuit before the *forum prorogatum*. In essence, there would still be an element of speculation about such outcome and its specific details.[184] It requires more than a mere allegation that protection might not be granted, and this might in turn require some inquiry about the way the *forum prorogatum* would most likely rule.[185] The restriction on procedural autonomy calls for some justification in order not to get out of balance and go beyond what material justice demands.[186] In summary, a middle of the road approach appears to be sensible in order not to require any *probatio diabolica* or let the principle run around on the rocks of practical unenforceability.

4. Second Restriction: Derogation from Jurisdiction Existing within the EU

It is necessary to add another *caveat*, though: Suppose that the general rules on jurisdiction do not provide for jurisdiction within the EU in a specific case. One then faces a severe problem of getting the balance right: Should the jurisdiction clause be torn apart because it would deprive the commercial agent of the protection granted by *Ingmar*, just to let the very same commercial agent face an equally undesirable fate and the unmerciful prospect of having no venue where he could sue his principal within the EU? In this case, there is no venue granted to the commercial agent by the Brussels I Regulation of which he could be deprived by the agreement. The verdict on the clause would not appear to enhance or ameliorate the commercial agent's position or make the European regime once against effective. In theory, the *caveat* thus is a necessary precondition in order to maintain the

[182] *Cf.* OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168 with note THUME K.-H.

[183] THUME K.-H., Case note, in: *IHR* 2006, 169 *et seq.*; RÜHL G. (note 6), in: *IPRax* 2007, 294 at 298; *ead.* (note 6), in: *ERPL* 2007, 891 at 897.

[184] *Cf.* RÜHL G. (note 6), *IPRax* 2007, 294 at 298.

[185] RÜHL G. (note 6), *IPRax* 2007, 294 at 298.

[186] RÜHL G. (note 6), *IPRax* 2007, 294 at 298.

consistency of the overall approach. If support for such restriction is required, one has only to turn to Articles 13, 17, and 21 of the Brussels I Regulation. Its opening words unequivocally read: 'The provisions of this Section may be departed from only by an agreement.' It is as clearly concerned about the derogative effect of jurisdiction clauses as it is determined to fight the prerogative effect of jurisdiction clauses. It is opposed to a protected party being deprived of the benefits established in its favour by the jurisdictional rules of the preceding Articles (in particular the respective *forum actoris*).

Does this in practice amount to an insoluble conundrum, a kind of Gordian knot? Or, more technically, phrased: Is this a practically valid restriction (even amounting to a partial counter-argument) to the line of argument derived from *Ingmar*? Is any and everything rendered illusionary and null if and insofar as the defendant principal resides outside the EU (and thus is not subjected in particular to special jurisdiction under Article 5 (1) (b) Brussels I Regulation)? Can American principals particularly rejoice? The first impression might indeed suggest so – but only the first impression and not the final conclusion. Nonetheless, the solution is a rather hidden one, requiring for its determination a lot of legal expertise and puzzle solving. The key is recognising that the European regime, as contained in the Commercial Agents Directive, aims only at protecting commercial agents who display activities within the EU. Hence, in every case in which this regime is rendered applicable one thing can be said for sure: the commercial agent in question displays activities within Europe. As a consequence of the agent's activity on the principal's behalf, it can be said that the principal himself displays business activity in the EU. If the commercial agent did a successful job, the principal has acquired some customers in the EU. Insofar as these customers are indebted to the principal, the principal has some assets in the EU and, presumably, in the forum state that generally happens to be the state where the agent resides. Whereas it is for the national law of the forum state to ascertain jurisdiction over a defendant principal who resides outside of the EU, the forum state most certainly will resort to connecting factors for jurisdiction, which in one way or the other will rely on either activity or the location of assets. Hence, what cannot be found in the Regulation because of its simple lack of applicability might be provided just as effectively by the national law brought into play *via* Article 4 (1) of the Brussels I Regulation. There might be jurisdiction within the EU, but only on other grounds and founded on other rules. Hence, while the theoretical concept needs refinement by adding a restriction that the *Ingmar* approach can only be extended if derogation from existing jurisdiction within the EU takes place, in practice national rules might provide such jurisdiction.

5. Applying the Law on Unfair Contract Terms as a Feasible Alternative?

Recently, a very experienced practitioner advocated for an alternative to the approach supported in this contribution and pursued by the *OLG München*: The suggested alternative allows a jurisdiction clause being controlled by the respective

forum's law on unfair contract terms the respective forum.[187] Of course, the proponent readily admits that this happens only if the jurisdiction clause at stake comes within the definition of unfair contract terms (as established on a European scale by the Unfair Contract Terms Directive[188]).[189] And there is the second objection, which is the main and major obstacle: Neither the commercial agent nor the principal is a consumer. Hence, any rules on unfair contract terms that national legislation has legitimately restricted to the area of terms and conditions in *consumer* contracts would be inapplicable. Things might be slightly different in Germany, where an extension[190] of the regime on unfair contract terms to contracts between professionals has long been established[191] (and therefore it should not come as a surprise that the alternative proposal originated from a German author).

Even if one is determined to overcome this hurdle, there would be a third obstacle: If procedural law as such does not limit the freedom of contract with regard to jurisdiction clauses, should that not be taken as a hint that such clauses are permitted? Yet the alternative approach might venture to point at lit. q of the Annex to the Unfair Contract Terms Directive, where jurisdiction clauses feature among the objects subjected to control. *Océano Grupo*[192] lurks around the corner as well. Once again it appears to come down to the issue already discussed at the second level: To what extent has national legislation extended the rules originally designed to protect consumers to protect the commercial counterparts of enterprises that employ Standard Terms and Conditions? But now the teeth and claws of the Community system appear to bite: In *Océano*, and within the proper scope of application of both the Unfair Contract Terms Directive and Article 23 of the Brussels I Regulation, we are talking about a clash of Community law. We are talking about one Community act taking precedence over the other. We are talking about *lex specialis* and a possible application of Article 67 of the Brussels I Regulation. All of this is absent where only an act of national law is at stake, even if such national law purports to extend the effect of a specific Community legislation to additional cases. Is this the final solution, lethal to the alternative approach?

One has to pause to re-consider things, even go a step back. In particular, one should remember that Article 23 of the Brussels I Regulation does not apply to the cases under review, because the jurisdiction clauses at stake do not opt for the jurisdiction of a court in a Member State. Hence, Article 23 of the Brussels I Regulation cannot bar restrictions imposed by national law. It also is incapable of

---

[187] EMDE R., Case note, in: *EWiR*, § 89b HGB 1/96, 621 at 622.

[188] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ EC 1993 L 95/29.

[189] EMDE R. (note 187).

[190] Currently to be found in paragraph 310 (1) BGB.

[191] Since 1 April 1977, to be precise, when the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* entered into force, which now has been superseded by paragraphs 305-310 BGB.

[192] ECJ, *Océano Grupo Editorial SA v. Rocío Murciano Quintero*, Cases C-240 to C-244, [2000] *ECR*, I-4941.

rendering any verdict over such restrictions. It is for national law to implement limits, and such limits and restrictions are not inhibited by anything in the Brussels I Regulation. It would come down to a clash, not within Community legislation but within the national law, as to whether the law on unfair contracts terms imposes any limits and, if so, prevails over the procedural law that as such does not contain limits. National law would have to decide while obeying its respective rules for the solution of internal conflicts.

In conclusion, the alternative approach has to overcome major obstacles. In many instances, particularly if the *lex causae* does not contain any relevant rules on unfair contract terms between commercial parties, it will flatly fail. Its loopholes are in fact floodgates. Its complexities make the approach less attractive compared to the straightforward job that the prevailing approach accomplishes.

VII. Arbitration Agreements

An alternative to jurisdiction clauses are arbitration agreements between the principal and commercial agents. Arbitral tribunals could be advantageous, because persons with business experience acquired over many years and who are especially experienced in matters of commercial agency could be appointed. For this reason, the parties could make sure that the arbitral tribunal has great personal experience and familiarity with the business concerned and, indirectly, with the cause to be administered. Arbitral forum shopping has even emerged as a modern-day phenomenon.[193]

Of course, a word must be added as to whether the *Ingmar* line of reasoning can also be extended to, and used against, arbitration clauses in favour of an arbitration tribunal that would not apply the EU regime, although the commercial agent in question executed his services in the EU. Astonishingly, the *Cour d'appel de Paris* on 24 November 2005 decided against such an extension.[194] It refused to repeal an arbitration award refusing to apply the Belgian protective mechanisms implementing the Directive for the simplistic reason that the court refrained from controlling which law the arbitration tribunal applied as to substance.[195] Not a single syllable in the judgment relates to *Ingmar*. It is not clear whether the court even remotely considered *Ingmar* or realised what was at stake.[196] Of course, this comes down to a matter of speculation, but it should be taken as more than an educated guess that the *ECJ*, if called upon, would reach the opposite result,

[193] *Cf.* KREINDLER R., '«Arbitral Forum Shopping?» – Observations on Recent Developments in International Commercial and Investment Arbitration', in: *Am. Rev. Int'l. Arb*. 2005, 157.

[194] CA Paris 24 November 2005, in: *Rev. arb*. 2006, 717 with note BOLLÉE S.

[195] CA Paris 24 November 2005 (note 194).

[196] BOLLÉE S., Case note, in: *Rev. arb.* 2006, 718 at 724.

regarding the EU regime protecting commercial agents as part of the *ordre public international* of the Member States, even with regard to arbitration.[197] At least the *OLG München*, apparently indefatigable but not to be accused of being overly bold in this regard, found it an *acte clair* that the ECJ would rule against such an arbitration agreement.[198] Therefore it dismissed an arbitration clause opting for arbitration in California under the auspices of the American Arbitration Association, once again supporting such contention by relying on an earlier German decision[199] from other quarters than the law of commercial agency.[200] Methodologically, such support might appear spurious. And of course, arbitration clauses might not be judged according to exactly the same yardsticks as jurisdictions clauses because of other bodies of law, in particular international treaties, possibly intervening.[201] Yet the New York Convention and other bilateral treaties, in particular with the United States, ought to give way to Community law.[202]

Article II (3) of the New York Convention denies recognition of an arbitration clause if the clause in question is invalid. The New York Convention does not contain an exhaustive list of reasons for invalidity, referring to only national law, least insofar as the invalidating reasons under national law are not internationally incompatible.[203] Safeguarding *lois de police* is not internationally incompatible.[204] This is about arbitrability. Yet the issue must not be transmitted and left to the exception of public policy,[205] since this exception attacks the arbitral award, not the

---

[197] BOLLÉE S., Case note, in: *Rev. arb*. 2006, 718 at 729.

[198] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 169.

[199] BGH 15 June 1987, in: *NJW* 1987, 3193 at 3194.

[200] OLG München 17 May 2006, in: *IPRax* 2007, 322 = *IHR* 2006, 166 at 168 *et seq*.

[201] RÜHL G. (note 6), in: *IPRax* 2007, 294 at 300.

[202] RÜHL G. (note 6), in: *IPRax* 2007, 294 at 301; *ead. (*note 6), in: *ERPL* 2007, 891 at 901.

[203] *Cf.* only Cassaz. 30 April 1969, in: *Riv. dir. int. priv. proc.* 1970, 332 = *Dir. scambi int.* 1969, 563 with note UBERTAZZI L.C.; Moscow City Court (Civil Dep.) 6 May 1968, in: *Yb. Comm. Arb.*, 1976, 206; SCHLOSSER P., *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, Tübingen 1989, paragraph 248; EPPING M., *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts*, München 1999, 41 *et seq*.; HAAS U. in: WEIGAND J. (ed.), *Practitioner's Handbook on International Arbitration*, München 2001, Art. II New York Convention note 107; LEW J.M. / MISTELIS L. / KRÖLL S., *Comparative International Commercial Arbitration*, The Hague/London/New York 2003, paragraphs 14/41; HAUSMANN R., in: REITHMANN C. / MARTINY D. (note 165), paragraph 3296. But *cf.* also *Podar Bros. v. ITAD Associates, Inc.* 636 F. 2d 75 (4th Cir. 1981); *Ledee v. Ceramiche Ragno* 684 F.2d 184 at 187 (1st Cir. 1982); *Rhône Méditerranée Comp. v. Achille Lauro* 712 F. 2d 50 (3rd Cir. 1983); *Di Mercurio v. Sphere Drake Insurance* 202 F. 3d 71 (1st Cir. 2000); *Oriental Commercial and Shipping Co. v. Rosseell N.V.* 609 F. Supp. 75 (S.D.N.Y. 1985); *Marchetto v. De Kalb Genetics Corp.* 711 F. Supp. 936 (N.D. Ill. 1989); *Tennessee Imports, Inc. v. Filippi* 745 F. Supp. 1314 (M.D. Tenn. 1990).

[204] RÜHL G. (note 6), in: *IPRax* 2007, 294 at 301.

[205] As QUINKE D. (note 6), 246 at 248 suggests.

arbitral agreement. The necessary material control is inherent in the prerequisite that the arbitral tribunal would not apply a material standard equivalent to that established by the Directive.[206] Hence, the intrusion into the territory of procedural autonomy would not be bottomless and unrestricted, but on the contrary subject to a sensible material qualification yet again.

VIII. Conclusions

- Commercial agents only exceptionally qualify as employees for the purposes of Articles 18-21 of the Brussels I Regulation.

- Special jurisdiction under Article 5 (1) (b) of the Brussels I Regulation gains particular relevance for commercial agents, for it might give them a *forum actoris* against their respective principals. If the commercial agent exerts activities in more than one state, a rebuttable presumption that the main body of his activity is carried out at his principal place of business should be recognised.

- General jurisdiction under Article 2 of the Brussels I Regulation must not be neglected, whereas special jurisdiction under Article 5 no. 5 of the Brussels I Regulation, in principle, will not apply to the 'internal' relations between commercial agents and principals.

- Jurisdiction or arbitration clauses can likewise provide an attractive means for ascertaining jurisdiction. Yet they must not be permitted to deprive a commercial agent who exerts activity within the EU of the protection granted to him by the Commercial Agents Directive. The *Ingmar*-doctrine must be supported by means of international procedural law. If the *forum prorogatum* (or the arbitral tribunal) applies lesser standards of protection than those established by the Directive, the respective jurisdiction or arbitration clause should be disregarded, provided however that the commercial agent can find jurisdiction for claims against the principal in the EU regardless of whether they are derived from the Brussels I Regulation itself or from national law, where the defendant principal resides outside the EU.

[206] In essence following parallel lines if only under the notion of public policy, QUINKE D. (note 6), 246 at 249.

DAMAGES FOR BREACH OF A CHOICE-OF-COURT AGREEMENT

Koji TAKAHASHI*

* Professor of Law at the Doshisha University Law School (Japan). The author had an opportunity to present a paper on this subject at the 114th biannual conference of the Japanese Private International Law Association (Autumn of 2006). The paper has been published in Japanese as '*Kankatsu Gôi Ihan no Songai Baishô* [Damages for Breach of Jurisdiction Agreement]', in: *Kokusai Shiô Nenpô* [Japanese Yearbook of Private International Law] 2007/9, pp. 104-162. The present article is a revised version of a part of the original.

Yearbook of Private International Law, Volume 10 (2008), pp. 57-91

Printed in Germany

I. Introduction

The idea of awarding damages for breach of a choice-of-court agreement is a brainchild of the common law system. It is not featured in the 2005 Hague Convention on Choice of Court Agreements nor has it been discussed by the draftsmen.[1] The remedy is at an early stage of development and there are as yet few in-depth scholarly analyses of the issue[2] The present article will try to articulate and analyse a variety of issues surrounding this remedy,[3] such as those related to procedural law, substantive law, private international law, international comity, and comparative law. The materials for discussion will be largely drawn from the common law jurisdictions where this remedy has been tested and is evolving. But references are also made to the viewpoints of the civil law system, in particular Japanese law, as well as EU law.

II. What Constitutes a Breach of a Choice-of-court Agreement?

At the outset, we must be in agreement as to what is meant by 'a breach of a choice-of-court agreement' since the courts of different countries may disagree whether there is a breach. More specifically, they may take different views with respect to the same choice-of-court agreement regarding whether it exists at all,[4] whether it is substantively and formally valid, whether it is exclusive or non-exclusive, what parties are bound by it,[5] what claims are subject to it,[6] and which

[1] See the text of the Convention as well as HARTLEY T./DOGAUCHI M., 'Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements' (2007).

[2] The commentaries making some reference to this remedy include: TAN D., 'Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers', in: *Va. J. Int'l L.* 2007, p. 545 *et seq.*; DUTSON S., 'Breach of an Arbitration or Exclusive Jurisdiction Clause: the Legal Remedies if it Continues', in: *Arbitration International* 2000, p. 89 *et seq.*; KNIGHT C.J.S., 'The Damage of Damages: Agreements on Jurisdiction and Choice of Law', in: *Journal of Private International Law* 2008, p. 501 *et seq.* as well as other materials cited in this article.

[3] The topic of damages for breach of an arbitration agreement merits a separate analysis, although it shares many issues with the topic of the present article and is treated without distinction in some primary and secondary materials.

[4] *e.g.* whether a bill of lading contains a choice-of-court agreement through incorporation by reference from a charterparty.

[5] *e.g.* whether a choice-of-court agreement in a bill of lading is binding on the transferee of the bill.

[6] *e.g.* whether a claim in tort is covered.

forum it specifies.[7] The divergence of opinion on those issues may arise as the courts of different countries may apply different laws to them[8], or construe differently the same legal provisions, or rely on their forum-specific *ordre public* (public policy) to exclude the application of foreign laws, or apply different rules on the burden or standard of proof.[9]

For the purpose of the present article, there is a 'breach of a choice-of-court agreement' if in the eyes of the court before which a claim for damages is made,[10] there is a valid and exclusive choice-of-court agreement and it has been broken by the institution of an action in a non-chosen forum. It is irrelevant whether the court seised of the action takes the same view. Nor is it relevant if the plaintiff, when bringing the action, believed that the agreement was invalid or non-exclusive.[11]

It is not possible to conceive of a breach of a non-exclusive choice-of-court agreement since such an agreement only operates to increase options for the plaintiff. A choice-of-court agreement specifying two or more courts – for example, an agreement giving jurisdiction to the New York courts and the English courts – is an exclusive agreement for the purpose of the present analysis if it purports to exclude the jurisdiction of all other courts. An asymmetric choice-of-court agreement - for example, an agreement in a loan contract providing that the lender may bring an action against the borrower in the English courts or any other courts having jurisdiction, while the borrower may bring an action against the lender only in the English courts – is exclusive to the extent it operates to exclude the jurisdiction of non-chosen courts, *i.e.* in the example just given, to the extent it excludes the jurisdiction of non-English courts in an action against the lender.

Throughout this article, the phrases 'the forum first seised' and 'the court first seised' will be used as shorthand expressions to refer to the forum and the court seised of the action alleged by the defendant to have been brought in breach

[7] *E.g.* which forum is specified by a choice-of-court agreement designating the principal place of business which, in the circumstances, could be localised in different countries.

[8] Thus, under some legal systems, a choice-of-court agreement in a consumer contract or an employment contract may be valid only if it is concluded after a dispute has arisen. It may also be that such an agreement is exclusive only when it is asserted against the consumer or employee.

[9] In some countries, the courts ascertain jurisdiction *ex officio* while in others, the burden of proof would be imposed on the parties.

[10] It is not necessarily the court chosen by the choice-of-court agreement since other courts may also have jurisdiction to hear the claim for damages.

[11] The court's finding may therefore sometimes come as a surprise to the parties. But such a result is by no means unique to the situation treated here. Rather, in theory, it could happen with respect to all legal issues. That is because the same set of facts may be given different legal meanings in different countries due to their different choice-of-law rules. Thus, for example, a party to a contract which he genuinely believed to be null and void in accordance with the law applicable to it in the country where he has conducted himself may be held liable, to his dismay, for failure to perform the obligations under that contract in another country where the same contract is deemed to be valid under a different law which, in accordance with the choice-of-law rules of that country, is the governing law.

of a choice-of-court agreement. This terminology is adopted in view of the fact that a subsequent claim for damages will often, though not invariably,[12] be brought before a court of another forum.

III. Categories of Cases

The cases in which damages may be claimed for breach of a choice-of-court agreement may be divided into two categories. They will be illustrated below by reference to the leading English cases. The differences between those two categories lie in the response of the court first seised to the allegation that the action has been brought in breach of a choice-of-court agreement. The categorisation along this line will be useful since material differences arise between those two categories as regards, *inter alia*, the availability of the remedy of damages in the court first seised, the preclusion of the damages claim in another forum under the principles of *res judicata*, implications for international comity towards the court first seised, and the quantification of damages. Those issues will be discussed in the remainder of the present article.

A. The First Category of Cases

In this category of cases, unlike the second category, the court seised of an action finds that it has been brought in breach of a choice-of-court agreement and accordingly refuses to hear the case by either dismissing or staying its proceedings. The defendant may then make a claim for damages for the breach in order to recover from the plaintiff the costs he has incurred in disputing the jurisdiction. The practical importance of such a claim cannot be underestimated because the lawyers' fees which form the largest part of costs can be expensive.[13] If the defendant has

[12] See Section VII below for the availability of the damages claim in the forum first seised.

[13] In Union Discount Co v. Zoller [2002] 1 W.L.R. 1517 para. 32, the English Court of Appeal, while conceding that the state's legal resources should be devoted to central rather than parasitic questions, noted that the amount of costs at stake could be much larger than the sums claimed on the merits. This reasoning can be contrasted with the decision of the Court of First Instance of the Republic and Canton of Geneva Judiciary on 2 May 2005 (C/1043/2005-15SP) *ASA Bull.* 2005, p. 728. In this case, the Swiss court was asked to issue an anti-arbitration injunction to restrain arbitration proceedings which the petitioner alleged to have been commenced in breach of a choice-of-court agreement. The petitioner contended that the breach would trigger huge attorneys' fees, a loss difficult to be made good. Under the applicable rules of the arbitration, each party was to bear its own attorneys' fees. The court, however, reasoned that the alleged loss would be insignificant since the arbitration would be short if the arbitral tribunal denied its jurisdiction. It therefore left the tribunal to decide on its jurisdiction under the principle of *compétence-compétence*.

been allowed to recover some of his costs[14] from the plaintiff by a costs order, he will limit his damages claim to the remainder.

The leading case for this category is *Union Discount Co. v. Zoller*.[15] In that case, the English Court of Appeal held that the defendant to a New York action (an action which had been struck out as an action brought in breach of an English choice-of-court agreement) was entitled to recover, as damages for breach of the agreement, the costs incurred in disputing the jurisdiction of the New York court, which the New York court had not awarded under what is known as the 'American rule' of costs.[16]

Since such a damages claim seeks to compensate for the loss which would not be sustained but for the breach, there is no reason for it to be barred merely because the court chosen by the choice-of-court agreement would not, in general, allow a prevailing party to recover his costs from his opponent by a costs order. Thus in *Indosuez International Finance B.V. v. National Reserve Bank*,[17] the New York court held that allowing the recovery of costs incurred in Russia as damages would not contradict the American rule of costs.

B. The Second Category of Cases

In this category of cases, unlike the first, the court seised of an action, notwithstanding that the defendant alleges that it has been brought in breach of a choice-of-court agreement, decides to hear the case on the merits by refusing to dismiss or stay its proceedings. On the merits of the case, too, the court may rule in favour of the plaintiff. The court may also make a costs order either allowing the defendant to recover all or part of his costs from the plaintiff or allowing the plaintiff to do the same from the defendant.

---

[14] A full recovery may not be awarded in respect of, for example, fees charged by foreign lawyers. In a case decided on 8 March 2005 by the German Federal Supreme Court (*Bundesgerichtshof*) (Case VIII ZB 55/04, [2005] I.L.Pr. 54), both parties claimed the costs of their respective English correspondence lawyers, whose fees, charged at an hourly rate, reached levels much higher than those payable under German rules to German lawyers for a similar service. The court, while acknowledging that the introduction of the English correspondence lawyers into the case was appropriate for the proper pursuit or defence of the case, held that the costs of foreign correspondence lawyers were to be reimbursed only up to the amount chargeable by German lawyers.

[15] [2002] 1 W.L.R. 1517 (CA) (The first instance decision is unreported).

[16] The costs rules vary depending on the forum. Thus in England, the winning party can generally, but not fully in all cases, recover the costs from his opponent whereas he cannot generally do so in the U.S. and in Japan. In Japan, Article 61 of the Code of Civil Procedure imposes costs on the losing party but the costs within the meaning of that provision cover only filing fees and not the lawyer's fees: Article 2 of the Act on Legal Costs [*Minji Hiyô Tou ni Kansuru Hôritsu*].

[17] 758 N.Y.S.2d 308 (N.Y. App. Div. 2003). To the same effect, see also El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp., 669 A.2d 36, 40 (Del.1995); Cornerstone Brands, Inc. v. O'Steen 2006 WL 2788414 (Del.Ch.).

The defendant may then make a claim for damages for breach of a choice-of-court agreement in order to recover from the plaintiff the costs which he has incurred in disputing the jurisdiction and the merits. If he has already been awarded by a costs order any part of his costs, he will limit his damages claim to the remainder of his costs. If, on the contrary, he has been compelled by a costs order to pay any part of the plaintiff's costs, he may seek to claw back the sum he has paid as well as to seek recovering his own costs from the plaintiff. In addition, he may seek to claw back any sum which he has been ordered to pay by a judgment on the merits.

In this category of cases, the court first seised, in deciding to hear the case on the merits, will generally find that there is no breach of a choice-of-court agreement. But there may be exceptional cases where the court finds that there is a breach of what it finds to be a valid agreement but nevertheless exercises whatever discretion it has to refuse to dismiss or stay its proceedings.[18] The court may do so, for example, where the time-bar applicable in the chosen forum has expired and the court finds that the plaintiff has not acted unreasonably in failing to bring an action in that forum within the time limit.[19] Other examples may arise where the action involves multiple parties, some of whom are not bound by the choice-of-court agreement. The court may in such cases decide to hear the case on the merits with respect also to the parties bound by the choice-of-court agreement, so that it can exercise jurisdiction over the entirety of the action. A court seised of an action brought by a consumer against a business party in breach of their choice-of-court agreement may also decide to hear the case on the merits, if the agreement is contained in an adhesion contract[20] or if the consumer would effectively have to give up litigating in the chosen forum because a class action or a similar procedure facilitating a large number of small claims is not available in that forum.[21]

---

[18] *E.g.* The Eleftheria [1970] P. 94, in which it was established that the English courts had discretion not to stay proceedings where the plaintiff could show a strong case for suing in England in breach of a foreign choice-of-court agreement.

[19] See *e.g.* Baghlaf Al Safer Facrory Co. v. Pakistan National Shipping Co., [1998] 2 Lloyd's Rep. 229, in which the English Court of Appeal held that where the plaintiff had acted reasonably in commencing proceedings in England and in allowing the time-bar to expire in the foreign forum chosen by his choice-of-court agreement, a stay of the English proceedings should only be granted on terms that the defendant waived the time bar in the foreign forum.

[20] SHANTAR N., 'Forum Selection Clauses: Damages in Lieu of Dismissal?', in: *Boston U.L. Rev.* 2002, pp. 1063, 1078 *et seq.*, suggests that in such cases the court might refuse to decline jurisdiction and consider awarding the business party damages in respect of the added costs of defending in the non-chosen forum, provided that consumers are able to show a sufficient likelihood of winning the case and their ability to pay the damages.

[21] In America Online v. Booker (781 So. 2d 423, Fla. Dist. Ct. App., 2001), America Online's terms of service agreement contained a choice-of-court agreement requiring its subscribers to bring all claims against it in Virginia where it had its principal place of business. But Booker and other subscribers brought an action and moved for a class certification in Florida since class actions were not available in Virginia.

The leading case for this category is *Donohue v. Armco Inc*.[22] In that case, an application was made in England for an antisuit injunction restraining a New York action which was alleged to have been brought in breach of an English choice-of-court agreement. The House of Lords refused to grant the application after the respondent (*i.e.* the plaintiff of the New York action) made a concession that he would be liable in damages for breach of the choice-of-court agreement if the petitioner (*i.e.* the defendant of the New York action) were to incur greater cost or liability in New York than he would in England. Among the judges, Lord Hobhouse accepted this concession as well-founded albeit acknowledging that it involved complex problems.

IV. An Overview of the Case Law

In England, where an action is brought in breach of a foreign choice-of-court agreement, the normal relief is the stay of proceedings. On the other hand, where an action is brought abroad in breach of an English choice-of-court agreement, the normal relief in England is an antisuit injunction.[23] In neither case has the remedy of damages for breach of a choice-of-court agreement been traditionally available. But some commentators have been suggesting for some time that in such cases it should be possible to award damages.[24] Around the turn of the millennium, in a few cases such as those seen in Section III above where an action was brought abroad in breach of an English choice-of-court agreement, the English courts have awarded damages in the first category of cases[25] and indicated the availability of the remedy in the second category.[26] In more recent cases, the English courts have shown more willingness to grant the remedy, to the point where it has been observed by one commentator that the remedy has gone from novelty to banality.[27] Thus, in *A/S D/S Svendborg v. Akar*,[28] the court held that the decision in the *Zoller*

[22] [2002] 1 All ER 749 (HL) para. 48.

[23] Continental Bank NA v. Aeakos SA [1994] 1 W.L.R. 588, 598 (CA); The Jay Bola [1997] 2 Lloyd's Rep 79; OT Africa Line Ltd v. Magic Sportswear Corp [2005] EWCA Civ 710 para. 33.

[24] *E.g.* PEEL E., 'Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws', in: *L.M.C.L.Q.* 1998, pp. 182, 224-6; MALES S., 'International comity and antisuit injunctions', in: *L.M.C.L.Q.* 1998, pp. 543, 550; BRIGGS A./REES P., *Civil Jurisdiction and Judgements*, 2nd ed., London 1997, para. 4-22.

[25] Union Discount Co Ltd v. Zoller [2002] 1 W.L.R. 1517(CA).

[26] See Donohue v. Armco Inc [2002] 1 All ER 749 (HL).

[27] BRIGGS A., *The Agreements on Jurisdiction and Choice of Law*, Oxford 2008, para. 8.14. This book contains in its chapter 8 an inspirational discussion of the topic of the present article.

[28] [2003] EWHC 797 at para. 37.

case had confirmed the principle that reasonable costs incurred in an action brought in breach of a choice-of-court agreement could be recoverable as damages for that breach. In *A v. B (No. 2)*,[29] Colman J. said that he had not previously encountered the practice of awarding costs where there was a breach of a choice-of-court agreement but acknowledged *obiter* that there was some sensible foundation to do so. In *Sunrock Aircraft Corporation Ltd v. Scandinavian Airlines System Denmark-Norway-Sweden*,[30] the Court of Appeal held *obiter* that damages for breach of a choice-of-court agreement are an established remedy. In *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,[31] it was held, in broad language capable of covering the case of a breach of a choice-of-court agreement, that damages would be awarded for the costs incurred in restraining Californian proceedings[32] which had been brought in breach of an antisuit agreement, *i.e.* agreement not to bring any action.

A complete picture of the legal landscape in the United States is more difficult to present due to its federal system. Neither the Restatement (Second) of Conflicts of Law nor the Restatement (Third) of Foreign Relations Law of the American Law Institute deals with the subject. In a modern case[33] decided in 1990, *Wells v. Entre Computer Centers Inc*.,[34] the Court of Appeals for the Fourth Circuit denied the availability of damages for breach of a choice-of-court agreement for the simple reason that no supporting authority had been cited. More recently, the courts have started to award, or suggest the possibility of awarding, damages in the first category of cases. Thus, in *Omron Healthcare Inc. v. MacLaren Exports Ltd*,[35] an action was brought in Illinois in breach of an English choice-of-court agreement. The Court of Appeals for the Seventh Circuit, affirming the decision of the District Court to decline jurisdiction, suggested *obiter* that damages for breach of a choice-of-court agreement might have been awarded if the defendant had opted to claim them. In *Laboratory Corp. of America Inc. v. Upstate Testing Laboratory*

[29] [2007] EWHC 54 (Comm) at para. 9. The case concerned a breach of an arbitration agreement but the language of the court's reasoning was broad enough to cover a choice-of-court agreement.

[30] [2007] EWCA Civ 882 at para. 37. The case was concerned with the breach of an expert determination clause.

[31] [2007] EWHC 1742 (Comm).

[32] Those proceedings had either been summarily dismissed on the merits or dismissed on the grounds of *forum non conveniens*.

[33] In an archaic case, *Nute v. Hamilton Mutual Insurance Co.* (72 Mass. 174 (1856)), the Supreme Judicial Court of Massachusetts gave a ruling which could be interpreted as accepting that damages were recoverable for breach of a choice-of-court agreement. But its value as a precedent for interstate or international cases is doubtful since in this case an action was brought before the court in the county of Essex in breach of a choice-of-court agreement choosing the court in the county of Suffolk, both of which were situated in the state of Massachusetts.

[34] 915 F.2d 1566 (4th Cir. 1990).

[35] 28 F.3d 600, 604 (7th Cir. 1994) para. 6.

Inc.,[36] a District Court in Illinois held, citing the *Omron Healthcare* decision, that the defendant to the New York action, which had earlier been dismissed by the New York court, was entitled to recover damages for breach of a choice-of-court agreement in favour of the Illinois court. It made no reasoned analysis, and the law report does not mention the amount of damages awarded. In *Allendale Mutual Insurance Co. v. Excess Insurance Co. Ltd*.,[37] the District Court of New York awarded damages for breach of a choice-of-court agreement in favour of 'a court of competent jurisdiction within the United States of America.' It did so in respect of an action brought in England over which the English court had declined jurisdiction for breach of that agreement. The sum awarded was equivalent to the costs the defendants of the English action had incurred less the amount which had been awarded to them by the English court. The New York court declared that New York law allowed the recovery of damages for breach of a choice-of-court agreement by citing the *Laboratory Corp.* case although it did not explain why the latter case could be treated as an authority on New York law. In *Indosuez International Finance B.V. v. National Reserve Bank*,[38] an action was brought in Russia in breach of a choice-of-court agreement, though no further detail is clear from the report. The Appellate Division of the Supreme Court of New York[39] held that damages might be awarded for breach of a choice-of-court agreement by citing the *Allendale* case and the Laboratory *Corp*. case. There are other more recent decisions supporting the availability of the remedy.[40]

A recognition of the remedy can also be found in the recent case law of Australia.[41] This overview shows that the courts in the common law countries have started to embrace the remedy of damages for breach of a choice-of-court agreement. None of those courts, however, have undertaken a sufficiently comprehensive analysis to match the complexity of issues raised by this remedy and the reports of their decisions often leave the relevant facts unclear.

Thus far, there appears to be no case in which a damages claim was made for breach of a choice-of-court agreement in the intra-EU context[42] to which the

[36] 967 F.Supp. 295 (ND Ill 1997).

[37] 992 F.Supp. 278, 286 (SD NY 1998).

[38] 758 N.Y.S.2d 308 (N.Y. App. Div. 2003).

[39] It is an intermediate appellate court in the State of New York, where the highest court is the Court of Appeals.

[40] *E.g.* Masiongale Elec.-Mech., Inc. v. Constr. One, Inc., 102 Ohio St.3d 1 (Ohio 2004); Ball v. Versar Inc. 454 F.Supp.2d 783, 809 *obiter* (S.D. Ind., 2006).

[41] See *e.g.* Incitec Ltd v. Alkimos Shipping Corp. [2004] FCA 698; Commonwealth Bank of Australia v. White (No. 2 of 2004) [2004] VSC 268. The facts and decisions of those cases will be outlined in Section VII below.

[42] To the same effect, see Through Transport Mutual Insurance Assn (Eurasia) Ltd v. New India Assurance Co Ltd [2003] EWHC 3158 (Moore-Bick J.) para. 34; BRIGGS A., 'Antisuit Injunctions and Utopian Ideals', in: *L.Q.R.* 2004, pp. 529, 532; BLOBEL F./SPATH P., 'The Tale of Multilateral Trust and the European Law of Civil Procedure', in: *E.L. Rev.* 2005/ p. 528 as well as GROSS P., 'Antisuit injunctions and arbitration' in: *L.M.C.L.Q.* 2005, pp. 10-27 which, in discussing the breach of arbitration agreement, expresses the same view.

Brussels I Regulation[43] is applicable. But there is a good possibility that this ingenious remedy will be tested in that context[44] since it may be thought that it is the only effective relief left available after the decisions of the European Court of Justice (ECJ) in the cases of *Gasser*[45] and *Turner*.[46] As a result of the *Gasser* ruling, where actions are pending between the same parties on the same cause of action in two Member States, the court seised second must stay its proceedings until the court first seised has declined jurisdiction in accordance with the rules of the Brussels I Regulation which give precedence to the proceedings of the court first seised[47] even if it considers itself to have been chosen by an exclusive choice-of-court agreement. Much less can it issue an antisuit injunction to restrain the proceedings of the court first seised even if it considers them to be vexatious or oppressive, as the result of the Turner decision.[48] The EU law in this field has been honed by the ECJ as a tool for promoting mutual trust between the courts of different Member States. But remedial responses to wrongs between private parties are in general[49] beyond the reach of the ECJ. It follows that if a claim for damages for breach of a choice-of-court agreement is framed in contract or tort, the ECJ's power to tame the remedy may be limited.

[43] Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] O.J. L 12/1.

[44] HESS B./PFEIFFER T./SCHLOSSER P., 'Report on the Application of Regulation Brussels I in the Member States', (Study JLS/C4/2005/03, September 2007) [462] alludes to this possibility.

[45] Erich Gasser GmbH v. Misat Srl (Case C-116/02) [2003] E.C.R. I-14693. This case was decided under the Brussels Convention, the predecessor of the Brussels I Regulation. But its ruling should be equally applicable under the Regulation.

[46] Turner v. Grovit (Case C-159/02) [2004] E.C.R. I-3565. This case, too, was decided under the Brussels Convention. Its ruling should be equally applicable under the Brussels I Regulation.

[47] Article 27 (formerly Article 21 of the Brussels Convention).

[48] In that case, the ECJ held that the courts of a Contracting State of the Brussels Convention had no power to issue an antisuit injunction to restrain proceedings in other Contracting States.

[49] In the field of substantive private law, it is only specific areas, such as those relating to consumer protection and products liability, that the EC legislator has adopted measures over which the ECJ has jurisdiction. The width of the legislative power depends on the interpretation of the word 'measure' in Article 95 (1) of the Treaty Establishing the European Community: *OJ* C/2006/321E/1.

V. Is the Question Procedural or Substantive?

A choice-of-court agreement possesses procedural character. That is manifested in, for example, its exclusion from the scope of the Rome I Regulation.[50] When consulted on a draft text of that Regulation, the European Economic and Social Committee observed[51] that the exclusion of a choice-of-court agreement was based on the same reasoning as that of procedure issues.[52] This position is inherited from its predecessor, the Rome Convention,[53] which also excluded a choice-of-court agreement[54] on the same reasoning.[55]

It might be thought that all issues concerning a choice-of-court agreement have procedural character and are accordingly subject to the *lex fori.*[56] Caution, however, is due against excessive reliance on the *lex fori* since the foundation of the modern conflict of laws is the idea of equal treatment of foreign and domestic legal systems. Admittedly, the issues forming part of the administration of justice which impinge directly on the resources of the State should be characterised as procedural and accordingly be determined by the *lex fori*. But other issues should be characterised as substantive and accordingly be submitted to the normal choice-of-law process.

Thus, for example, the issue whether jurisdiction is conferred or excluded by a valid choice-of-court agreement should be characterised as procedural since it impinges directly on the judicial resources. On the other hand, the valid formation of a choice-of-court agreement, such as the effect of fraud or duress on validity, does not have to be characterised as such. Rather, just like the validity of an ordinary commercial contract, it should be characterised as substantive. Similarly, there is room to characterise as substantive the issues of whether, in what circumstances, and to what extent damages are recoverable for breach of a choice-of-court agreement. If so characterised, the answer to those issues will depend on the

[50] Article 1(2)(e) of the Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations: *OJ* L/2008/177/6.

[51] Para. 3.1.4 of the Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I): COM(2005) 650 final – 2005/0261 (COD).

[52] Article 1(3).

[53] The Convention of 19 June 1980 on the Law Applicable to Contractual Obligations: *OJ* L/1980/266/1.

[54] Art. 1(2)(d).

[55] See the comment on Article 1(2)(d) of GIULIANO M./LAGARDE P., 'Report on the Convention on the law applicable to contractual obligations' in: *OJ* C/1980/282.

[56] As once held by the Tokyo District Court in its judgment on 17 October 1967 (reported in 18-9/10 *Kaminshu* 100). It must be noted, though, that as is the case with other decisions of the lower courts, this pronouncement is not a definitive representation of Japanese law since it is not binding on other courts in future cases.

governing law of the damages claim, which will in turn depend on the legal basis, such as contract and tort, in which the claim is framed.

As regards the governing law, choice-of-law rules differ from country to country but there are some similarities between many of them. Thus, if a damages claim for breach of a choice-of-court agreement is framed in contract,[57] the governing law may be the law chosen by the party as the law governing that agreement, and where, as may often be the case, there is no effective choice, it may be the law applicable to the substantive contract to which the choice-of-court agreement is attached or it may be the law of the forum chosen by that agreement.[58] If the claim is framed in tort, the governing law may be: the law of the forum first seised in the capacity of the law of the place where the tortious act has been committed; or it may be the law of the forum chosen by the agreement in the capacity of the law of the place where the resulting damages have occurred;[59] or in the capacity of the law of the place with which the tort is most closely connected.[60]

VI. The Legal Basis of the Claim

Whenever the defendant to an action considers that the court hearing the action has no jurisdiction, he may wish to claim damages to recover whatever the loss sustained in defending the action or incurred from the ensuing decisions. However, his claim has no chance of success unless it is supported by a cause of action.

In this regard, a breach of a choice-of-court agreement may be considered to be a breach of contract or a tort, and a claim for damages for the breach may accordingly be framed in contract or tort. Alternatively, the same financial purpose may be pursued by making a restitutionary claim. Whether such claims will succeed will depend on the governing law. This article will focus on the contractual basis of

[57] The choice-of-law rules for substantive contracts may not be applicable. See *e.g.* Article 1(2)(e) of the Rome I Regulation.

[58] As apparently suggested in YEO N./TAN D., 'Damages for Breach of Exclusive Jurisdiction Clauses', in: WORTHINGTON S. (ed.) *Commercial Law and Commercial Practice*, Oxford and Portland Oregon 2003, Ch14, pp. 403, 404. Articles 5(1) and 6(a) of the 2005 Hague Convention on Choice of Court Agreements refer the validity of a choice-of-court agreement to the law specified by the choice-of-law rules of the forum chosen by the agreement: See HARTLEY T./DOGAUCHI M., 'Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements', para. 125.

[59] See *e.g.* Article 4(1) of the Rome II Regulation (Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations: *OJ* L/2007/199/40). It must, however, be noted that whether a claim framed in tort for breach of a choice-of-court agreement falls within the purview of the Rome II Regulation is far from certain.

[60] See *e.g.* Article 4(3) of the Rome II Regulation.

the claim[61] since the discussions in the common law jurisdictions generally presuppose that the breach of a choice-of-court agreement is a contractual question.[62]

Even if it is accepted that a choice-of-court agreement is a contract, it may be seen to be a contract of special character. Thus in Japan, agreements on procedural steps, such as a choice-of-court agreement, are called procedural contracts (*soshô keiyaku*) which include arbitration agreements, choice-of-law agreements, antisuit agreements, agreements to discontinue an action, agreements to desist from executing a judgment, agreements to abstain from disputing particular facts, and agreements to refrain from adducing particular evidence. Where there is a breach of, for example, an antisuit agreement or an agreement to discontinue an action, it is generally thought that the court may either bring the action to an end or specifically enforce the agreement. But no discussion is to be found over the possibility of awarding damages for breach of any of those procedural contracts. That is presumably due to the dearth of practice, at any rate to date, of seeking such a remedy. In theory, the possibility of a damages award may not be foreclosed.

A view which acknowledges the distinctive character of a choice-of-court agreement is to be found also in the scholarship of common law countries. Thus, it has been suggested that a choice-of-court agreement is not an ordinary contract creating an independently enforceable obligation and that the only way for the courts to give effect to it is to uphold or decline jurisdiction or to restrain proceedings in other countries.[63] The mainstream of the common law thinking, however, makes no dogmatic distinction in character between a choice-of-court agree-

[61] However, a brief note on other possible legal bases is in order. The tort characterisation has not been paid much attention in the common law discourse. It may play a more prominent role in Japanese law since damages claims are usually characterised as such when they are granted generally in respect of procedural steps. Thus, the Japanese Supreme Court acknowledged that the institution of an action could be regarded as a tortious act where it was plainly unreasonable in view of the purpose of the judicial system. It calls for analysis, though, how this test can be applied to the case of a breach of a choice-of-court agreement. There is also the possibility of a restitutionary claim to recover the benefit which the plaintiff unjustly obtained at the expense of the defendant by bringing an action in breach of a choice-of-court agreement. But this possibility is hardly examined in the common law discourse.

[62] *E.g.* Union Discount Co v. Zoller [2002] 1 W.L.R. 1517 para. 19; Donohue v. Armco Inc [2002] 1 All ER 749 (HL) at paras. 36, 48. Also see National Westminster Bank Plc v. Rabobank Nederland (No. 3) [2007] EWHC 1742 (Comm) para. 20 (The costs incurred in restraining proceedings brought in breach of an antisuit agreement were held recoverable as damages for breach of a contract). Among the commentaries, see *e.g.* TAN D./YEO N., 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?', in: *L.M.C.L.Q.* 2003, p. 435; *cf.* THAM C.H., 'Damages for breach of English jurisdiction clauses: more than meets the eye', in: *L.M.C.L.Q.* 2004, p. 46, argues that contractual damages are difficult to justify and that a tortious claim may arguably be available as an alternative.

[63] *E.g.* HO L.C., 'Antisuit injunctions in cross-border insolvency: A restatement', in: *I.C.L.Q.* 2003, pp. 697, 707-708.

ment and substantive contracts and instead stresses their shared attribute, namely that both may be the product of a hard-fought negotiation.

Traditionally, however, the common law countries have been treating a breach of a choice-of-court agreement differently from a breach of an ordinary contract. Thus, the primary remedy available as of right for breach of an ordinary contract is damages whereas specific performance is only granted at the court's discretion where damages do not provide adequate relief. On the other hand, the usual remedy for breach of a choice-of-court agreement has not been the award of damages but a stay of proceedings or, where the action was brought abroad, the issuing of antisuit injunction.[64] An English court has attributed this difference not to any dogmatic characterisation of a choice-of-court agreement but to more practical reasons, namely, the difficulty of quantifying damages for its breach and the negative impact that damages award may have on international comity.[65] It should, however, be pointed out that the difficulty of quantification *per se* is not a good reason to deny the recoverability of damages.[66] Furthermore, as will be shown in Sections VIII and X below, the difficulty of quantification and the extent of implications for comity differ between different types of cases in which the claim is made.

In the types of cases where quantification and comity do not pose difficulties, the common law jurists would not be deterred from submitting the breach of a choice-of-court agreement to the normal contractual analysis. That would result in the award of damages if the governing law is a common law legal system because damages are recoverable as of right as the primary remedy and because liability for breach of contract is strict,[67] requiring neither negligence nor intent on the part of the defaulting party. The liability may, therefore, come as a surprise for the plaintiff of the action complained of if he has acted in genuine belief that the choice-of-court agreement is null and void or non-exclusive.[68] The chain of causation would not be severed[69] even in the second category of cases, *i.e.* where the court first seised has decided to hear the case on the merits, since that response of the court is none other than what the plaintiff petitioned for and accordingly is foreseeable to him.

---

[64] See note 23 for authorities.

[65] OT Africa Line Ltd v. Magic Sportswear Corp [2005] 1 C.L.C. 923 para. 33 (CA).

[66] The Japanese Code of Civil Procedure provides in Article 248 that where the proof of the amount of damage is extremely difficult due to the nature of the damage, the court may make a reasonable estimate on the basis of the arguments made and evidence adduced in the hearing.

[67] See *e.g.* SMITH S., *Contract Theory*, Oxford 2004, p. 376, which considers justifications for strict liability.

[68] And there can be good reasons to believe so since the same choice-of-court agreement may have different effects depending on the governing law, as explained in Section II above.

[69] As a general rule, the chain of causation is severed if an unforeseeable act of a third party intervenes: Stansbie v. Troman [1948] 2 KB 48.

In the civil law system, on the other hand, liability for breach of contract is traditionally fault-based.[70] Thus, under Japanese law, both jurisprudence and scholarship require negligence or intent as an essential ingredient for liability for breach of contract.[71] Accordingly, if a choice-of-court agreement were to be treated under the normal contractual principles, liability for its breach would not be established unless negligence or intent was proved on the part of the plaintiff bringing the action complained of. It follows that if the plaintiff was in genuine belief that the agreement was null and void and if he is found to be faultless in so believing, he may be exonerated. It would be possible to find negligence or intent in many cases belonging to the first category since the court first seised in that category of cases also acknowledges that there is a breach. Making such a finding, however, would be more difficult in some of the cases belonging to the second category where the court first seised does not acknowledge that there is a breach, though it might still be legitimate to hold that there was an intentional breach in such cases as where the plaintiff has flouted a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement.

VI. Availability of the Remedy in the Forum First Seised

For the defendant of an action which has been brought in breach of a choice-of-court agreement, it would be more convenient if he can obtain damages for the breach in the court before which the action has been brought (*i.e.* 'the court first seised' according to the terminology of this article) than going to another forum to claim them.

Whether that court has jurisdiction to hear such a damages claim depends on its jurisdictional rules. Thus, it may have jurisdiction in the cases where, for example, it is the court for the place where the plaintiff (*i.e.* the respondent to the damages claim) is domiciled or resident. It may also have jurisdiction where the plaintiff is deemed to have submitted to its jurisdiction by entering appearance, which he may well do since it is the court he chose to bring his action before in the first place.

Where the court has jurisdiction, the availability of the remedy of damages and the extent of recovery will depend on the applicable law. If the court treats the breach of a choice-of-court agreement as a procedural matter, it will apply the procedural rules of the forum as the *lex fori*. In general, there can be procedural

[70] For a survey, see *e.g.* VON BAR, C./DROBNIG U., *The Interaction of Contract Law and Tort and Property Law in Europe: a Comparative Study*, München 2004, paras. 83-92.

[71] The defendant is considered to have the burden of proving the lack of intent and negligence.

rules, outside those pertaining to a costs order, which may be invoked to award damages in respect of losses caused by certain procedural steps.[72] It is therefore possible, at least in theory, to conceive of procedural rules for awarding damages for breach of a choice-of-court agreement. In practice, though, it is unlikely for any country to presently have such procedural rules since the concept of damages for breach of a choice-of-court agreement has not yet received wide recognition. If, on the other hand, the court treats the breach of a choice-of-court agreement as a substantive matter, the success or failure of a damages claim for the breach will depend on its governing law.

Other factors relevant to the availability of damages in the forum first seised will be examined below by reference to the two categories of cases described in Section III above.

A. The First Category of Cases

In the first category of cases, *i.e.* where the court first seised dismisses or stays its proceedings, the court may issue a costs order allowing the defendant to recover all or part of his costs from the plaintiff.[73] If the costs order has not fully compensated the defendant for his costs, whether he can claim the remainder as damages for breach of a choice-of-court agreement in the same forum is the question here.

In many jurisdictions, the damages claim will be barred by the rules of *res judicata*. For example, in the English case of *A v. B (No. 2)*,[74] Colman J. took the

[72] Thus, in Japan, where a judgment is set aside or modified after it has been provisionally executed, there is a procedural rule rendering the plaintiff, *i.e.* the party who has applied for the provisional execution, liable to pay damages for the loss caused by the execution: Article 260(2) of *Minji Soshô Hô* [the Code of Civil Procedure].

[73] In so doing, the court may take into account the breach if to do so is permitted under its costs rules. In England, costs are in general borne by the losing party. But in practice, it is only 50 to 60 per cent of the total costs which are usually awarded under the measure known as the standard basis: BIRKS P. (ed.) *English Private Law*, vol. 2, Oxford 2000, para. 19.321 (by ANDREWS N.). Under that measure, the recoverable costs must be reasonably incurred and proportionate to the matter in question, with any doubt about the reasonableness being resolved in favour of the losing party (Civil Procedure Rules, Rule 44.4(2)). Depending on the losing party's procedural behaviour, however, the court may use the measure known as the indemnity basis, under which there is no requirement of proportionality and any doubt about reasonableness is resolved in favour of the winning party: Rule 44.4(3) of the Civil Procedure Rules. In A v. B (No. 2) [2007] EWHC 54 (Comm), an action had been brought in England in breach of a Swiss arbitration agreement, and it was held that in such a case, the indemnity basis should normally be used to assess the recoverable costs on the ground that the conduct of deriving an unjustifiable procedural advantage through deliberately ignoring such an agreement constituted the misuse of the judicial facilities. The language of the court's reasoning was wide enough to cover the case of a choice-of-court agreement. A similar suggestion has been made with respect to costs for applying for an antisuit injunction to restrain foreign proceedings brought in breach of a choice-of-court agreement: see YEO N./TAN D. (note 58), pp. 403, 413-414.

[74] [2007] EWHC 54 (Comm) at para. 9.

view that in England, separate proceedings for damages could not be instituted because, when there was a breach of a choice-of-court agreement, the cause of action for the relief of staying proceedings and the cause of action for the relief of damages were normally the same.[75] In *Union Discount Co v. Zoller*,[76] the English court observed that the defendant to the New York action, after having disputed the jurisdiction of the New York court by relying on an English choice-of-court agreement, would not be able to claim damages for breach of the agreement in New York and therefore would have to come to England to do so.

B. The Second Category of Cases

It will be recalled that in the second category of cases, the court seised of an action alleged by the defendant to have been brought in breach of a choice-of-court agreement nevertheless decides to hear the case on the merits. In most of those cases, the court reaches that decision by finding that there is in fact no breach of an agreement and, therefore, a damages claim for the breach will fail.

Such a claim may, however, be successful in the cases where the court finds that there is a breach of a choice-of-court agreement but nevertheless decides to hear the case by refusing to dismiss or stay its proceedings under whatever discretion it has. Examples of those cases have been mentioned in Section III above. In such cases, as between the parties to a choice-of-court agreement, the court may award the defendant damages for breach of the agreement in respect of the costs incurred over and above the sum already awarded to him by its costs order. It is doubtful, however, that the court will go so far as to allow him to claw back any sum which it has ordered him to pay by its own judgment on the merits[77] since doing so would effectively negate its own decision to hear the case in the first place. To reject such a claw-back claim, the court may refuse to see the sum it has ordered the defendant to pay as a loss, or find it too remote from the breach, or come up with other theoretical bases available under the applicable law.

---

[75] It is sometimes said that in England, costs incurred in defending an action, beyond the sum awarded by a costs order, are not recoverable as damages under the principle established in Quartz Hill Consolidated Gold Mining Co v. Eyre (1883) 11 QBD 674 (CA). YEO N./TAN D. (note 58), p. 414, further suggests that it should be immaterial whether or not the breach of a choice-of-court agreement has been asserted in the hearing on costs under the principle of Henderson v. Henderson ([1843] 2 Hare 100), under which a party is estopped from raising issues which could and should have been litigated in an earlier action. Upon a close reading of *Quartz Hill*, however, the case was only concerned with what the court called the 'extra costs,' *i.e.* the costs unnecessarily incurred by the successful party in defending the case, and their recovery was denied simply because they could not be properly considered to have been caused by the unjust litigation.

[76] [2002] 1 W.L.R. 1517 para. 28.

[77] YEO N./TAN D. (note 58), pp. 429-430, however, seem to suggest that such recovery should be allowed. They note that the costs, on the other hand, will not be recoverable in England under the *Quartz Hill* principle (see *supra*, note 75).

A couple of Australian cases illustrate the point on costs. In *Incitec Ltd v. Alkimos Shipping Corp*,[78] the Federal Court of Australia refused to stay its proceedings which had been brought in breach of an English choice-of-court agreement. It did so in order to avoid inconsistent decisions since the action also involved parties who were not bound by the agreement. The court alluded to the breach of a choice-of-court agreement in holding that it would hear the parties on costs, implying that the breach of a choice-of-court agreement would be taken into account in the application of the normal costs rules. By contrast, another Australian case, *Commonwealth Bank of Australia v. White (No. 2 of 2004)*[79] featured a damages claim to recover the costs over and above those recoverable under the normal costs rules. This case involved third party proceedings and the third party sought leave to file a counterclaim against the defendant in order to recover the costs as damages for breach of the English choice-of-court agreement which existed between them. The Supreme Court of Victoria granted leave, holding that it was arguable that if the third party succeeded in their defence on the merits,[80] they might have a claim for damages for breach of the choice-of-court agreement. The court took this view notwithstanding that it had earlier refused to stay the third party proceedings.

VIII. Availability of the Remedy in Another Forum

Since, as seen above, the damages claim has a limited chance of success in the forum first seised, it will usually be brought in another forum. Whether other forums have jurisdiction to hear the claim depends on the jurisdictional rules of each forum. Thus, for example, the forum chosen by the choice-of-court agreement may have jurisdiction by virtue of being so chosen,[81] or in the capacity of the forum where the contract (*i.e.* the choice-of-court agreement) should have been performed if the claim is framed in contract, or in the capacity of the forum where harm is done to the interests of defending the action there if the claim is framed in tort. Also, the forum in which the defendant to the damages claim (*i.e.* the plaintiff of the action brought in breach of a choice-of-court agreement) is domiciled or resident may have jurisdiction.

Other questions which may arise when the damages claim is made in those forums include whether the jurisdictional battle should be arrested by the binding force of *res judicata* or under more general principles and whether awarding

[78] [2004] FCA 698 para. 67.

[79] [2004] VSC 268.

[80] The court reasoned as if the third party's success in his defence on the merits were a prerequisite to his entitlement to damages. But that should be immaterial.

[81] To allow this logic, the choice-of-court agreement must cover within its scope a damages claim for its breach, an interpretation which is not without difficulty.

damages would not offend international comity towards the court first seised. Those questions will be examined in turn below.

A. Finality of the Settlement of a Jurisdictional Battle

1. Pleas of res judicata

Generally, the finality of the settlement of a dispute is achieved in the international arena only to the extent the decision is recognised as having the binding force of *res judicata* in other countries. Since a claim for damages for breach of a choice-of-court agreement could prolong the jurisdictional battle, it would be apposite to consider whether the decisions of the court first seised are recognised as having the *res judicata* force of precluding the damages claim in the other forum. This question can be rephrased in the context of specific types of cases. Thus, in the first category of cases, the question is whether the costs order which has awarded the defendant some of his costs will acquire a binding force of *res judicata* precluding his claim for damages to recover the remainder of his costs.[82] In the second category of cases, the questions are, apart from the same question as that for the first category, whether the costs order which has compelled the defendant to pay some of the plaintiff's costs will have the *res judicata* effect of precluding his claim for damages to claw back the sum he has been compelled to pay, and whether the judgment on the merits rendered against the defendant acquires the binding force of *res judicata* precluding his claim for damages to claw back the sum he has been compelled to pay. Where the defendant has claimed damages in the forum first seised rather than being content with a normal costs order, a further question arises whether the decision in the first forum may be presented as *res judicata* to preclude the defendant from making another damages claim to recover the remainder in another forum.

If the costs order or the judgment on the merits, as the case may be, satisfies the prerequisites for recognition,[83] it will be recognised as *res judicata* and preclude the damages claim.[84] Where the court first seised and the court hearing the damages claim are both situated in the EU Member States or in the Contracting States to the

[82] This question did not arise for the English Court of Appeal in Union Discount Co v. Zoller ([2002] 1 W.L.R. 1517) since, as noted by the English court (para. 26), the New York court had made no decision on the costs.

[83] Such as the non-infringement of public policy and the sufficient service of the document instituting proceedings: see *e.g.* Article 34 of the Brussels I Regulation and Article 27 of the Lugano Convention.

[84] BRIGGS A. (note 27), para. 8.22, however, suggests that an application for costs is not to be seen as the prosecution of a cause of action in English law, with the result that a claim for damages in respect of the unrecovered costs is not barred under section 34 of the Civil Jurisdiction and Judgments Act 1982 which provides that a party who has obtained a favourable foreign judgment recognisable in England may not bring proceedings in England on the same cause of action.

Lugano Convention, the Brussels I Regulation and the Lugano Convention apply respectively. Under those regimes, as a general rule, no jurisdictional review is permitted[85] and the decisions of the first court are to that extent more likely to be recognised.[86] Under most other legal systems,[87] a jurisdictional review is a prerequisite for recognition. That requirement is unlikely to be satisfied in the present context, with the result that the damages claims are not precluded. That is because the claimant of the damages claim would usually choose to make the claim before a court which would affirm the breach of the choice-of-court agreement.

In many legal systems, a costs order will be subject to the same rules for recognition as a judgment on the merits.[88] In Japan, there is a case[89] in which the Supreme Court considered the enforcement of a costs order which a Hong Kong court had issued after rendering a judgment on the merits. It was held that whether the foreign court issuing a costs order had jurisdiction to do so from the Japanese viewpoint depended on whether it would have had jurisdiction over the merits of the case if the Japanese jurisdictional rules had been applicable. This ruling was based on the reasoning that the costs order was an offshoot of a judgment on the merits. From this ruling, it would follow that in the cases with which the present discussion is concerned, the costs order issued by the court first seised will not likely be recognised since the claimant of damages would usually choose to make the claim before a court which would affirm the breach of the choice-of-court agreement. The damages claim would therefore not likely be precluded.

Where the defendant to the action brought in breach of a choice-of-court agreement has made a damages claim in the forum first seised, the decision on that claim will acquire a binding force of *res judicata* precluding another damages claim to recover the remainder in another forum, provided that the decision is entitled to recognition in the latter forum. Among the prerequisites for recognition, the jurisdictional requirement will likely be satisfied since the defendant has submitted to the jurisdiction of the first court by making the damages claim there.

---

[85] See Art 35(3) of the Brussels I Regulation, Art 28(4) of the Lugano Convention. Incidentally, the 2005 Hague Convention on Choice of Court Agreements in its Chapter III provides for the recognition of a judgment given by a court chosen by a choice-of-court agreement, but it is silent on the recognition of a judgment by a non-chosen court.

[86] Accord: JOSEPH D., *Jurisdiction and Arbitration Agreements and their Enforcement*, London 2006, p. 406.

[87] *E.g.* Article 118(1) of *Minji Soshô Hô* [the Japanese Code of Civil Procedure]. In England, s. 32 of the Civil Jurisdiction and Judgments Act 1982 specifically mentions a foreign judgment given in breach of a choice-of-court agreement and provides that such a judgment will not be recognised or enforced in England, except where the Brussels I Regulation applies.

[88] *E.g.* Article 32 of the Brussels I Regulation provides that the word 'judgment' embraces the determination of costs by an officer of the court. It would *a fortiori* cover the determination of costs by a court.

[89] The judgment of the Supreme Court on 28 April 1998 (Minshû, Vol. 52, No. 3, p. 853; translated into English in: *JAIL* 1999, p. 155).

A separate somewhat taxing question arises in the second category of cases if the damages claim is brought in a third forum, *i.e.* a forum other than the forum first seised or the forum chosen by the choice-of-court agreement. In such a situation, if the judgment on the merits of the court first seised is entitled to recognition in the forum chosen by the agreement, should the claim be dismissed for that reason?[90] A negative answer would follow if it is thought that the court hearing the claim should not let itself be confused by others' viewpoints but should be guided solely by its own law. Then, the court may allow the claimant (*i.e.* the defendant in the forum first seised) to claw back the sum he has been compelled to pay by the court first seised. However, the plaintiff would have no chance to relitigate the case in the chosen forum since his action would be, *ex hypothesi*, dismissed by the binding force of *res judicata*. If such a consequence is considered to be unfair for the plaintiff, an affirmative answer should be supported.

2. General Principles of Procedure Law

As we have seen just above, the decisions made in the forum first seised often do not acquire the binding force of *res judicata* precluding the damages claim made in another forum. As a matter of policy, however, a claim for damages for breach of a choice-of-court agreement should not be encouraged since it gives rise to the question where the action should have been brought after the court first seised has addressed a similar question of equal complexity, *i.e.* whether it has jurisdiction. It may, therefore, be thought that such a claim should be precluded by the general principles of procedure law, such as those of good faith and abuse of process.[91]

Thus, in England, the institution of an action which would bring the administration of justice into disrepute among right-thinking people is regarded as an abuse of process.[92] This concept was invoked in an international context in *House of Spring Gardens Ltd v. Waite*.[93] In that case, two of the three defendants who had lost in an Irish action brought a fresh action there to set aside the judgment on the ground of fraud, but the Irish court dismissed it. When the original Irish judgment was sought to be enforced in England, the English court held that it would be an abuse of process for the third defendant, who did not join the second Irish action, to try to block the execution by alleging fraud since he had been well aware of that action.

---

[90] An analogous question, to which an analogous analysis can be applied, is whether the claim should be dismissed if the court specified by a choice-of-court agreement would find the agreement invalid or non-exclusive.

[91] For an examination of the use of such general concepts in the Japanese civil procedure, see TANIGUCHI Y., 'Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure' in: *Tul. J. Int'l & Comp. L.* 2000, p. 167.

[92] Hunter v. Chief Constable of the West Midlands Police [1982] AC 529, 536.

[93] [1991] 1 QB 241, 254-5.

No case is to be found where the court has dismissed a damages claim for breach of a choice-of-court agreement as an abuse of process. Such general concepts tend to have an ill-defined scope of application. There is a view which considers it to be inappropriate to invoke such a general principle in order to deny or restrict what is considered to be a fundamental right to claim damages for breach of a choice-of-court agreement.[94] But it is a remedy no more fundamental than the normal relief of damages for breach of an ordinary contract. There may, therefore, be appropriate cases where resorting to such general concepts is apt in order to curb an attempt to jeopardise the finality of settlement of a jurisdictional dispute.

B. Comity towards the Court First Seised

Even if the decisions of the court first seised do not have the effect of precluding a damages claim in another forum, it may be queried whether allowing such a claim would not be contrary to international comity towards the court first seised.

Comity is a complex concept; it does not imply an absolute obligation but requires deference to foreign interests. Due to the opaqueness of the concept, a clear line cannot be drawn to define an acceptable range of conduct. It would not, therefore, be possible to conclude unequivocally whether awarding damages for breach of a choice-of-court agreement offends international comity towards the court first seised.

What is not impossible, though, is to assess the degree of implications for international comity. The court seised with a damages claim may take that into account under whatever discretion it has on the exercise of jurisdiction over the claim or on the assessment of damages.[95] The court may also exclude the application of the foreign law governing the claim if it results in awarding damages in the circumstances where it has such a negative impact on comity as would be contrary to the *ordre public* of the forum.[96]

---

[94] *E.g.* YEO N./ TAN D. (note 58), p. 419.

[95] TAN D., 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation', in: *Tex. Int'l L.J.* 2005, pp. 623, at 658, suggests that awarding damages in the reliance measure will go some way towards alleviating affront to comity since the quantum of damages will in most cases be drastically less and more easily ascertainable than one assessed in the expectation measure. The reliance measure allows recovery of damages which have resulted from the reliance on a contract which later transpires to be invalid. In the present context, it protects the interest of reliance on a choice-of-court agreement in the belief that it is valid and exclusive.

[96] It might, however, be reasonable to think that international comity has no bearing on *ordre public*, a concept constituted by the fundamental principles underpinning the operation of a domestic legal system.

1. The First Category of Cases

It will be recalled that the damages award in this category of cases would allow the recovery of the costs incurred in disputing the jurisdiction of the court first seised over and above those already awarded by the costs order of that court. To the extent that the damages award disregards the upper ceiling on the awardable costs set by the court first seised, there is an implication for international comity. The degree of implication would be greater if the costs rules of the court first seised give the court discretion to take into account the circumstances of the case since that court would be best placed to evaluate the merit of the costs claim.[97] Having said this, implications for comity will not be significant in this category of cases since, *ex hypothesi*, the court first seised and the court hearing the damages claim are in agreement, unlike in the second category of cases, that the court first seised should dismiss or stay its proceedings on account of the breach of a choice-of-court agreement. Furthermore, the upper limit on awardable costs would not be a matter serious enough to impose a heavy strain on international comity.[98]

In *Union Discount Co v. Zoller*,[99] the English Court of Appeal acknowledged that there might be good policy reasons for each of the different approaches to costs that different countries have. It further accepted that it would infringe international comity if an English court were to seek indirectly to apply its own approach to litigation which had taken place in a foreign country. However the Court of Appeal concluded, noting that comity is a term of elastic content, that allowing recovery, as damages for breach of a choice-of-court agreement, of costs over and above those awarded in the forum first seised would not violate international comity. In so concluding, the Court of Appeal considered the reverse situation, *i.e.* where an English court had dismissed proceedings because of a foreign choice-of-court agreement, and the court chosen by the agreement awarded the defendant the costs over and above those awarded by the English court. It observed that such a result would not cause concern to England.[100]

It would not be necessary to alter this observation in the cases where the court first seised and the court hearing the damages claim are both in the EU

---

[97] ANDREWS N., *English Civil Procedure*, Oxford 2003, para. 36.110, suggests that the English courts should show great restraint before supplementing foreign costs orders for this reason as well as for the reason that relitigating foreign costs matters can become an expensive and time-consuming satellite litigation.

[98] As indicated by the fact that in the situation where the enforcement is sought of a foreign court order awarding costs to the winning party, some courts which would not award costs to the winning party themselves displayed no objection to enforcing such a foreign costs order: *e.g.* the Japanese Supreme Court judgment on 28 April 1998 (note 89, *supra*) concerning a Hong Kong costs order; Somportex v. Philadelphia Chewing Gum v. Brewster, Leeds & Co. and M.S. International (453 F.2d 435 (3rd Cir. 1971)) concerning the enforcement of an English costs order in Pennsylvania.

[99] [2002] 1 W.L.R. 1517 (the English Court of Appeal).

[100] [2002] 1 W.L.R. 1517 paras. 21-22.

Member States. The rationale of the ECJ's decisions in *Gasser*[101] and *Turner*[102] is the respect which the courts of each Member State are supposed to accord to those of other Member States in the correct application of their common jurisdictional rules. This rationale would not be undermined if, after the court first seised has declined jurisdiction and awarded the defendant part of his costs, the court of another Member State supplements the recovery of the costs as a damages award, since the latter is not, by so doing, second-guessing the judgment of the court first seised on the correct application of their common jurisdictional rules.

2. The Second Category of Cases

It will be recalled that in the second category of cases, the court first seised decides to hear the case notwithstanding the allegation of a breach of a choice-of-court agreement. It follows that if the court of another forum awards damages for the breach, there would be a greater implication for international comity than in the first category of cases.

It does happen frequently, though, that the courts of different countries take different views on the same procedural step taken by a party without giving rise to a significant problem of international comity. Thus in a Japanese case,[103] a Panamanian company claimed damages in Japan against a Californian company, contending that the latter's application in California for a provisional attachment of its ship at a port in California constituted a tort. The California company maintained that it would be tantamount to a breach of international comity if the Japanese court were to judge the illegality of the application prior to the Californian appellate court's review of the lower court's decision to grant the application. The Japanese court did not rule on the point since it declined to hear the case on the ground, *inter alia*, of parallel litigation. It is submitted that even if the Japanese court had ruled that the application constituted a tort in the circumstances where the California appellate court had affirmed the decision to grant it, the ruling would not have had a serious impact on international comity. Such a simple divergence of views entails no more than the refusal to recognise or enforce the decision of a foreign court.

By comparison, awarding damages for breach of a choice-of-court agreement would have a more serious implication for international comity if, as in the second category of cases, it has the effect of negating the decision of the court first seised by allowing the sums awarded by that court to be clawed back. A greater restraint would therefore be warranted when awarding damages in the second category of cases.

---

[101] Erich Gasser GmbH v. Misat Srl (Case C-116/02) [2003] E.C.R. I-14693.

[102] Turner v. Grovit (Case C-159/02) [2004] E.C.R. I-3565.

[103] Tokyo District Court judgment on 15 February 1984 (*Kaminshû* vol. 35, issues 1-4, p. 69).

An informative comparison can be made with the recovery allowed under what is known as clawback statutes since they also undo the effect of a foreign judgment. The 1980 United Kingdom Protection of Trading Interests Act, for example, provides that a foreign judgment awarding multiple damages is not recognised[104] in the United Kingdom[105] and moreover allows the defendant of the foreign action to recover from the plaintiff so much of the judgment as exceeds the compensatory part by bringing an action in the United Kingdom.[106] Since those provisions are effectively targeted at the judgments of the United States, the U.S. government protested to the U.K. government, contending that those provisions violated international comity as well as international law.[107]

In formulating the general principles of conflict of laws, it would be desirable to promote international comity by adopting a universalist approach. Such an approach is manifested in, *inter alia*, the equal treatment of domestic and foreign laws in the choice-of-law field and the common law principle of *forum non conveniens* which mandates a stay of proceedings where there is another forum clearly more appropriate. Nevertheless, it should at the same time be firmly kept in mind that such an idealistic approach could only be sustained if the court is equipped with means to confront the far-from-ideal reality of the world. Thus, the equal treatment of domestic and foreign laws could not be maintained unless there is an escape hatch to exclude the applicable foreign law which produces results contrary to the *ordre public* of the forum. Similarly, the courts in the common law countries, while subjecting themselves to the self-denying ordinance of the principle of *forum non conveniens*, keep in their armoury an antisuit injunction to restrain a vexatious or oppressive pursuit of foreign proceedings which is encountered from time to time in the merciless world of international litigation. By the same token, where a breach of a choice-of-court agreement bears the hallmarks of an unscrupulous behaviour, the court hearing a damages claim for the breach should not shrink from granting the remedy by citing international comity. Where, for example, the plaintiff blatantly flouts a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement, the court hearing a damages claim for breach of the agreement should not let international comity stand in the way of granting the relief sought. In fact, the *modus operandi* of the court condoning such an opportunistic behaviour would not be worthy of being granted comity. The courts should not, therefore, shy away from its responsibility towards the aggrieved party who has such a sufficient contact with its forum as to warrant extending him a helping hand.

---

[104] Clawback statutes are more widely known as blocking statutes because of their function of preventing recognition and enforcement.

[105] Article 5.

[106] Article 6.

[107] See 'United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act', in: *I.L.M.* 1982, p. 840.

IX. Comparison with an Antisuit Injunction

Where proceedings are about to be brought or have been brought in violation of a choice-of-court agreement choosing the courts of a common law country, the defendant may be able to obtain an antisuit injunction from the chosen courts to restrain the plaintiff from instituting or continuing with the proceedings.[108] As an established remedy for breach of a choice-of-court agreement, an antisuit injunction offers a useful point of comparison with the remedy of damages. The two aspects on which a particularly informative comparison may be made are implications for international comity and effectiveness as remedy.

The compatibility of an antisuit injunction with international comity is often doubted especially by the civil law jurists. However, the English courts have tried to justify the injunction by pointing out that it is not issued against the court but against the plaintiff of the foreign proceedings.[109] A similar argument may be made[110] to play down any concern about the negative impact on comity which a damages award for breach of a choice-of-court agreement may have, by stressing that it is only a response to the plaintiff's conduct rather than a criticism of the foreign court. Awarding damages is indeed not incompatible with admitting that the foreign court's decision is correct under the law which it is supposed to apply in accordance with its own choice-of-law rules.[111]

It may further be thought that damages are less intrusive than an antisuit injunction[112] since they are not in general awarded until after the foreign court has ruled on its jurisdiction or the merits of the case, whereas an antisuit injunction, if obeyed by the respondent, does not let the foreign proceedings run their course. The opposite view, however, could just as easily be formed from the same fact since, unlike an antisuit injunction, damages undo the effect of the foreign decisions after a lot of time, costs and adrenalin have been spent to obtain them.

Another aspect in respect of which an informative comparison can be made with an antisuit injunction is the effectiveness as remedy. In *OT Africa Line Ltd v. Magic Sportswear Corp*,[113] the English Court of Appeal observed that the remedy of damages was not as effective as an antisuit injunction for the reasons of negative impact on international comity and the difficulty of quantification. Whether those

[108] Donohue v. Armco Inc [2002] 1 All ER 749 (HL).

[109] See *e.g.* Castanho v. Brown Root LTD [1981] AC 557, 572.

[110] See *e.g.* AMBROSE C., 'Can Antisuit injunctions Survive European Community Law?', in: *I.C.L.Q.* 2003, pp. 401, 415; BRIGGS A., 'Distinctive aspects of the conflict of laws in common law systems: Autonomy and agreement in the conflicts of laws', in: *Doshisha Law Review* 2005, para. 40.

[111] Accord: MERRETT L., 'The Enforcement of Jurisdiction Agreements within the Brussels Regime', in: *I.C.L.Q.* 2006, pp. 315, 321.

[112] On that basis, awarding damages was considered to be an 'ideal solution' in Horn Linie GmbH & Co. v. Panamericana Formas E Impresos S.A., Ace Seguros S.A. [2006] EWHC 373, para. 26.

[113] [2005] EWCA Civ 710.

are valid points is considered elsewhere in this article.[114] Also, a point has been made[115] that since an antisuit injunction bites earlier in time than damages, it may provide a more effective remedy to cash-strapped parties, especially small businesses and individuals, who have difficulty finding resources to defend their action.

On the other hand, the versatility of the remedy of damages shows strength over the rigidity of an antisuit injunction in certain types of cases belonging to the second category. Thus, in a multi-party action involving parties some of whom are bound by a choice-of-court agreement, an antisuit injunction restraining only the proceedings between the parties bound by the agreement would negate the advantages of a multi-party action such as the avoidance of inconsistent decisions and the efficient administration of justice. On the other hand, the award of damages, if tailored to target only the costs between the parties bound by the agreement, could to that extent realise the financial interests embodied in the agreement while at the same time keeping intact the advantages of a multi-party action. Thus, in *Donahue v. Armco*,[116] the English court refused to issue an antisuit injunction against a New York action involving parties some of whom were bound by an English choice-of-court agreement. But damages were held to be recoverable for breach of the agreement as between the parties to the agreement. Similarly, where the foreign court finds a breach of a choice-of-court agreement but nevertheless decides to hear the case, as where the plaintiff has been time-barred from suing in the chosen forum but the court finds that he had not acted unreasonably in failing to sue within the time, it may not be appropriate or even possible to issue an antisuit injunction, not least because the foreign proceedings may not in such circumstances be seen as vexatious or oppressive. Nevertheless, there is room to award damages for breach of the choice-of-court agreement[117] to allow recovery of the unrecovered costs so that the financial purpose of the agreement is, if only partially, attained.

Damages may have another advantage over an antisuit injunction in respect of enforceability.[118] An antisuit injunction, being an *in personam* order, is not effective unless the respondent obeys it. If the respondent disobeys an injunction and is found guilty of contempt of court, he may be imprisoned or have his assets sequestrated. Those sanctions, however, do not necessarily bring about the intended effect of the injunction. On the other hand, if the award of damages is not voluntarily complied with, its enforcement would realise its intended pecuniary effect, although it must be acknowledged that the enforceability of an award of damages for breach of a choice-of-court agreement outside the forum where it is rendered is at best uncertain and is probably doubtful.

---

[114] See Sections VIII and X.

[115] See BAATZ Y., 'Who Decides On Jurisdiction Clauses?', in: *L.M.C.L.Q.* 2004, pp. 25, 28.

[116] [2002] 1 All ER 749 (HL).

[117] For a similar view, see PEEL E. (note 24), pp. 209, 211.

[118] BRIGGS A. (note 110), para. 36.

X. Quantification of Damages

Although the English Court of Appeal in the *OT Africa Line* case[119] cited the difficulty of quantification of damages as one of the reasons for observing that the remedy of damages is not as effective as an antisuit injunction, upon a close analysis, the difficulty differs depending on the types of cases. Thus, as will be seen below, the items for which damages may be claimed are simpler in the first category of cases than the second category. Also, identifying the point in time at which the loss is deemed to have materialised will involve a greater difficulty in some of the cases belonging to the second category than other cases.

In the first category of cases, *i.e.* where the court first seised finds that the action has been brought in breach of a choice-of-court agreement and accordingly dismisses or stays its proceedings, the defendant may claim damages for the breach in respect of the costs incurred in disputing the jurisdiction over and above any sum already awarded to him by a costs order, if any, of the court first seised.

The recoverable sum may, however, be limited to the costs reasonably incurred under the applicable remoteness test. For example, if an antisuit injunction is sought unsuccessfully in a third forum, the cost of making the application may be found to be unreasonably incurred. The remoteness test will be the one applicable to substantive damages claims and will, therefore, be different from the measure applicable to the costs rules. Thus, in *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,[120] the English court refused to apply the standard basis, a normal measure for costs order under the English Civil Procedure Rules which requires the costs to be reasonably incurred and proportionate to the matter in issue, on the ground that it would be wrong to apply the measure for costs order when assessing damages for breach.[121] The court noted[122] that applying the costs rules would in effect impose on the defendant to foreign proceedings *ex post facto* a set of principles for the conduct of proceedings which, at the time of incurring the costs, he could not have assumed would have any bearing.

The plaintiff may request the court to deduce from the award of damages the sum equivalent to the costs which the defendant would have been ordered to bear in the forum chosen by the choice-of-court agreement should the plaintiff have sued there. However, the court may not accede to the request[123] unless the plaintiff proves the amount of the costs by actually bringing an action in the chosen forum. The reason is that it would not be hard on him to require a relitigation of the case given that in this category of cases the court first seised has dismissed or stayed its proceedings.

---

[119] [2005] EWCA Civ 710.

[120] [2007] EWHC 1742 (Comm).

[121] In this case, an antisuit agreement (*i.e.* an agreement not to sue) was breached but the language of the decision was wide enough to cover the breach of a choice-of-court agreement.

[122] At para. 25.

[123] BRIGGS A. (note 27), para. 8.27, appears more sympathetic to such an argument.

In the second category of cases, the court first seised decides to hear the case on the merits notwithstanding that the defendant alleges that the action has been brought in breach of a choice-of-court agreement. On the merits of the case, too, the court may rule in favour of the plaintiff. The court may also make a costs order either allowing the defendant to recover all or part of his costs from the plaintiff or allowing the plaintiff to do the same from the defendant. Then, the defendant may make a claim, as a damages claim for breach of the agreement, to recover the costs left unrecovered as well as to claw back the sums which he has been compelled to pay to the plaintiff by a costs order or a judgment on the merits. The items for which damages may be sought are therefore more complicated in this category of cases than in the first category. In this category of cases, no court appears to have had a chance to ponder specific measures of damages.[124] If the plaintiff has managed to prove what costs order and judgment on the merits the court chosen by the agreement would render, the court hearing the damages claim may be open to deduct those sums, so that damages awarded would be the sum equivalent to the financial difference (1) between the costs order actually rendered by the court first seised and that which would be rendered by the chosen court and (2) between the judgment on the merits actually rendered by the court first seised and that which would be rendered by the chosen court. In making the proof, the plaintiff will have to identify factors which may lead to different decisions between those two forums, such as rules of evidence, choice-of-law rules, mandatory rules and the public policy of the forum.[125] If the plaintiff fails to make out the proof to the satisfaction of the court, he would not get the reduction and consequently may bring an action in the chosen forum to relitigate the case. If the court hearing the damages claim is the court chosen by the choice-of-court agreement, the plaintiff may, instead of trying to prove on a hypothetical basis what decisions that court would make on the costs and merits, opt for actually bringing an action to obtain decisions. However, unlike the first category of cases just examined, he could not necessarily be expected to take that step since, *ex hypothesi*, he may have already obtained a judgment in his favour in the forum first seised. Proof on a hypothetical basis may, therefore, be regarded as sufficient.

Damages can only be quantified when the loss has materialised. If the court is not satisfied that the loss has sufficiently materialised, it may stay proceedings or reject the claim as being premature. In the first category of cases, the loss in the form of costs incurred in disputing jurisdiction accrues as the proceedings unfold. In *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,[126] the English court held that the costs reasonably incurred up to the time of hearing could be recovered even if at some future point in time, the court seised of the action (a California court in that case) might make a costs order, observing that there would

[124] In Donohue v. Armco ([2002] 1 All ER 749, the House of Lords did not consider quantification of damages since it only accepted a party's concession to pay damages for breach of a choice-of-court agreement.

[125] For a similar point, see TAN D./YEO N. (note 62), fn. 17.

[126] [2007] EWHC 1742 (Comm) at para. 3.

be no question of double recovery. The court did not clarify the basis of this observation, but it may have been thought that the avoidance of double recovery is simply a matter of proof of facts.

In the second category of cases, if the court first seised has ruled in favour of the plaintiff on the merits, the loss is represented by the sum the defendant is ordered to pay by the judgment on the merits as well as the costs he is ordered to bear. At what point in time should it be deemed to have materialised? This is no easy question. Should it be when a pre-judgment provisional measure has been issued to constrain his asset, or when a final judgment has been rendered against him, or when a final judgment has been provisionally executed pending appeals, or when a final judgment against him has become conclusive, or when a final and conclusive judgment has been executed or otherwise paid for? The answer depends in theory on the law governing the damages claim. It is submitted that a point before the provisional execution of a final judgment would not be reasonable.

XI. Duty to Mitigate Loss

Where a party aggrieved by a wrong fails to minimise the loss or has contributed to the occurrence of the loss, the recoverable damages may be limited by the duty to mitigate loss or by a similar principle available under the applicable law.[127] Such principles may be pleaded as a defence to a claim for damages for breach of a choice-of-court agreement in a variety of contexts. As examined below, however, such defence is not likely to succeed.

Firstly, it may be argued that the defendant should have made efforts to restrain the proceedings brought against him in breach of a choice-of-court agreement by applying for an antisuit injunction in another forum so that he could be saved the costs and spared an unfavourable judgment on the merits. This argument will not be found persuasive[128] unless the circumstances are such that the chances that an antisuit injunction is actually granted and obeyed by the plaintiff are high.

Secondly, where the court first seised is obliged to ascertain its jurisdiction *ex officio*, it may be argued that the defendant should not have spent costs in disputing jurisdiction. This contention would be weak since the likelihood of the court declining jurisdiction would be higher if the defendant disputes jurisdiction by submitting evidence. Thus, in *Union Discount Co v. Zoller*,[129] the English court was unimpressed by the argument put forward by the defendant (*i.e.* the plaintiff of the New York action brought in breach of an English choice-of-court agreement) that the plaintiff should not have gone to New York to dispute jurisdiction.

---

[127] *E.g.* the principle of comparative negligence as under Article 418 of *Minpô* [the Japanese Civil Code].

[128] See also YEO N./TAN D. (note 58), p. 423.

[129] [2002] 1 W.L.R. 1517 (CA) para. 33.

Thirdly, in the second category of cases, after the court first seised has decided to hear the case on the merits, if the defendant omits to defend the case, it may be contended that he should have made an effort to obtain a favourable judgment.[130] This argument should be rejected since where the defendant alleges that the action against him has been brought in breach of a choice-of-court agreement, it does not make sense to expect him to defend the action.[131] If, on the contrary, the defendant opts to defend, he should not be deemed to have waived his right to claim damages.[132]

Fourthly, it may be argued that the damages claim should be made in the forum first seised[133] to avoid the loss which would arise from the claim being made and heard in another forum. This argument should be treated with caution because, as we have examined in Section VII above, the likelihood of the damages claim being granted in the forum first seised is often neither predictable nor high and because, if it is partially granted, a further recovery may be precluded in other fora where that decision is recognised as *res judicata*.

XII. Express Clause on Damages

The whole raft of the relevant issues as set out in the present article makes it difficult to predict whether, in what circumstances, and to what extent the remedy of damages will be granted. To overcome this uncertainty, wise drafters may wish to agree in express terms that damages are recoverable for breach of their choice-of-court agreement. Such a clause may be attached to their choice-of-court agreement or may be agreed on as a separate contract. Drafters may possibly go further by identifying the items of loss for which damages are recoverable or go one more step further to agree on a specific sum as liquidated damages.

Some commentators have begun proposing model clauses. Thus, it has been suggested to include in an English choice-of-court agreement a clause promising payment of 'all such sums as shall represent the whole of the loss' caused by breach.[134] A suggestion has also been made to attach to a choice-of-court agreement choosing the Tokyo District Court a clause reading, 'In the event that either party institutes any legal proceedings in any court other than the Tokyo District Court, that party shall assume all of the costs incurred in having such proceedings dis-

[130] An argument envisaged, though not necessarily supported, in BRIGGS A. (note 110), para. 29.

[131] Accord: YEO N./TAN D. (note 58), p 425.

[132] Accord: BRIGGS A. (note 27), para. 8.26.

[133] *E.g.* MERRETT L. (note 111), fn. 35.

[134] BRIGGS A. (note 27), p. 161 with a commentary at para. 5.51.

missed or stayed, including but not limited to the other party's attorney's and paralegal fees.'[135]

Such clauses will contribute to legal certainty since what the court is asked to do is simply to give effect to privately negotiated clauses and, therefore, the objections based on *res judicata* and international comity may be avoided. The precise extent to which such clauses can be given effect will depend on their governing law and may give rise to a dispute of its own. They are indeed not wholly immune from the risk of being struck out. Also, their scope may be disputed unless they are tightly drafted. Thus, with respect to the suggested clauses mentioned above, a dispute may arise as to whether they are wide enough to cover, for example, costs incurred in making an application in vain for an antisuit injunction; and again, if a specific sum is agreed upon as damages, it may come under scrutiny to see that it does not violate any rules against a penalty clause under the applicable law.

XIII. Dichotomy Between the Common Law and the Civil Law

As apparent from the foregoing analysis, the legal system and thinking of the common law jurisdictions are instrumental in shaping the remedy of damages for breach of a choice-of-court agreement. The relevant differences from the civil law system can be summarised as follows.

Firstly, mainstream common law thinking makes no dogmatic distinction in character between a choice-of-court agreement and substantive contracts. This makes it possible to award damages for breach of a choice-of-court agreement just as in the case of a breach of an ordinary contract. The civil law thinking may be more inclined to see a distinct character in a choice-of-court agreement, which may lead to a different treatment of its breach. Thus, if a breach of a choice-of-court agreement is regarded as a procedural issue, it will be subject to procedural rules, which may not make the remedy of damages available. Even if a choice-of-court agreement is acknowledged to be a contract, it may be treated as a special species of contract for which no remedy of damages is considered to be available.

[135] DOGAUCHI M., *Kokusai Keiyaku ni okeru Boilerplate jyôkô o meguru Jyakkan no Ryûiten* [Some Points to Note on Boilerplate Clauses in International Contracts] in: *NBL* 2008/874(5) p. 66. It modifies the language suggested by HAMABE Y./ANDERSON K., *Law School Jitsumuka Kyôju ni yoru Eibun Kokusaitorihiki Keiyakusho no Kakikata* [A Guidance on Writing International Business Contracts in English by a Law School Professor/Practitioner] Tokyo 2007, p. 197, which reads: In the event that either party institutes any legal proceedings in any court other than the Tokyo District Court, that party shall assume all of the costs incurred in transferring said proceedings to the Tokyo District Court, including but not limited to the other party's attorney's and paralegal fees.

Secondly, the courts of common law countries generally have power to issue an antisuit injunction to restrain foreign proceedings brought in breach of a choice-of-court agreement. The courts of most civil law countries have no equivalent power. The value of damages may be felt to be greater when it operates in tandem with an antisuit injunction in a complementary fashion.[136] Furthermore, an antisuit injunction provides a benchmark to gauge effectiveness as a remedy and measure implications for international comity. Without it, the hurdle which the proponents for the remedy of damages have to surmount may be higher since a doubt over its effectiveness and a concern about its impact on comity may loom larger.

Thirdly, whereas liability for breach of contract is generally strict in the common law legal systems, it is fault-based in the civil law legal systems. It follows that in the latter systems, damages are not awarded for breach of a choice-of-court agreement unless the breach is intentional or negligent. That requirement would be difficult to be satisfied particularly in some of the second category of cases where the court first seised declines to find that there is a breach.

For those reasons, a damages claim for breach of a choice-of-court agreement is less likely to be successful in the civil law countries than in the common law countries and under the civil law legal systems than under the common law legal systems. Even if a court of a civil law country characterises the question as substantive and its choice-of-law rules point to a common law legal system which would grant a damages claim, the court may refuse to apply that law if it finds that the result of awarding damages would offend comity towards the court first seised and hence would be contrary to the *ordre public* of the forum.

The courts of common law countries, with an antisuit injunction in their armoury, are more willing than the civil law counterparts to take proactive control over the workings of international litigation provided that the case has a sufficient nexus to warrant their involvement.[137] This tendency will intensify with a new addition to their armoury if they shed any remaining diffidence in awarding damages for breach of a choice-of-court agreement. The upshot would then be a wider divide between the common law camp and the civil law camp in their attitude and approach to international litigation. This may accelerate the tendency among strategic drafters of favouring the common law courts in the selection of courts for their choice-of-court agreements. By selecting common law courts, they could buttress their choice-of-court agreement as they would then have the option of bringing a damages claim in the chosen common law forum, which would be more open to the idea of embracing such a claim than the civil law counterparts and because the governing law would then be likely to be the law of the chosen forum,

[136] Thus, JOSEPH D. (note 86), p. 404, argues that if an antisuit injunction is available to prevent breach of a choice-of-court agreement, damages should be available to compensate for loss suffered consequent on breach.

[137] *E.g.* In Airbus Industrie G.I.E. v. Patel [1999] 1 AC 119, the House of Lords held that comity required that the English forum should have a sufficient connection with the matter in question to justify indirect interference with foreign proceedings by means of an antisuit injunction.

which is *ex hypothesi* a common law legal system, under which the claim would have a better chance of success than under the civil law counterparts.

XIV. Conclusion

The foregoing analysis has revealed that whether, in what circumstances, and to what extent damages may be awarded for breach of a choice-of-court agreement depend on a myriad of factors. Thus, the claimant may not have a good chance of success if the court treats the breach of a choice-of-court agreement as a procedural matter. If it is treated as a substantive matter, its success depends largely on the governing law of the claim. The governing law, in turn, depends on the legal basis in which the claim is framed. Where it is framed in contract and is governed by a civil law legal system, it may encounter difficulties in overcoming the fault-based system of contractual liability in certain cases. Furthermore, the court before which the claim is made must have jurisdiction, whether it is in the forum first seised, or the forum chosen by the choice-of-court agreement, or another forum. Where the claim is made in the forum first seised, it will not be successful if the court has earlier made irreconcilable decisions. There must be an end to the jurisdictional battle also in the cases where the claim is made in another forum. Thus, the decisions of the court first seised may be recognised as having the *res judicata* force of precluding the claim. Furthermore, it may be queried whether awarding damages would not be contrary to international comity towards the court first seised. Comity should, however, be put in the context of the far-from-ideal reality of international litigation. If a party is aggrieved by his opponent's unscrupulous litigational behaviour, the courts should not use comity as a pretext for renouncing its responsibility towards him if he has such a sufficient contact with the forum as to warrant extending to him a helping hand. In examining implications for international comity, a useful comparison may be made with an antisuit injunction, an established remedy in the common law countries for breach of a choice-of-court agreement. An antisuit injunction offers a useful point of comparison also in respect of effectiveness as a remedy. In both respects, the picture is mixed and, therefore, a choice should be wisely made between the two remedies to best fit the situation at hand. The effectiveness of the remedy of damages has been doubted due to the perceived difficulty of quantification. However, upon a close analysis, the difficulty differs depending on the type of cases. The duty to mitigate loss or similar concepts may be pleaded in defence in various contexts but will not be found persuasive in most cases. A practical solution to the uncertainty over the success of the damages claim would be an express clause on damages. It may, however, give rise to a dispute of its own.

Two threads run throughout the present analysis. They are the distinction between the first and second categories of cases described in Section III and the contrasts between the common law and civil law camps.

As between the two categories of cases, the damages claim is more likely to succeed in the first category of cases, *i.e.* where the court first seised dismisses or stays its proceedings. The reasons include that negative implications for international comity are less serious, that the quantification of damages is less difficult, and that if the governing law adopts the system of fault-based liability, the requirement of negligence or intent in breaching the agreement will be met with less difficulty. In the second category of cases, *i.e.* where the court first seised decides to hear the case on the merits, the claim will face more obstacles. Nevertheless, practical justice demands that the law should be crafted and interpreted to allow the claim at least in the cases displaying an unscrupulous behaviour, for example, where the plaintiff has flouted a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement.

The idea of awarding damages for breach of a choice-of-court agreement has its genesis in the common law system. Whether the seed growing in the common law field can be transplanted onto the civil law ground remains to be seen. The present article has identified some conceptual and normative hurdles to overcome. If the common law courts cast off any remaining hesitancy in granting this remedy, the divide between the common law and the civil law camps in their approach to international litigation will become wider, which may affect the strategy of drafters of choice-of-court agreements.

ARBITRATION AGREEMENTS IN INTERNATIONAL ARBITRATION

THE NEW SPANISH REGULATION*

Carlos ESPLUGUES MOTA**

I. Introduction

Arbitration has long been known to the law of Spain. Its antecedents date far into the earlier epochs of the Roman Empire, and references to it are found as early as the 6th Century at the Breviario of Alarico (506 a.c.). The *Liber Iudiciorum* (654 a.c.), the *Fuero Real* (1252) and the *Partidas of Alfonso X* '*el Santo*' (1265), among others, also refer to the institution of Arbitration. In modern times, Arbitration was recognized in both the Spanish Constitution of 1812 – the first Spanish

* Article prepared under the auspices of the Research Project MEC/SEJ2007-64594: 'Hacia una cultura de las ADRs: de la mediación al arbitraje'.

** LLM (Harvard), MSc (Edinburgh); Professor of Private International Law, University of Valencia (Spain).

Yearbook of Private International Law, Volume 10 (2008), pp. 93-111

Constitution – and the Civil Procedure Act of 1881 as a method of settling disputes.[1]

Despite its longstanding presence in Spanish Legal History, arbitration lacks – and has traditionally lacked – an active role in social reality. Historically, Spain has not had a tradition of having people refer to arbitration in order to settle their disputes. This unreasonable situation has existed for a long time due to a number of reasons: (1) a 'litigation culture' instead of a 'settlement culture'; (2) the century long tradition of economic underdevelopment and social isolation; (3) the political instability of the country; and, among others, (4) the Government and Judges' historical mistrust of an institution – such as arbitration – based on the free will of the parties that ousts the jurisdiction of national courts. It is for all these reasons that arbitration has traditionally been and still is an underdeveloped, almost 'virtual', institution in Spain.[2]

The Spanish legislator has always been fully aware of this unbearable situation. In fact, three different Arbitration Acts have been enacted in the last 50 years, in an attempt to tackle this grim scenario.[3] These three Acts were passed in very different historic environments, and despite the fact that they tried to favor the use of arbitration in practice, their origins and objectives differ widely:

– The Arbitration Act of December 22nd, 1953[4] was the first of these Acts. The 1953 Act was passed under the Franco's dictatorial regime, and, therefore, the attitude towards arbitration it embodied was extremely cautious.

– Act 36/1988, on Arbitration, of December 5th, 1988[5] was the second of these Acts to take effect. This Act was passed after Spain became a fully democratic country and a member of the current European Union. It aimed to promote a much broader use of Arbitration in practice in both the domestic and international arenas. However, it was not a UNCITRAL Model-Law based Act.

– Finally, the Act 60/2003, of Arbitration, of December 23rd, 2003,[6] was passed, which is the law still currently in force. The social and economic situation surrounding this Act's passage differs greatly from that of 1953 or 1988 Acts. Spain is now a much more developed country and a major investor in some areas of the world. Therefore, the Arbitration Act of 2003 was written with the direct purpose of turning Spain into a suitable place for International Arbitration.[7]

---

[1] BARONA VILAR S., 'Introducción', in: BARONA VILAR S. (Coord.), *Comentarios a la Ley de Arbitraje. Ley 60/2003*, Madrid 2004, at 47-48.

[2] BARONA VILAR S., 'Arbitraje en España: a la búsqueda de un lugar adecuado en el marco de la Justicia', in: BARONA VILAR S. (Coord.), *Arbitraje y Justicia en el Siglo XXI*, Cizur Menor 2007, at 39.

[3] BARONA VILAR S. / ESPLUGUES MOTA C., 'Introducción', in: BARONA VILAR S. / ESPLUGUES MOTA C., *Arbitraje (Legislación básica)*, Valencia 2004, at 9 ff.

[4] *Boletín Oficial del Estado* (*BOE*) n. 358, of 24-XII-1953.

[5] *BOE* n. 293, of 7-XII-1988.

[6] *BOE* n. 309, of 26-XII-2003.

[7] See ESPLUGUES MOTA C., 'Artículo 1', in: BARONA VILAR S. (Coord.) (note 1), at 77; BARONA VILAR S. (note 2), at 39.

With the intent of transforming Spain into a major center for International Arbitration, the Spanish legislature rigidly aligned itself with the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Model Law establishes a 'minimum standard' rule to be respected in International Arbitration. In fact, the Spanish Arbitration Act of 2003 emphasizes its own connection with the Model Law in its preamble,[8] stating that its 'main inspiring criteria is to have the Spanish legal regime on Arbitration grounded on the UNCITRAL Model Law of International Commercial Arbitration of June 21st, 1985...'[9]

The 2003 Act's relationship to the Model Law is so close that it almost totally reproduces the wording of the original 1985 version of the Model Law. In practice, the 2003 Act only creates a very limited set of exceptions to this general rule, such as the regulation of arbitration agreements in international arbitration.

II. The Joint Regulation of Domestic and International Arbitration as a Cornerstone of the Spanish Arbitration Act of 2003

Clearly differing from the 1988 Arbitration Act's approach,[10] the Arbitration Act of 2003 is grounded on the 'monistic doctrine,' a basic premise – and a truly legal paradigm – for the Spanish legislature. Consistent with this 'monistic' approach, the 2003 Act establishes a common set of rules for both domestic and international arbitration.[11]

This common treatment of both types of arbitration is considered fully compatible with the Model Law of 1985, which is expressly devoted to 'International Commercial Arbitration', insomuch as the Secretariat of UNCITRAL has expressly accepted the possibility that the Model Law may also be applied to domestic arbitration.[12]

---

[8] 'Exposición de Motivos' ('Statement of Purposes').

[9] 'Exposición de Motivos', n. I.

[10] ESPLUGUES MOTA C., 'Artículo 3', in: BARONA VILAR S. (Coord.) (note 1), at 146 ff.

[11] A general approach to the Act may be found in ESPLUGUES MOTA C., 'Arbitraje comercial internacional', in: ESPLUGUES MOTA C. / IGLESIAS BUHIGUES J.L., *Derecho internacional privado*, Valencia 2008, at 143 ff.

[12] See UNCITRAL: 'Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration', <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf, p. 17, n. 9>: 'While the need of uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.'

The Preamble to the 2003 Arbitration Act stresses the Spanish legislature's unitary approach as a salient feature of the Act, stating that 'with regards to the contrast between domestic and international arbitration, this Act clearly upholds a unitary regulation of both of them. In relation to the choice between the so-called dualism approach (international arbitration is totally – or almost totally – governed by a specific set of rules differing from those applicable to domestic arbitration) or the monistic approach (subject only to some specific exceptions, domestic and international arbitration are subjected to similar rules of arbitration), the Act follows the monistic system. There are very few and very well justified cases in which international arbitration requires specific rules granting a regulation different to that awarded to domestic arbitration.'[13]

Moreover, art. 1 of the 2003 Arbitration Act – titled 'Scope of Application' – provides in its first paragraph that the Act 'shall apply to any arbitration where the place of arbitration is in Spanish territory, either of domestic or international character, without prejudice to the provisions of treaties to which Spain is a party or to legislation containing specific provisions relating to arbitration.'

The monistic stance employed by the Spanish Arbitration Act of 2003 provides that the regulation is, as a matter of principle, identical regarding domestic and international arbitration; in broader terms, both types of arbitration are governed by the same set of rules. Nevertheless, this general approach, as stated in the Preamble, enjoys a small number of express exceptions regarding specific points of international arbitration. Specifically, the Act contains exceptions for the following issues:

– First, the extraterritorial application of the Act to arbitration proceedings taking place outside Spain (art. 1,2);[14]

– Second, the State's role in international arbitration (art. 2,2);[15]

– Third, the criteria for establishing the domestic or international character of a particular arbitration (art. 3);[16]

– Fourth, the law governing arbitration agreements and arbitrability of a dispute in international arbitration (art. 9.6);[17]

– Fifth, the substantive law applicable to disputes in international arbitration (art. 34,2);[18] and

– Sixth, the legal regime established for the recognition and enforcement in Spain of foreign arbitration awards (art. 46).[19]

---

[13] 'Exposición de Motivos', n. II.

[14] See ESPLUGUES MOTA C. (note 7), at 80 ff.

[15] See MONTERO AROCA J. / ESPLUGUES MOTA C., 'Artículo 2', in: BARONA VILAR S. (Coord.) (note 1), at 99 ff.

[16] See ESPLUGUES MOTA C. (note 10), at 146 ff.

[17] See ESPLUGUES MOTA C., 'Artículo 9', in: BARONA VILAR S. (Coord.) (note 1), at 395 ff.

[18] See ESPLUGUES MOTA C., 'Artículo 34', in: BARONA VILAR S. (Coord.) (note 1), at 1115 ff.

These six provisions are specifically devoted to International Arbitration, and a vast majority are already included in the Model Law on International Commercial Arbitration of 1985. However, article 9.6 contains a specific solution regarding the law applicable to arbitration agreements in International Arbitration that is not included in the Model Law and is inconsistent with its philosophy and solutions. We will next examine article 9.6, considering the solution it contains and its relation with both the UNCITRAL Model Law and the Arbitration Act of 2003 as a whole.

III. The Regulation of Arbitration Agreements in the Arbitration Act of 2003: Some Basic Ideas

Article 9 of the Spanish Arbitration Act is devoted solely to the regulation of arbitration agreements. The Act, consistent with the Model Law of 1985 and many modern national arbitration rules, recognizes the intimate relationship between arbitration and party autonomy as a basic arbitral principle.[20] Accordingly, so far as an arbitration agreement reflects the parties' will to refer their disputes to arbitration, the agreement becomes paramount. It is essential in at least two respects: First, without a valid and enforceable arbitration agreement there is no right to arbitrate, and, second, the arbitration agreement provides the limits and rules that govern the parties and the arbitrator during the arbitration proceedings.[21]

Article 9 includes rules governing arbitration agreements that greatly departs from the regulation contained in article 61 of the former Arbitration Act of 1988: an article that was almost unanimously criticized in Spanish literature.[22]

Article 9 now contains a highly complex solution, based on the distinction between general and international arbitration agreements. Such a – somehow artificial – distinction is absent in the Model Law of 1985 and national and international arbitration rules, and clearly contradicts the monistic approach faithfully upheld by the Spanish Legislature in the Arbitration Act of 2003. Article 9 states:

---

[19] See ESPLUGUES MOTA C., 'Presente y futuro del reconocimiento y ejecución de laudos extranjeros en España', in: AA.VV., *Pacis Artes. Obra homenaje al profesor J.D. González Campos*, Madrid 2005, at 97 ff.

[20] VERDERA SERVER R., 'Artículo 9', in: BARONA VILAR S. (Coord.) (note 1), at 319; BARONA VILAR S., 'Artículo 25', in: BARONA VILAR S. (Coord.) (note 1), at 919.

[21] VERDERA SERVER R. (note 20), at 319 ff.

[22] See ESPLUGUES MOTA C. (note 10), at 146 ff.; ARROYO MONTERO R., 'Artículo 61', in: BERCOVITZ RODRÍGUEZ-CANO R. (Coord.), *Comentarios a la Ley de Arbitraje*, Madrid 1991, at 897 ff. and ESPLUGUES MOTA C., 'Artículo 61', in: MONTERO AROCA J. (Dir.), *Comentario breve a la Ley de Arbitraje*, Madrid 1990, at 316 ff.

> 'Article 9. Form and Content of the Arbitral Agreement.
>
> 1. The arbitration agreement, which may be in the form of a clause in a contract or in the form of a separate agreement, shall express the will of the parties to submit to arbitration all or some disputes which have arisen or which may arise between them in respect of a determined legal relationship, whether contractual or non-contractual.
>
> 2. If the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to these contracts.
>
> 3. The arbitration agreement shall be verifiable in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement. This requirement shall be deemed satisfied when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other type of format.
>
> 4. The arbitration agreement appearing in a document to which the parties have expressly referred in any of the forms specified in the preceding paragraph shall be deemed incorporated into the contract.
>
> 5. There is an arbitration agreement when in an exchange of statements of claim and defence the existence of an arbitration agreement is alleged by one party and not denied by the other.
>
> 6. In respect of international arbitration, the arbitration agreement shall be valid and the dispute shall be capable of arbitration if it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law.'

In paragraphs one through five, article 9 provides some general rules governing the validity of arbitration agreements. This set of rules directly implements article 7 of the UNCITRAL Model Law of 1985, which provides substantive requirements regarding the validity of arbitration agreements in international commercial arbitration:

– Thus, article 9.1 of the Arbitration Act, consistent with article 7.1 of the Model Law of 1985, defines arbitration agreement. An arbitration agreement, which can be separate and distinct from the main contract, must express the will of the parties to submit their disputes – current or future – to arbitration.

– Article 9.3, adhering to the mandate of article 7.2 of the Model Law of 1985, requires an arbitration agreement to be in writing and signed by the parties. This writing requirement covers all means of communication, allowing the agreement to be evidenced by a text.

– Article 9, paragraph 4, recognizes the validity of those arbitration clauses that are not contained in the contract itself but are contained in an earlier document

and incorporated by reference. This possibility is expressly provided for in article 7.2 *in fine* of the Model Law of 1985.

– Article 9.5 of the Spanish Arbitration Act, consistent with article 7.2 of the Model Law, provides for the existence of a valid arbitration agreement 'when in an exchange of statements of claim and defence the existence of an arbitration agreement is alleged by one party and not denied by the other.'

– Finally, article 9.2 is the only one of these initial five paragraphs in article 9 that has no corresponding provision in the Model Law of 1985. This is because article 9.2 reiterates the content of article 5.2 of the old Spanish Arbitration Act of 1988 and satisfies certain legal requirements posed by Spanish consumer law regarding arbitration clauses in consumer transactions.[23]

All of the rules in article 7 of the UNCITRAL Model Law of 1985, and which are almost exactly reproduced in article 9.1, 3, 4, and 5 of the Spanish Arbitration Act, were originally intended to apply to international commercial arbitration. This is despite the fact that they are said to also be susceptible of being applied to domestic arbitration. Close attention should be focused on this fact, as article 9.6 of the Arbitration Act now includes a rule specifically devoted to the regulation of arbitration agreements in International Arbitration.

Article 9.6 of the Arbitration Act not only contradicts the Spanish legislator's intent to rigidly adhere to the solutions and philosophy embodied in the Model Law on International Commercial Arbitration, it also poses some relevant problems regarding the relationship existing between it and the remaining five paragraphs of article 9.

We will next examine article 9.6 of the Arbitration Act of 2003. Thus, after determining its exact scope of application (IV), we will address, in turn, its specific rules (V) and its relationship with the other paragraphs of article 9 (VI). Only after approaching these three questions will it be possible to wholly understand the legal regime governing arbitration agreements established by the Arbitration Act of 2003.

IV. The Scope of Application of Article 9.6 of the Arbitration Law of 2003

A. Introduction

Article 9 of the Arbitration Act creates a solution concerning arbitration agreements that is both structurally complex and hard to understand. Despite the

[23] See BARONA VILAR S., 'Reflexiones en torno a la tutela procesal de los consumidores y usuarios. La política de protección de los mismos en la Unión Europea: Líneas de presente y de futuro', in: BARONA VILAR S. (Coord.), *Tutela de los consumidores y usuarios en la Ley de Enjuiciamiento Civil*, Valencia 2003, at 40 ff.; VERDERA SERVER R. (note 20), at 361 ff.

fact that the Spanish Legislator has repeatedly stated that it used the UNCITRAL Model Law as a guide when drafting the Arbitration Act of 2003, the Act varies from the Model Law on certain specific points: as stated above, the regulation of arbitration agreements is one of these variances.

Leaving aside the Model Law, the very core of arbitration agreement regulation, is an important decision. Nevertheless, the Spanish legislator's approach is very relevant, because instead of providing for a totally new rule, article 9 of the Arbitration Act combines the solutions embodied in article 7 of the Model Law of 1985 – which, it bears noting again, governs only International Commercial Arbitration – with some new rules directed specifically at international arbitration: 'In respect of international arbitration, the arbitration agreement...'. This, obviously, is a fairly complex system.

First, article 9.6's scope of application must be clearly fixed before it can be properly understood. Particularly, it must be determined whether that rule governs all issues arising out of an arbitration agreement in international arbitration or whether, notwithstanding the express reference to 'international arbitration,' there are still some features of the arbitration agreement in international arbitration that are beyond its scope.

At first glance, article 9.6's reference to 'international arbitration' would lead to the understanding that this rule governs all those issues arising out of an arbitration agreement in international arbitration.[24]

But, arbitral practice reveals that arbitration agreements have a complex, and plural nature.[25] And, they contain various distinctive aspects that are independent among these natures and should be considered in an independent manner. As a result, a unitary approach to arbitration agreements would contradict the Arbitration Act itself and the Spanish Civil Code, both of which employ particularized solutions for certain facets of arbitrations agreements. This makes a single rule – like article 9.6 – that governs every aspect of both domestic and international arbitration agreements a hard concept to accept.

Practically, accepting this last approach means that even when parties rely on article 9.6 and choose a law to govern their arbitration agreement, that law will not entirely govern the agreement. There will still be some issues that are deemed independent and, accordingly, subject to their own law.[26] In some cases this law will differ from that one stated in article 9.6.

Three different categories of issues arise from arbitration agreements: (1) a party's capacity to enter into the agreement; (2) the formal validity of the agreement, and (3) the substantive validity of the agreement. While this last issue

---

[24] MANTILLA-SERRANO F., *Ley de Arbitraje. Una perspectiva internacional*, Madrid 2005, at 83-84.

[25] See BLESSING M., 'The Law Applicable to the Arbitration Clause', in: VAN DEN BERG A.J. (ed.), *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention. ICCA Congress Series no. 9 (Paris/1998)*, The Hague / Boston 1999, at 168.

[26] ARTUCH IRIBERRI E., *El convenio arbitral en el arbitraje comercial internacional*, Madrid 1997, at 150 ff. and 177 ff.

is covered by article 9.6, the two former questions are considered independent and therefore subject to specific regulation. Thus, capacity and formal validity remain outside of article 9.6's scope.

B. Issues Not Governed by Article 9.6 of the Spanish Arbitration Act of 2003

1. A Party's Capacity to Enter into an Arbitration Agreement

By its very nature, arbitration has a contractual basis. An arbitration agreement is, thus, an agreement between two or more parties in which they agree to refer their disputes to arbitration – basically ousting the court's jurisdiction. As a result, for an arbitration agreement to be valid the parties entering into it – either natural or juridical persons – must be fully capable.

The Arbitration Act of 2003 is silent as to the law applicable to international arbitration agreements. This silence is interpreted by scholars to mean that the general rule governing capacity in the Spanish International Private Law controls. That means that capacity will be governed by article 9.1 Cc for natural persons and article 9.11 Cc for juridical persons.[27] Hence, this issue is outside the scope of article 9.6 of the Spanish Arbitration Act.

This solution is reinforced by the scarce Spanish case law concerning this question[28] and is consistent with different international treaties and national rules.[29]

2. The Formal Validity of the Arbitration Agreement

Again, formal validity is considered to be an independent feature of arbitration agreements and is subject to its own specific regulation. As a result, formal validity remains outside the scope of application of article 9.6 of the Arbitration Act of 2003.

Almost all national[30] and international[31] arbitration rules presuppose that certain crucial formalities have been met. In any case, an arbitration agreement

---

[27] See CARBALLO PIÑEIRO L., 'Artículo 9.6', in: GUILARTE GUTIÉRREZ V. (Dir.): *Comentarios prácticos a la Ley de Arbitraje*, Valladolid 2004, at 191.

[28] See Auto of the Supreme Court (ATS) of 17-II-1998, in: *EDJ* 1998/40991; of 28-III-2000, in: *RJ* 2000/2964; of 26-II-2002, in: *RCEA* 2004, at 516; of 1-IV-2003, in: *RCEA* 2004, at 213 or of 29-IV-2003, in: *RCEA* 2004, at 217.

[29] See ESPLUGUES MOTA C., *Arbitraje marítimo internacional*, Cizur Menor 2007, at 95 ff.; GAILLARD E. / SAVAGE J., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Deventer 1999, at 244 ff.; RUBINO-SAMMARTANO M., *International Arbitration. Law and Practice*, The Hague 2001, at 197 ff. Nevertheless, this solution is different in Common Law countries where reference is usually made to the proper law of the contract. For instance, note *Irvani v. Irvani* [2000] 1 Lloyd's Rep 412 (CA). See HILL J., *International Commercial Disputes in English Courts*, Oxford / Portland 2005, at 632 ff.

must be in writing and signed by the parties. These conditions are paramount and broadly maintained, despite their current undeniable relaxation due to the technology revolution of the past few decades.[32] These formal requirements serve two purposes: (1) to assess the parties' intent to submit their disputes to arbitration and (2) to ensure the existence of a valid, enforceable arbitration clause to third parties.

The Arbitration Act of 2003 also includes some additional formal requirements. Article 9.3 expressly states that the arbitration agreement 'shall be in writing, in a document signed by the parties.' This provision follows article 7.2 of the UNCITRAL Model Law of 1985, softening the New York Convention of 1958's rigid rule concerning the written condition of the agreement, allowing an agreement to be valid if it is contained 'in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement' or it 'appears and is accessible for its subsequent consultation'[33] in an electronic or optical format.

Article 9.3 directly raises the question of its relationship with article 9.6's rule regarding the law governing international arbitration agreements. The issue is whether the formal validity of an international arbitration agreement is governed by the general rule in article 9.3 or the specific rule in article 9.6 concerning international commercial arbitration agreements.

The trend among Spanish commentators is to consider formal validity as being an independent issue and, therefore, outside of article 9.6's scope. This approach consistent with the position maintained in several national and

---

[30] That is the case, for instance, in Italy (art. 807 CPC); in Belgium (art. 1677 CJB); in The Netherlands (art. 1021 WBR/DCCP); in Germany (P. 1031 ZPO); in the USA (FAA, 9 USC P.3); in Switzerland (art. 178.1 LFDIP); in England (S. 5(1) Arbitration Act 1996); in Perú (art. 13, Ley de Arbitraje de 2008), among others.

[31] See the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 – art. II –, and the UNCITRAL Model Law on International Commercial Arbitration of 1985 – original version, art. 7.

[32] Both at the international – Option II of art. 7 of the amended version of the Model Law on International Commercial Arbitration- and national level – Sweden, Lag (SFS 1999:116) om Skiljeförfarande or Danemark (P. 7, Voldgiftsloven). See ESPLUGUES MOTA C., 'Sobre algunos desarrollos recientes del arbitraje comercial internacional en Europa', in: BARONA VILAR S. (note 2), at 186-187; REDFERN A. / HUNTER M., *Law and Practice of International Commercial Arbitration*, London 2004, at 159; BERGER K.P., 'The Arbitration Agreement under the Swedish 1999 Arbitration Act and the German 1998 Arbitration Act', in: *Arb. Int.* 2001, at 395 ff.

[33] Art. 9.3.I *in fine* and II, respectively, of the Spanish Arbitration Act. An analysis in depth of this provision may be found in VERDERA SERVER R. (note 20), at 354 ff. See also, DIEZ-PICAZO PONCE DE LEON L., 'Artículo 9. Forma y contenido del convenio arbitral', in: GONZALEZ SORIA J. (Coord.), *Comentarios a la nueva Ley de Arbitraje*, Cizur Menor 2004, at 107. Yet, Case Law has upheld a very flexible attitude towards signatures, to the point of considering this requirement not necessary in practice. See Supreme Court Judgment (STS) of 6-II-2003, in: *TOL* 253543 or Judgment of the Audiencia Provincial (S.Aud.Prov.) of Pontevedra of 23-V-2002, in: *EDJ* 2002/53698.

international arbitration rules.[34] And it is upheld by the Arbitration Act itself, which states in article 1.2:

> 'The provisions of paragraphs 3, 4 and 6 of Article 8, of Article 9, except paragraph 2, of Articles 11 and 23 and of Titles VIII and IX of this Act shall apply even when the place of the arbitration is outside Spain...'

Accordingly, article 9.3 is applicable both in and outside of Spain, thus favoring the idea that an arbitration agreement's formal validity is an autonomous issue excluded from the scope of article 9.6.

C. Issues Covered by Article 9.6 of the Arbitration Act

The substantive validity of arbitration agreements covers a very broad set of questions, including: (1) formation of the agreement, (2) validity and vices of consent, (3) extinction of the agreement, (4) subjective arbitrability, (5) interpretation, (6) effects, (7) breach of the agreement and (8) remedies.[35] As a matter of principle, the broad issue of substantive validity would be within the scope of article 9.6. The regulation of those effects arising out of the agreement – which is expressly covered in article 11 of the Arbitration Act – is the only exception to this rule.

Unfortunately, despite this undisputed assessment, some problems will most probably arise regarding the understanding of what 'substantive validity' of the arbitration agreement means. This will directly shape the real scope of article 9.6 and make its application increasingly arduous. For instance, distinguishing between the formal dimension of an arbitration agreement (governed by article 9.3) and its substantive dimension (governed by article 9.6) is not an easy task. Both questions are highly related,[36] and attempting to differentiate between them in practice is rather difficult. As a matter of fact, in some situations an arbitration agreement's formal validity is inseparably linked with its substantive validity,[37] such as when assessing the parties' actual intention to submit their disputes to arbitration. Incorporating provisions from another document by reference in an arbitration agreement is revealing.[38]

---

[34] A good example of this approach is found in article 178.I LDIP of Switzerland.

[35] See ARTUCH IRIBERRI E. (note 26), at 150-151; BERNARDINI P., *L'arbitrato commerciale internazionale*, Milan 2000, at 96 ff; POUDRET J.F. / BESSON S., *Droit comparé de l'arbitrage international*, Brussels / Zurich 2002, at 270; HILL J. (note 29), at 622.

[36] See LEW J.D.M. / MISTELIS L.A. / KRÖL S., *Comparative International Commercial Arbitration*, The Hague 2003, at 130.

[37] LEW J.D.M. / MISTELIS L.A. / KRÖL S. (note 36), at 130.

[38] See ESPLUGUES MOTA C. (note 29), at 179 ff.

V. Solutions Embodied in Article 9.6 of the Arbitration Act of 2003

A. Introduction

A number of ideas emerge when addressing the issue of the law governing the substantial validity of the arbitration agreement in an international arbitration. Two of those ideas are essential: the perception of approaching a somehow highly theoretical question, and the existence of several different approaches to this question.

First, one should recognize at the outset that an analysis of national and international arbitration rules shows that only a few contain specific provisions regarding the law applicable to arbitration agreements. Further, in practice there is a clear trend of parties failing to choose any law to govern the substantial validity of their agreement.[39]

Second, at least three different approaches address the question of the law applicable to arbitration agreements:

The first approach is traditional and relies on conflict of laws rules to determine the law applicable to the substantial validity of an arbitration agreement. These rules contain different connecting factors in every country – *lex causae, locus regit actum*, the law of the seat of arbitration, autonomy of the parties, etc[40] – which allows an arbitration agreement to be ruled by a law other than that governing the main contract.[41] This is the oldest, most common method of determining the law governing the arbitration agreement. The approach is used by a few national arbitration[42] rules and international instruments.[43] National case law also upholds this approach in certain situations.[44]

Nevertheless, in addition to the problems that the choice of law method itself traditionally encompasses, the practical relevance of this approach is negatively affected by other factors. First, as it has already been pointed out, parties have traditionally maintained a passive attitude towards selecting a law to govern their arbitration agreements; in other words, they tend to be silent on this point. Second, there is a certain tendency for some domestic courts to apply the law

[39] See as to this issue LEW J.D.M. / MISTELIS L.A. / KRÖL S. (note 36), at 124 ff.; REDFERN A. / HUNTER M. (note 32), at 148.

[40] See BLESSING M. (note 25), at 168-169.

[41] See POUDRET J.F. / BESSON S. (note 35), at 144 ff; CRAIG W.L. / PARK W.W. / PAULSSON J., *International Chamber of Commerce Arbitration*, New York 2000, at 108.

[42] See art. 48 of the Swedish Lag (SFS 1999:116) om Skiljeförfarande; art. 1047 of the Netherlands WBR/DCCP.

[43] Art. V.1.a) of the New York Convention of 1958; art. 6.2.a) of the Geneva Convention on International Commercial Arbitration of 1961 or art. 36.1.a.i) of the Model Law of 1985.

[44] POUDRET J.F. / BESSON S. (note 35), at 275.

chosen by the parties for the main contract to the arbitration agreement in that contract,[45] a solution positively reproached by certain scholars.[46]

In the last few decades, this traditional conflict of laws method has evolved into an intermediate approach, in which the traditional conflictual structure of the rule is combined with some substantive policies directly favoring the validity of the arbitration agreement. This position has already been upheld by the *Institut de Droit International* in 1989, in its Resolution of Santiago de Compostela on 'Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises.'[47] And, it is now embodied in several national arbitration rules.[48] Article 178.2 of the Swiss LDIP is a good example. That article states:

> 'As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law.'[49]

Although this kind of rule formally maintains the choice of laws rule structure, it does not plainly provide connecting factors for determining the law applicable to the arbitration agreement. Conversely, this type of rule focuses on the validity issue itself, stating that the arbitration agreement will be deemed valid insofar as it fulfills the requirements set out in any of the given laws. As far as article 178.2 of the Swiss LDIP is concerned, these laws are: (1) the law chosen by the parties to govern the substance of the dispute, (2) the law chosen by the parties to rule the main contract, and (3) Swiss law.

Besides the above mentioned techniques, a unique method of assessing an arbitration agreement's validity has been developed by French Courts over the last three decades:[50] the so-called substantive method. Since the 1970's,[51] French Courts

---

[45] See POUDRET J.F. / BESSON S. (note 35), at 274-275.

[46] Concerning this question, see REDFERN A. / HUNTER M. (note 32), at 148 ff.; HILL J. (note 29), at 647; LEW J.D.M. / MISTELIS L.A. / KRÖL S. (note 36), at 120.

[47] Art. 4: 'Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following: the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided in every case by the principle in favorem validitatis.'

[48] This approach is also embodied in art. 458 bis 1.3 of the CPC of Algeria or in art. 43.2 of the Ley de arbitraje, conciliación y mediación of 1995, of Panamá.

[49] See WENGER W., 'Article 178', in: BERTI S.V. (ed.), *International Arbitration in Switzerland*, The Hague 2000, at 339 ff.; ARTUCH IRIBERRI E. (note 26), at 151.

[50] An in-depth analysis of French Case Law may be found in GAILLARD E. / SAVAGE J. (note 29), at 229, mainly notes 118, 138 and 139. See also ARTUCH IRIBERRI E. (note 26), at 159 ff.; CRAIG W.L., PARK W.W., PAULSSON J., *International Chamber of Commerce Arbitration*, New York 2000, pp. 53 ff.

have opted for determining the validity of the arbitration clause by taking into account a set of principles deemed essential in the international context by a given country,[52] leaving aside any reference whatsoever to national laws or conflict of laws rules.

B. Article 9.6 of the Spanish Arbitration Act of 2003

Article 9.6 of the Arbitration Act provides a specific rule on the validity of arbitration agreements in international arbitration. It is an entirely new provision in Spanish Law, both departing from the rigid choice of law solution embodied in article 61 of the 1988 Act and, further, wholly disregarding the Spanish Court's traditional position.

Despite the 1988 Act's inclusion of a choice of law rule concerning the validity and effectiveness of arbitration agreements (article 61), Spanish Courts – consistent with French Courts – have broadly and steadily endorsed a substantive approach for this issue.

The question of substantial validity of an arbitration agreement has been addressed by Spanish Courts primarily while they are addressing the recognition and enforcement of foreign arbitral awards. The statement in article V.1.a) of the1958 New York Convention reading 'law to the which the parties have subjected it (the arbitration agreement) or, failing any indication thereof, under the law where the award was made' has been largely unattended by Spanish Courts. In fact, a survey of Spanish case law shows that reference to the law applicable to arbitration agreements is almost never made in practice.[53]

On the contrary, Spanish Courts have almost unanimously disregarded any reference to choice of law rules or national laws when addressing the existence of a

---

[51] See C.Cass., of 4-VII-1972, *Hecht c. Buisman's* (*J.D.I.*, 1972, p. 843); C.App. París, of 25-I-1972, *Quijano Agüero c/. Marcel Laporte* (*Rev.Arb*., 1973, p. 158); C.Cass., of 20-XII-1993, *Comité populaire de la municipalité de Khoms El Mergeb c./ Dalico* (*Rev.Arb.*, 1994, p. 108 ff.). Previously note C.Cass., of 3-III-1992, *Sonetex c./ Charphil* (*J.D.I.*, 1993, p. 140); C.App. Paris of 21-X-1993, *Isover-Saint Gobain c./ Dow Chemical France* (*Rev.Arb.*, 1984, p. 98); C.App. Paris, of 14-XII-1983, *Epoux Convert c./ Droga* (*Rev.Arb.*, 1984, p. 483); C.App. Toulouse, of 26-X-1982, *Sieur Behar c./ Monoceram* (*J.D.I.*, 1984, p. 603)*;* C.Cass., of 21-V-1997, *Renault c./ V 2000* (*Rev.Arb.*, 1997, p. 537); C.Cass., of 5-I-1999, *Banque Worms c./ Bellot* (*Rev.Arb.*, 2000, p. 85); C.App. París, of 25-XI-1999, *SA Burkinabe des ciments et matériaux c./ Société des ciments d'Abidjan* (*Rev.Arb.*, 2001, p. 165).

[52] C.App. Paris, of 26-III-1991, *Comité populaire de la municipalité de Khoms El Mergeb c./ Dalico Contractors Rev. Arb.*, 1991, p. 456 ff.). See GAILLARD E. & SAVAGE J., (note 29), pp. 230 ff.

[53] ARTUCH IRIBERRI E., 'Nota al ATS de 11 de abril de 2000', in: *RCEA* 2000-2001, at 263. The ATS of 29-IV-2003 (note 28) could be considered the only exception to this rule.

valid arbitration agreement.[54] They have, more often than not, focused on assessing the parties' real desire to refer any current or future dispute to arbitration. The Supreme Court has upheld this approach on many occasions: for instance, in its Decisions –'*Autos*'– of 14-X-2003[55]; 7-X-2003[56]; 14-I-2003[57]; 26-II-2002[58]; 13-XI-2001[59]; 13-III-2001[60]; 20-II-2001[61]; 28-XI-2000[62]; 31-VII-2000[63]; 11-IV-2000[64]; 28-III-2000[65]; 8-II-2000[66]; 18-IV-2000[67]; 24-XI-1998[68]; 29-IX-1998[69]; 14-VII-1998[70]; 7-VII-1998[71]; 26-V-1998[72]; 5-V-1998[73]; 18-II-1998[74]; 17-II-1998[75]; 17-I-1998[76]; 19-XI-1996[77] or 28-X-1994[78].

Spanish case law begins with the presumption that arbitration agreements are valid. This presumption is rebutted only if the challenging party is able to successfully show otherwise.[79] Basically, a valid arbitration agreement is presumed to exist unless the parties' actual intent submit their disputes to arbitration cannot be ascertained from the circumstances. The Supreme Court has clearly stated:

---

[54] See ESPLUGUES MOTA C., 'Zehn Jahre Schiedsgerichtsbarkeitsgesetz in Spanien', in: *ZZPInt* 1999, at 91 ff; ARTUCH IRIBERRI E. (note 53), at 262-263. See also, ESPLUGUES MOTA C., 'Artículo 46', in: BARONA VILAR S. (Coord.) (note 1), at 1576 ff.

[55] JUR 2003/261670.

[56] JUR 2003/261577.

[57] *TOL* 268796.

[58] *RCEA* 2003, at 368.

[59] *RCEA* 2002, at 257.

[60] *TOL* 149505.

[61] *TOL* 149507.

[62] *AEDIPr* 2002, at 322.

[63] *RCEA* 2000-2001, at 278.

[64] *RCEA* 2001, at 257.

[65] *RCEA* 2000-2001, at 253.

[66] *RCEA* 2001, at 249

[67] *RCEA* 2001, at 266.

[68] *RCEA* 1999, at 307 ff.

[69] *RCEA* 1999, at 290.

[70] *RCEA* 1999, at 287.

[71] *RCEA* 1998, at 246.

[72] *RCEA* 1998, at 233.

[73] *RCEA* 1998, at 227.

[74] *RCEA* 1999, at 181.

[75] *RCEA* 1998, at 215.

[76] *RCEA* 1999, at 275.

[77] *RCEA* 1997, at 237.

[78] *La Ley net.*

[79] ARTUCH IRIBERRI E. (note 53), at 262-263.

> '… this Court has focused its efforts towards the search of an effective will of the parties to include in the wording of the contract the already mentioned clause of submission or, in general, to refer the dispute at stake to arbitration, thus taking into account all communications and conducts carried out by the parties during their business relation.' [80]

Furthermore, the Spanish Supreme Court's positive attitude regarding the existence of a valid arbitration agreement is clearly evinced by its acceptance of implied and oral arbitration agreements. In this respect, ATS of 4-III-2003[81] has clearly stated that the lack of a written arbitration agreement may be overcome by analyzing the parties' conduct to determine if an arbitration agreement has been tacitly formed:

> '... there is no reason to disregard the attitude maintained by the opposite part throughout the whole arbitration proceeding. He did appear before the arbitration tribunal, he did not challenge the jurisdiction of the arbitrators and, even more, he did challenge the demand of the claimant, therefore it must be concluded that he knew and accepted the submission of the dispute to arbitration. All these factors lead us to conclude that the company XXX evidences its unequivocal decision to refer all those disputes arising out of their contractual relationship to arbitration... As to the requirement set out in art. IV of the New York Convention concerning the obligation to supply the original arbitration agreement in writing, the «ratio» underlying this rule is to provide the exequatur Court with a clear statement of the existence of a common will of the parties to refer their disputes to arbitration. That is more than a purely formal statement, it may be ascertained through different ways, one of them – without doubts – is through the analysis of the very own conduct of the parties during the arbitration proceeding,...'.[82]

In conclusion, the Spanish Supreme Court has consistently upheld the individual facts-and-circumstances analysis as the method to verify the existence of a valid and effective arbitration agreement in international arbitration. This fact-based approach gives the courts the ability to determine the existence and validity of an agreement by parties to submit their disputes to arbitration; 'it will allow us to assess without a doubt that the desire of the parties was to include in their contract a submission of their disputes to arbitration.' [83]

---

[80] ATS of 29-IV-2003 (note 28), Fdo. de Dº. 4.

[81] JUR 2003/87950. See also AATS of 7-X-2003 (note 56); of 21-III-2000, in: *RJ* 2000/2966 and of 1-XII-1998, in: *RJ* 1998/10541.

[82] Fdo. de Dº. 1.

[83] ATS of 1-IV-2003, in: *JUR* 2003/118425, Fdo. de Dº. 3.

Nevertheless, the Arbitration Act of 2003, notwithstanding this clear – almost unanimous – jurisprudential trend, includes in article 9.6 a choice of law rule specifically devoted to the validity of arbitration agreements in international arbitration. Article 9.6 states:

> 'In respect of international arbitration, the arbitration agreement shall be valid and the dispute shall be capable of arbitration if it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law.'

Article 9.6 outlines a highly flexible approach, both in its underlying rationale and the specific legal solutions it envisages:

First, as far as its rationale is concerned, article 9.6 almost wholly reproduces the wording of article 178.2 of the Swiss LDIP. The endorsement of a choice of law rule that furthers a policy favoring the substantial validity of arbitration agreements is a common feature of these two provisions.[84]

Despite the fact that it is designed as a choice of law rule, article 9.6 of the Arbitration Act – consistent with article 178.2 of the Swiss LDIP – presumes that an arbitration agreement is valid. Thus, article 9.6 emphasizes that an arbitration agreement is valid and effective if it complies with the requirements established in any of three different arbitration rules mentioned in the article.[85]

Second, this positive attitude is also undoubtedly assessed when approaching the specific connecting factors included in article 9.6. Again, the validity of the arbitration agreement is to be verified against one of three possible arbitration rules, which according to the provision itself may be either national or international rules:

– The first of these possible laws is the '*legal rules*' – or '*normas jurídicas*' – chosen by the parties. The Spanish legislator consciously refers to '*legal rules*' – '*normas jurídicas*'– chosen by the parties, as opposed to article 28 of the 1988 Model Law's reference to the '*rules of law*' –'*normas de derecho*' – chosen by the parties. The legislator, therefore, emphasizes that under this expression both national and international rules may be referred to by the parties.[86]

– The second of these possible laws is the '*legal rules*' – reference to '*rules of law*' is again rejected – chosen by the parties to apply to the merits of the dispute.[87]

---

[84] See 'Exposición de Motivos', n. III.

[85] 'Thus, it is enough for the arbitration agreement to be considered as valid by any of the three legal regimes set out in paragraph 6 of article 9…' ('Exposición de Motivos', n. III).

[86] See ESPLUGUES MOTA C.: 'Artículo 34', in BARONA VILAR S. (Coord..) (note 1), at 1128 ff. Nevertheless, it has already been said that in practice there is a clearly noticeable trend for the parties not to determine the law applicable to the arbitration agreement.

[87] According to art. 34.2 of the Arbitration Act.

– The final of these possible laws is Spanish Law: that is to say articles 9.1, 2, 3, 4, and 5 of the Spanish Arbitration Act.

VI. Untying the Gordian Knot: the Relationship Between Article 9.6 and Article 9.1, 3, 4 & 5 of the Spanish Arbitration Act of 2003

The above issues having been discussed, it is now necessary to analyze the relationship between paragraph 6 and paragraphs 1, 3, 4, and 5 of article 9 to fully understand the system embodied in this provision. This will not be an easy task, taking into account the complex structure of article 9 combined with Spanish scholars' silence on this topic.[88]

At first glance, the wording of article 9.6 favors a twofold approach to this question: On the one hand, notwithstanding the general wording of article 9.6, article 9.3 governs the formal validity of arbitration agreements, whereas article 11 governs the effects thereto, both in domestic and international arbitrations. On the other hand, article 9.1, 4, and 5 governs arbitration agreements in only domestic arbitration, while article 9.6 plainly refers to arbitration agreements in international arbitration. This approach poses some relevant questions concerning its own validity. Two of these questions, among others, should be mentioned:

First, this approach makes certain provisions embodied in article 7 of the Model Law on International Commercial Arbitration, a set of rules originally designed to apply only to international arbitration and which have been reproduced in article 9.1, 4, and 5 of the Arbitration Act, applicable to solely domestic arbitration.

Second, article 1.2 of the Arbitration Act stresses that all paragraphs – except paragraph 2 – of article 9 will also apply to arbitrations outside Spain. This reflects the Spanish legislator's intent that those provisions of article 9 are a sort of 'minimum requirement' that must be fulfilled by any arbitration agreement before it will be considered valid and effective in Spain.

The question of whether there is a relationship between the different paragraphs of article 9, thus, remains open. The answer to this question will directly depend on the consideration of two prominent features of the Arbitration Act of 2003: the monistic approach adopted by the Act and the Spanish Legislator's desire to make Spain a suitable place for international arbitration. These two elements afford some relevant clues for the understanding of article 9.6.

The parallelism between articles 178.2 of the Swiss LDIP and 9.6 of the Arbitration Act is an objectively verifiable fact. Both provisions share similar

[88] See MANTILLA-SERRANO F. (note 24), at 83 ff.; GÓMEZ JENÉ M., 'Artículo 9. Forma y contenido del convenio arbitral', in: ARIAS LOZANO D. (Coord.), *Comentarios a la Ley de Arbitraje*, Madrid 2005, at 84 ff.; DIEZ-PICAZO PONCE DE LEON L. (note 33), at 99 ff.

approaches and solutions that provide a very flexible and pro-arbitration answer to the question of the validity of arbitration agreements in international arbitration. Nevertheless, the Swiss LDIP refers solely to international arbitration, whereas the Spanish Arbitration Act provides a joint legal answer for both domestic and international arbitrations. The Spanish Legislator's goal to make Spain a suitable place for international arbitration drives him to include a provision in article 9.6 dedicated exclusively the validity of arbitration agreements in the international arena. The purpose of this provision is to ensure that an arbitration clause in international arbitration will almost always be considered valid in Spain.

Consequently, article 9.1, 3, 4 and 5 of the Arbitration Act will deal with the arbitration agreement in domestic arbitration. The point is – as previously stated – that those provisions of article 9 are tightly based on article 7 of the UNCITRAL Arbitration Model Law of 1985, which was designed to be applied primarily to international arbitration. The Spanish Legislator was perfectly aware of this fact when drafting the Act, but he was also very concerned with providing a flexible legal regime that encourages international arbitration in Spain. Therefore, the Legislator decided to depart from the structure and solutions of the Model Law – which was the legislators 'main inspiring criteria'[89] – as to this issue.

Does this mean that article 9.1, 3, 4, and 5 of the Arbitration Act will apply to only domestic arbitration? Not exactly. It does, however, mean that these provisions will apply to mainly domestic arbitrations, but they will also apply to international arbitration when the validity of the arbitration agreement must be verified according to Spanish Law. Does this also mean that article 9.1, 3, 4, and 5 fails to set out a 'minimum standard' rule regarding the validity of an arbitration agreement? Not necessarily. This nature is fully recognized when referring to domestic arbitrations and also when attesting the validity of the arbitration agreement according to Spanish Law.

VII. Conclusion

Article 9.6 perfectly suits the clear policy favoring arbitration – mainly, international arbitration – that underlies the Arbitration Act of 2003. Nevertheless, the extremely broad and highly inaccurate wording of this provision –'In respect of international arbitration...' – and the absence of a straightforward relationship with the rest of article 9's paragraphs creates a structurally complex and hard to understand provision. This fact is relevant because it may eventually frustrate those objectives on which the provision is grounded.

[89] 'Exposición de Motivos', n. I.

ACCIDENTAL DISCRIMINATION IN THE CONFLICT OF LAWS: APPLYING, CONSIDERING, AND ADJUSTING RULES FROM DIFFERENT JURISDICTIONS

Gerhard DANNEMANN*

I. Introduction

The present article invites a new understanding of the conflict of laws.[1] It argues that three different methods are available for determining the rules which influence the outcome of an international case. These three methods are (1) the application of

* Professor, Humboldt-Universität, Berlin; formerly Reader in Comparative Law at the University of Oxford and Fellow of Worcester College, Oxford.

[1] This article summarises some of the ideas discussed more fully in my monograph on *Die ungewollte Diskriminierung in der internationalen Rechtsanwendung: Zur Anwendung, Berücksichtigung und Anpassung von Normen aus unterschiedlichen Rechtsordnungen*, Tübingen 2004, 528 + xxii pp.

Yearbook of Private International Law, Volume 10 (2008), pp. 113-134

substantive rules selected by conflict rules, (2) the consideration of non-applicable rules, and (3) adjustment of the applicable rules.

(1) The applicable substantive rules are selected through conflict of law rules. Such conflict rules are not limited to only private law. Every area of law has its own rules for selecting applicable norms in international cases, including public and criminal law. A full set of conflict rules is also required for procedural laws, covering issues which extend well beyond jurisdiction. Such a full set of conflict rules is necessary in particular for dealing with incidental questions relating to these areas of law.

(2) The consideration of non-applicable rules may be necessary in an international context when such rules have a bearing on a case, even when they are not being applied by the particular forum. This is particularly the case if two fora apply law to the same case, or if the parties have mistakenly assumed that the case is governed by a law which is in fact inapplicable. Non-applicable rules must also be considered in order to identify cases of accidental discrimination.

(3) Adjustment occurs when courts modify or ignore applicable rules in order to avoid accidental discrimination. Accidental discrimination would otherwise occur in a given case if two or more legal systems, whose rules are not dovetailed to each other, combine to produce results that are unintended by any legal system involved – Insufficient maintenance or benefits, heirs receiving more or less than they should, criminals punished too harshly or too leniently, marriages which cannot be terminated, or cases which no court wants to hear.

As a backdrop to these issues, the present article also deals with Public International Law influences on conflict of laws and the international spheres of application for domestic, European, and international human rights provisions.[2]

II. Extension of Conflict Rules

Conflict of laws is often understood to be limited to private international law. It is well established in most Continental legal systems that courts must apply foreign obligations law (contract, tort, and unjust enrichment), property law, family law and inheritance law. Common law countries have been more hesitant to apply foreign family and inheritance laws. They have instead relied on combining jurisdiction with the applicable substantive law rules to ensure, to the degree possible, that English law will always apply whenever English courts assume jurisdiction for family or inheritance cases.[3]

[2] See below, VI., and otherwise DANNEMANN G. (note 1), pp. 347-369.

[3] See e.g. CHESHIRE G.C., NORTH P. and FAWCETT J., *Private International Law*, 14th ed., by FAWCETT J. and CARRUTHERS J.M., Oxford 2008, Ch. 9, 21-25 and 32.

A. Conflict Rules in Public, Criminal, and Procedural Law

The traditional Continental view is that courts will not, or at the very least are reluctant, to apply any foreign public, criminal or procedural law.[4] The main argument is that the application of foreign rules outside of the private law would infringe upon the sovereignty of the foreign country concerned, and perhaps also that of the forum.

The common law's opposition against applying foreign public, criminal, and procedural law has been less absolute. The general rule is not that such a law cannot be applied at all. It is rather that a foreign criminal[5] or tax law[6] cannot be enforced and that other areas of public law – relating notably to foreign trade[7] or involving human rights questions[8] – are subject to particular scrutiny.

The present author sides with the common law view.[9] Closer inspection reveals that foreign public, criminal, and procedural law is applied in all legal systems as a matter of daily routine.[10] For example, the German statutory provision which requires all foreigners to possess a valid passport while in Germany[11] invokes the law of the foreigner's nationality to make two determinations: (1) whether the foreigner's passport is valid for Germany and (2) whether the same passport is also valid for any children of the holder which might be listed in this document. Likewise, it is the law of the country which issued a driver's license which determines whether the license covers, for example, three wheel motorbikes or whether the license has been revoked or automatically expires on a certain date.[12] Furthermore, it does not matter whether this question of the licences validity arises in administrative law (such as an application to convert a foreign driving

---

[4] For German law, see e.g. SCHACK H., *Internationales Zivilverfahrensrecht*, 4th ed., München 2006, § 2 III (civil procedure); JESCHECK H.-H. and WEIGEND T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin 1996, § 18 I C (criminal law); BGH 17.12.1959, BGHZ 31, 367, 371 (public law).

[5] *Huntington v Attrill* [1893] AC 150, 156 (PC).

[6] *Government of India v Taylor* [1955] AC 491, 514f (HL); see also *In re State of Norway's Application (Nos. 1 and 2)* [1990] 1 AC 723 (HL); CHESHIRE G.C., NORTH P. and FAWCETT J. (note 3), pp. 123-6.

[7] CHESHIRE G.C., NORTH P. and FAWCETT J. (note 3), pp. 130-2.

[8] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30 (Hgh Ct Australia).

[9] For foreign public law, see generally BAADE H., 'Operation of Foreign Public Law' (1991), in: *International Encyclopaedia of Comparative Law*, Vol. III, *Private International Law* (ed. by LIPSTEIN K.), Tübingen [etc.], 1972 *et seq.*, ch. 12.

[10] See DANNEMANN G. (note 1), pp. 26-40.

[11] § 3 Aufenthaltsgesetz.

[12] Every state remains free to accept or reject foreign driver's licenses, to impose limits on it use, or to revoke (perhaps as consequence of a criminal offence) the right to use it in the territory of that state, all subject to international treaties.

license), in a criminal law suit (for driving without valid license), or in a civil law suit (relating e.g. to an automobile accident and the insurer's against the driver).

This example also demonstrates that there are not three separate sets of conflict rules relating to driving licenses in public, criminal, and civil law. Regardless of whether the validity of a driver's license is an incidental question (as e.g. in the civil or criminal law suit) or the main issue (as in the example of conversion of a foreign driver's license), it is the same conflict rule which invokes the law of the country which issued the driver's license. Moreover, there should be no doubt that this uniform conflict rule belongs to public, rather than private or criminal law. The fact that three grand academic designs for a truly international administrative law[13] have failed to gain any lasting support may have obscured this simple daily routine of application of foreign public law in the above-mentioned, and many other, areas.

Likewise, foreign criminal law is also frequently applied. For example, requests for extradition are commonly granted only if there is a reasonable prospect of the extradited person being found guilty under the law of the requesting state – a fact which is verified by the state from which the extradition is requested. Similarly, extraterritorial jurisdiction may depend on whether the act in question is considered a criminal offence in the place where it was committed.[14] Those authors who believe that foreign criminal law can never be applied may unconsciously have based their views on the mistaken assumption that the application of criminal law is limited to the determination of guilt or innocence.

It is suggested that the real issue is one of jurisdiction rather than of applicable law. If we look at two fictional countries, Ruritania and Arcadia, it is clear that no criminal law court in Arcadia will convict a defendant for a criminal offence under Ruritanian law. However, neither will any civil law court of Ruritania convict a defendant for a criminal offence under Ruritanian law. Nevertheless, civil law courts in Ruritania will apply Ruritanian criminal law – such as in a civil law suit for breach of statute – if that statute forms part of criminal law. Likewise, a criminal law court in Arcadia will apply Ruritanian criminal law when deciding whether a person should be extradited to Ruritania. Similarly, while motor traffic authorities have no jurisdiction to give a person a foreign driver's license, they nevertheless apply foreign law to the question whether a foreign driver's license is valid for a particular person and vehicle.

B. Public International Law Sources of Conflicts Rules

It is furthermore suggested that public international law not only tolerates the application of foreign public and criminal law but in some situations even dictates

[13] NEUMEYER K., *Internationales Verwaltungsrecht, Vol. IV, Allgemeiner Teil*, Zürich and Leipzig 1936; NIBOYET J.-P., *Traité de droit international privé français, Vol. VI*, Paris 1949; BISCOTTINI G., *Diritto amministrativo internazionale, Vol. I*, Padova 1964; *Vol. II*, Padova 1966. See DANNEMANN G. (note 1), p. 50.

[14] As e.g. in § 7 Strafgesetzbuch (German Criminal Code).

that foreign law must be applied.[15] Some basic conflict rules arise from the power of a state over its territory and its citizens.

An obvious example is nationality. Every state has the right under public international law to regulate is own nationality.[16] The necessary consequence is a conflicts rule according to which the question of whether a natural person has the nationality of a particular state is governed by the law of that state. A similar conflicts rule follows for passports and other identification documents and further from the fact that the state of permanent residence has certain responsibilities for stateless persons. This conflicts rule could be formulated as follows:

(1) Every state issues passports to its own citizens.

(2) Every state also issues passports to stateless persons with permanent residence in their territory.

(3) The state where a person has permanent residence may also issue a passport to a person if this person is unable or cannot reasonably be expected to procure a passport from the state which is competent under paragraph (1).

Public International Law also requires the application of foreign law to money claims in a foreign currency when the currency has been converted into a new currency (e.g. with the introduction of the Euro).[17] Foreign law must also be applied to traffic law violations on foreign territory,[18] to the question whether an applicable foreign law may be reviewed against the constitution of that country,[19]

---

[15] German legal writing is generally critical of any public international law influences on conflict of laws; see e.g. KEGEL G. and SCHURIG K., *Internationales Privatrecht*, 9th ed., München 2006, § 1 IV 1 c; SONNENBERGER, H.-J. (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 10, Internationales Privatrecht*, 4th ed., München, Einl IPR, nos. 123 *et seq.*; VON BAR C. and MANKOWSKI P., *Internationales Privatrecht, Vol. I*, 2nd ed., München 2003, § 3 I 1 b. Different reasons why and how public international law influences conflict of laws are given by BLECKMANN A., *Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts* (with contributions from SCHMEINCK S. and SCHOLLMEIER A.), Köln [etc.] 1992; see DANNEMANN G. (note 1), pp. 51-73.

[16] A possible exception concerns the refusal of English courts to recognise the effect of § 2, 11, *Verordnung zum Reichsbürgergesetz* of 25 November 1941 which stripped all Germans of Jewish origin who were living abroad of their German citizenship, see *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 265.

[17] PCIJ 12.7.1929, *Case of Serbian Loans*, Pub. PCIJ A No. 20, p. 44: 'It is indeed a generally accepted principle that a state is entitled to regulate its own currency.'; MANN F.A., *The Legal Aspect of Money*, 3rd ed., Oxford 1992, p. 461.

[18] BGH 23.11.1971, BGHZ 57, 265, 268.

[19] See e.g. KROPHOLLER J., *Internationales Privatrecht*, 6th ed., Tübingen 2006, § 31 II; SONNENBERGER H.-J. (note 15), Einl IPR Rn 350-1; BLECKMANN A. (note 15), p. 51; BayObLG 21.2.1969, in: *NJW* 1969, 988 = *IPRspr.* 1968-69 No. 106, p. 237 *et seq.*; see also *Settebello Ltd v Banco Totta and Acores*, [1985] 1 WLR 1050, 1057G (CA, Sir John Donaldson MR, *obiter dictum*). From a comparative viewpoint, see MARTIN M., 'Constitutional review of foreign law in English and German courts: a comparative study', in: *Oxford U. Comparative L. Forum* 2002, at <ouclf.iuscomp.org>; KAHN-FREUND, SIR O, 'Constitutional Review of Foreign Law?', in: *Internationales Recht und*

and to decide whether a foreign judgment or decision is final.[20] This list of conflict rules which stem from public international law is modest in scope[21] and essentially consists of rules which are self-evident. That should, however, not detract from the fact that these are nevertheless conflict rules which require the mandatory application of foreign law, predominantly in the area of public law; many of these laws are in fact applied as a matter of daily routine.

III. Consideration of Non-Applicable Law

In the classical view, the work of a conflicts lawyer is done once the forum's choice of law rules have served up to three functions (1) selected the applicable substantive law, (2) determined the scope of this reference by way of qualification, and (3) perhaps narrowed this scope by invoking the forum's *ordre public*. Those rules govern the case, and all rules which have not been selected are irrelevant. The present author argues that this is not true. Rather frequently, rules which are definitely not applicable to a case will nevertheless have a bearing on the legal outcome.[22]

A similar observation can be made for foreign judgments or other decisions. The classical view is again that the work of a conflicts lawyer is done once the law of the forum has determined whether the foreign decision will be recognised; if not, that foreign decision will have no bearing on the case. It is argued that this is likewise untrue.

Three examples should illustrate why non-applicable norms and unrecognised decisions must be considered in some situations.

(1) In 1918, the *Reichsgericht* (German Imperial Court) had to determine the fate of a contract governed by German law.[23] The defendant argued that performance was rendered impossible by the British rules on 'trading with the enemy,' as performance was to be made in Britain, who was at war with Germany.

Wirtschaftsordnung. Festschrift für F. A. Mann zum 70. Geburtstag am 11. August 1977, ed. by FLUME W., München 1977, pp. 207-225.

[20] BGH 29.4.1999, in: *BGHZ* 141, 286, 294.

[21] See DANNEMANN G. (note 1), pp. 55-73.

[22] Some support for this view can be found in the datum theory developed by Ehrenzweig and the German scholarly doctrines of *Tatbestandswirkung ausländischen Rechts* and *Zweistufenlehre*. See EHRENZWEIG A., *Private International Law*, Dobbs Ferry, NY 1967, sec. 34; STOLL H., 'Deliktstatut und Tatbestandswirkung ausländischen Rechts', in: *Multum non multa. Festschrift für Kurt Lipstein aus Anlaß seines 70. Geburtstages*, ed. by FEUERSTEIN P. and PARRY C., Heidelberg and Karlsruhe 1980, pp. 259-277; HEßLER, H.-J., *Sachrechtliche Generalklausel und internationales Familienrecht. Zu einer zweistufigen Theorie des internationalen Privatrechts*, München 1985. For a full and critical appraisal see DANNEMANN G. (note 1), pp. 79-121.

[23] RG 28.6.1918, in: *RGZ* 93, 182, 184.

The British 'trading with the enemy' rules were obviously inapplicable before a German court. And even if they should have applied in principle, they would have been rejected as being against the German *ordre public*. Germany's highest court nevertheless recognised that performance of the contract had been made impossible by the imposition and enforcement of those rules in Britain. The non-applicable British rules had the effect of discharging the defendant from its obligation to perform under the contract.[24]

(2) A case decided in 1987 concerned a German man who, in 1976, had married in front of a German registrar an Israeli woman who subsequently became stateless.[25] An Islamic wedding ceremony celebrated shortly afterwards resulted in a document signed by both parties, two witnesses, and a religious official. This document stated that the dowry had been fixed at DM 100,000 and contained no choice of law clause. The spouses, who were divorced in 1980, remained domiciled in Germany at all relevant times. As to the dowry agreement, no German conflict rule, regardless of whether it related to family or contract law, could have applied any law other than German. The validity of this agreement nevertheless depended on its proper classification. Both matrimonial property agreements and promises of a gift (§ 518 BGB) require notarial certification under German law (§ 1410 BGB). However, in 1987 there was no similar requirement for agreements on post-divorce maintenance.[26] The Federal Court of Justice held that, in order to establish what the parties had in mind when entering into this agreement, recourse would have to be made to the Islamic law which had shaped the parties' expectations. The Court referred the case back to the lower court, which was to inquire whether under this Islamic law such a stipulated dowry was to be paid in lieu of or in addition to any maintenance or matrimonial property rights on divorce. The validity of the agreement thus depended on a law which was clearly inapplicable.

(3) A case decided in 1930 by the French *Cour de Cassation* concerned jurisdiction for a divorce between two British nationals domiciled in Paris.[27] At the time, French courts only had jurisdiction when at least one of the spouses was French. English courts, on the other hand, had jurisdiction only when at least one of the spouses was domiciled in England. The *Cour de Cassation* resorted to emergency jurisdiction to avoid the situation of a case which no court wants to hear. This emergency – an instance of an accidental discrimination – could only be spotted by the *Cour de Cassation*, because it considered a law which was inapplicable: English jurisdiction rules are not applied by French courts, and the doctrine of *renvoi* does not extend to jurisdiction issues.

---

[24] See also *Ralli Bros v Compania Naviera Sota Y Aznar* [1920] 2 KB 287, Lord Sterndale MR referring to Dicey on the Conflict of Laws: 'A contract ... is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed'.

[25] BGH 28.1.1987, in: *IPRax* 1988, 109, with a case note by HEßLER H.-J., *ibidem*, pp. 95 *et seq.*

[26] Such a requirement has since been introduced by § 1585c BGB.

[27] Cass. req. 30.12.1930, in: *Rev. dr. int. pr.* 1933, p. 111.

These cases represent the three main situations where norms which are clearly inapplicable must nevertheless be considered. The reason in case one is that a foreign law, which is not applied by the forum, nevertheless effectively controls an aspect of the case, and this control is decisive for a requirement established by an applicable norm (impossibility of performance in our example). In case two, regard must be given to a non-applicable law because of a rule requiring a party's intent to be ascertained, and because the intention of that party is guided by an inapplicable law. Case three, an example of accidental discrimination, also involves a foreign law which controls an aspect of this case. In our example, French jurisdiction rules would refer the case to England, but are powerless to do so.

The following sections will elaborate on accidental discriminations, their causes, their constitutional significance, and their solution.

IV. Accidental Discriminations and How They Are Caused

An accidental discrimination occurs when the outcome of a case is different merely because it is connected to more than one legal system and the different treatment is not intended by any applicable rule.[28]

This difference is measured by comparing the outcome of the international case (e.g.: no jurisdiction anywhere) with the outcome of otherwise identical cases which are connected to only one of the systems involved (an English couple seeking divorce in England, a French couple seeking divorce in France). If the two legal systems agree on the treatment of national cases (there is jurisdiction) and the treatment deviates from the result which both legal systems produce when taken together (no jurisdiction), then the international case is treated differently just because it is international.

Accidental discriminations are caused by the fragmentation of applicable rules, including the fragmentation of the process of applying law.[29] This fragmentation creates a combination of rules from different legal systems which are not dovetailed to each other, leading to accidental discriminations. Many examples for such accidental discriminations can be found.

[28] For a more detailed analysis, see DANNEMANN G. (note 1), pp. 153-217. Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 601.

[29] See DANNEMANN G. (note 1), pp. 265-339.

A. Fragmentation through Application in One Forum

Some accidental discriminations result from *diverging classifications* of issues, both within substantive law and between substantive and procedural law.

Much ink has been spilled over the so-called widow's case. This is a textbook case of a husband who dies intestate, leaving his widow without a penny because the applicable matrimonial property law belongs to one legal system and the applicable inheritance law to another.[30] The legal system whose rules apply to the matrimonial property leaves the issue of the widow's share to inheritance law. However, the legal system whose rules govern inheritance law, would instead give the widow a share of her deceased husband's assets under matrimonial property law. This is an accidental discrimination: both legal systems want the widow to receive a share of the husband's assets, but when they are applied in tandem the widow is left with nothing. *Beaudoin v Trudel* is an example of the reverse situation; a widower received more than he was entitled to under either the law of Quebec (which governed matrimonial property) or the law of Ontario (which governed inheritance).[31] This is also an accidental discrimination, which will adversely affect the children of the deceased rather than the widower.

An example of an accidental discrimination which is based on different classifications between substantive and procedural law relates to maintenance payments, where the assets and the income of the debtor must be established in order to determine the amount of maintenance due.[32] Some legal systems (e.g., Austrian law) provide a procedural solution. They give judges the power to investigate the financial situation of the defendant. Other legal systems (e.g., German law) give the person who is entitled to maintenance a substantive right of information against the debtor. If a child living in Austria sues a parent before a German court, it appears that there is no way to force the parent to disclose any personal financial information.[33] German courts have no such investigative powers, and the applicable Austrian law gives the claimant no right to such information. The result would be that the maintenance claim would fail.

---

[30] This textbook case was probably invented by HECK P., Review of C.L. von Bar, Theorie und Praxis des internationalen Privatrechts, in: *Zeitschrift für das gesamte Handelsrecht* 1891, pp. 305-319, at 311. The first attempt to solve this case was probably made by BARTIN E., 'De l'impossibilité d'arriver à la suppression définitive des conflits de lois', in: *Clunet* 1897, pp. 225-255, at 226-7. For further references and a full discussion, see DANNEMANN G. (note 1), pp. 9-11, 221, 226, 432-3, 458-9, 466.

[31] *Beaudoin v Trudel* [1937] 1 DLR 216, 217f, 220, 221ff (CA Ontario); see DANNEMANN G. (note 1), pp. 10, 226.

[32] Cases include OLG Stuttgart, 4.10.1988, in: *IPRspr.* 1988 No. 89, p 174 = *IPRax* 1990, 113; OLG Hamm 3.7.1992, in: *NJW-RR* 1993, 1155 = *IPRspr.* 1992 No. 119, p. 272; OLG Frankfurt 2.10.1990, in: *IPRspr.* 1990 No. 77, p. 152; AG Böblingen 16.1.1992, in: *IPRspr.* 1992 No. 85, p. 195; OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739 = *IPRspr.* 1994 No. 94, p. 193, 195.

[33] As in OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739, which, however, concerned maintenance between former spouses.

Accidental discrimination can also occur through what the present author would call a '*reference into the void*,' the conflicts equivalent to a '404 link' on the internet. This occurs when one legal system presupposes the existence of a particular institution which does not exist in a different legal system which, according to the conflicts rules of the forum, governs that (non-existing) institution. There are, for example, many occasions where English academics must wear a gown – during examinations; when Chancellor, Vice-Chancellor or Pro-Vice-Chancellor are present; and in Oxford and Cambridge, even during dinner in hall at their College. The gown they must wear is the one to which they are entitled by virtue of their university degree. This is a 'reference into the void' for those whose home universities have no gowns, as is the case for most German universities. The resulting accidental discrimination is that many Germans teaching at English universities are forced to break rules, either by not wearing a gown or by wearing a gown to which they are not entitled.

B. Fragmentation through Application in Several Fora

Accidental discrimination can also be caused through a sequence of decisions or other applications of law in different jurisdictions. In one such case, a German woman married a British soldier in Germany in front of a marriage officer of the British Rhine Army.[34] The marriage was valid under English law but void under German, which restricts the right to officiate marriages on German soil to specifically authorised German civil servants.[35] When the couple, still living in Germany, wanted to divorce, this turned out to be impossible. The English courts had no jurisdiction (because the spouses were domiciled in Germany), whereas the German court refused to dissolve a marriage which did not exist under German law. The resulting accidental discrimination creates a limping marriage which cannot be dissolved, with the effect that neither spouse can remarry without risking a conviction for bigamy – a result intended by neither English nor German law.

There are three different ways in which this lack of coordination between the legal systems can result in accidental discrimination; (1) loss of jurisdiction, (2) loss in transfer, and (3) loss of context.

The last case is an example of a *loss of jurisdiction*, as there was no court which could dissolve what, in many countries, would be considered a valid marriage.

If there is no loss of jurisdiction, there may nevertheless be a *loss in transfer*, when a case is handed from one legal system to another. One example concerns a person who had been convicted by a German court to one year imprisonment under § 189 of the German Criminal Code for Disparaging the Memory of a Deceased Person, and who had managed to escape to Italy.[36] He was

[34] OLG Düsseldorf 19.12.1956, in: *IPRspr.* 1956-57 Nr. 110.

[35] Art. 13 para. (3) Einführungsgesetz zum BGB.

[36] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

subsequently arrested in Italy and held on remand for eight months under a German extradition request, which was eventually rejected because the Italian court considered the offence to be of a political nature. The offender was later arrested in Germany. The Appellate Court decided that the man should serve the full sentence without any credit for the eight months he had spent in an Italian prison. There was no statutory provision which expressly ordered that the offender's Italian imprisonment must be counted towards the German sentence, as the legislator had failed to envision that a German conviction may precede the time when person is be held on remand under a German extradition request. The loss in transfer occurred when German law assumed jurisdiction without taking into consideration the legal developments which had occurred in Italy because of the German extradition request. The Federal Constitutional Court decided that the principle of proportionality required the Italian time to be counted towards the sentence and thus prevented the accidental discrimination which the Appellate Court had sanctioned.

Loss of context is the most subtle form of loss which occurs when different laws are applied to the same case in different jurisdictions. This situation is best illustrated by another example from academia. Very few students fail law exams at English universities, but those who do have little if any opportunity for a re-sit. For examinations at German law faculties, on the other hand, failure rates of 30% or higher are very common. However, these high failure rates are compensated by extended opportunities for a re-sit, which can be taken in a subsequent term. English exchange students who spend a semester or two in Germany can easily be caught between those two systems. If they narrowly fail one examination in Germany and then return to England, they are frequently unable to retake an examination for logistical or even legal reasons (they are no longer registered with the German university). In England, the German examination will count as a final failure and have the same consequence as a failed English examination. This can imply that students will receive no credit for their entire year abroad. There is no loss of jurisdiction in this case (the English university remains in charge), nor any loss in transfer (all examination results are recognised). This is a loss of context – namely the context between high failure rates and extended opportunities for a re-sit. And this is also an accidental discrimination. In a purely English case, the narrowly failed examination in Germany would have been marked as a 'pass' or better. In a purely German case, students who narrowly fail on the first attempt will most frequently pass on their second or third attempt.

V. Adjustment and Accidental Discrimination

Adjustment (*Anpassung* or *Angleichung* in German,[37] *adaptation* in French,[38] *adaptación* in Spanish,[39] *aanpassing* in Dutch[40]) is recognised as an instrument of conflict law in most continental legal systems. It is, however, hardly known or recognized in this generality in the common-law world.[41]

The present author makes four propositions relating to adjustment:

(1) Adjustment should be understood narrowly, as an act by which courts or other authorities intentionally ignore or modify applicable legal norms. Adjustment must be clearly distinguished from regular legal application and interpretation. Setting aside the applicable law is an act by which courts correct the legislator. Exceptional reasons must be found in order to justify such an act. Extending the use of the term 'adjustment' into regular interpretation obscures the border line which courts cross when they set aside applicable rules. Such an obscurity facilitates a wide understanding of situations which allow for adjustment, leaving courts as *de facto* legislators for all conflict situations perceived as being somehow difficult or problematic.[42]

(2) Adjustment should be permitted and is normally necessary as *ultima ratio* in order to prevent accidental discrimination. Accidental discrimination will normally amount to an infringement of human rights or of the rule of law, most commonly as an infringement of the principle of equal treatment. The rights to liberty and property will also frequently appear on the casualty list. It is argued that the power and duty of courts to prevent accidental discrimination through adjustment is linked to and limited by the degree to which the legislator is bound by human rights provisions and the rule of law. Whenever the legislator would be prevented from deliberately treating cases differently on the ground that they are linked to more than one legal system, courts may and must intervene if the same unequal treatment occurs accidentally (below, VI).

(3) Adjustment should not be used to overcome other obstacles involving conflict of laws. German courts in particular have become accustomed to resorting to adjustment whenever they perceive a 'gap' in the applicable norms. Scholarly writing supports the notion that adjustment is permitted whenever rules from

---

[37] SCHRÖDER J., *Die Anpassung von Kollisions- und Sachnormen*, Berlin 1961; LOOSCHELDERS D., *Die Anpassung im internationalen Privatrecht*, Heidelberg 1995.

[38] LEWALD H., 'Règles générales des conflits de lois. Contribution à la technique du droit international privé', in: *Recueil des Cours* 1939-III, pp. 1-147; CANSACCHI G., 'Le choix et l'adaptation de la règle étrangère dans le conflit des lois', in: *Recueil des Cours* 1953-II, pp. 81-162.

[39] BOUZA VIDAL N., *Problemas de adaptación en derecho internacional privado e interregional*, Madrid 1977.

[40] OFFERHAUS J., *Aanpassing in het internationaal Privaatrecht*, Amsterdam 1963.

[41] JOFF G. J., 'Adjustment of Conflicting Rights. A Suggested Substitute for the Method of Choice-of-Laws', in: *Virg. L.R.* 1952, pp. 745-768.

[42] See below VII.A.

different legal systems are 'contradicting.' Outside accidental discrimination, such problems can generally be solved through proper construction and interpretation of rules, without having to resort to overriding applicable norms (below, VII).

VI. Adjustment, Human Rights, and the Rule of Law

It has been argued above that accidental discrimination normally amounts to an infringement of human rights or of the rule of law.[43] This will naturally depend on the way and extent to which the forum protects human rights and the rule of law through its constitution, international obligations, and other laws. The German constitutional arrangements can serve as an example for the following observations.

It is submitted that German courts and other authorities are required to prevent accidental discrimination for reasons relating to human rights and the rule of law if the following requirements are met:

(1) The case to be decided falls within the international scope of German human rights provisions or the German rule of law;

(2) The accidental discrimination falls within the substantive scope of German human rights provisions or the German rule of law; and

(3) Constitutional law would have prevented the German legislator from deliberately treating this and similar cases differently on the ground that they are linked to more than one legal system.

A. International Scope of Human Rights Provisions and the Rule of Law

The accidental discrimination examples given above show that some cases have strong links to two legal systems, as for example in the case of the person held on remand in Italy for extradition to Germany.[44] However, other cases are predominantly connected with one legal system, as for example the case of 'gownless' fellows in English academia.[45] It appears evident that the first case falls within the international scope of German human rights provision, but this is far less obvious for the second case.

It is argued that the international scope of such provisions is related to the responsibility which the forum's legal system has assumed in a given case.

(1) If Germany assumes full and exclusive jurisdiction over a case, any accidental discrimination which occurs in Germany is within the international scope of protection of German constitutional law.

---

[43] Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 341.

[44] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

[45] Above, IV.

(2) If Germany assumes only partial or non-exclusive jurisdiction, an accidental discrimination will generally be within the international scope of German constitutional law, if the German legal system has contributed to the fragmentation which caused the accidental discrimination by making or accepting partial or complete references to or from other legal systems.

(a) This is the case particularly if the German legal system employs another legal system for administering justice in Germany. In the above-mentioned extradition request case, this request amounted to a partial reference to Italian law and at the same time expressed the willingness of the German legal system to accept a reference back from Italian law as soon as the person was extradited.[46] It is this reference to Italian law which brought the entire process – including the eight months spent on remand in Italy – within the protective sphere of the right of liberty enshrined in Article 2 paragraph (2) of the German Basic Law (Grundgesetz, GG). The Federal Constitutional Court emphasized that it was the German authorities who had asked the Italian authorities to arrest the applicant and to keep him on remand until extradition.

(b) If the forum refers only part of a case to another legal system without expecting to have it referred back later, that forum remains responsible for any accidental discrimination which results from a loss of jurisdiction, loss in transfer, or loss of context.[47] In a case decided by the ECJ, a French law replaced unemployment benefits for older employees with an early retirement pension.[48] The claimant, who had divided his working life between the UK and France, was not entitled to early retirement in the UK and for four years had to live on a pension which was lower than the pension of fellow workers who had spent their entire working life in France. The French legal system, which partially referred the claimant to a (non-existing) early retirement pension in the UK, was responsible for this accidental discrimination. Had German law applied instead of French law, this loss of entitlements would have been within the international scope of protection of Article 14 GG on property rights.[49] The UK, on the other hand, was not responsible. It had neither made nor accepted any reference to or from French law.

(c) A more difficult situation is the complete and final reference a forum uses to deny any jurisdiction, as in the case of the British couple who were domiciled in France and where neither English nor French courts appeared to have jurisdiction over their divorce.[50] While no legal system should be expected to open

[46] BVerfG 27.10.1970, in: *BVerfGE* 29, 312; above, IV.

[47] See above, IV.

[48] Judgment of 7 July 1994, C-146/93, *Hugh McLachlan / Caisse nationale d'assurance viellesse des travailleurs salariés de la région d'Ile-de-France (CNAVTS)*, in: *ECR* 1994 I 3229. The ECJ held that this did not amount to a violation of the claimant's freedom of movement.

[49] Pensions are covered by the constitutional protection of property rights in Article 14 GG, see e.g. BVerfG 16.7.1985, in: *BVerfGE* 69, 272, 300-304; BVerfG 12.2.1986, in: *BVerfGE* 72, 9, 18 *et seq.*; BVerfG 15.7.1987, in: *BVerfGE* 76, 220, 235.

[50] Cass. req. 30.12.1930, in: *Rev. dr. int. pr.* 1933, p. 111; see above, III.

jurisdiction for just any international legal dispute, the example demonstrates that at least one legal system, and sometimes two, must assume responsibility for any case where no jurisdiction seems to exist. In the author's view, German constitutional law, and in particular the right to access to court under the German rule of law established in Article 20 GG,[51] require German legislative and judicative powers to ensure that at least one court – be it German or foreign – will be able to hear any case having a close connection to the German territory or to a German citizen. If need be, German courts must open emergency jurisdiction by adjusting their jurisdiction rules, as was done by the *Oberlandesgericht* Düsseldorf in the above-mentioned case involving a disputed prorogation of arbitration proceedings in England.[52]

(d) Another difficult situation arises where the German legal system accepts a reference from a foreign legal system. It is argued that accidental discrimination resulting from this form of fragmentation falls within the international scope of protection of the German constitution to the extent that the German legal system has accepted the case for a complete and final resolution (as e.g. in the case of a complete enforcement of a foreign decision). Other cases depend on the individual circumstances.[53]

(3) An equally difficult situation is created by uncoordinated jurisdiction – where courts or other authorities in different states have assumed simultaneous and overlapping jurisdiction over the same case without any facility for coordination. It is argued that if one of those jurisdictions is Germany, such cases are within the international scope of protection of the German rule of law, at least to the extent that the German authorities may not impose duties on parties which are incompatible with the duties imposed in foreign proceedings. For example, German courts may not punish a witness for having refused to give evidence if the witness, by making a statement, would have committed a criminal offence under a foreign law.[54]

---

[51] BVerfG 12.2.1992, in: *BVerfGE* 85, 337, 345. See also BAG 25.11.1983, in: *NJW* 1984, 751: German social and labour courts played a game of jurisdiction ping pong with a case in which the Federal Labour Court eventually decided that access to justice was paramount, being part of the constitutional guarantee of the rule of law in Article 20 GG, and more important than the correct application of jurisdiction rules between labour and social courts. A more specific guarantee for access to courts exists for the judicial review of acts of any German public authority in Article 19 para. (4) GG.

[52] OLG Düsseldorf 17.11.1995, in: *IPRspr.* 1995, No. 189, p. 384 = *RIW* 1996, 239. The court stated that German courts had to assume jurisdiction in this situation regardless of whether the arbitration tribunal in England had been right or wrong to decline jurisdiction.

[53] See DANNEMANN G. (note 1), pp. 392-5, 399.

[54] See e.g. COESTER-WALTJEN D., *Internationales Beweisrecht*, Ebelsbach 1983, no. 592.

B. Substantive Scope of Human Rights Provisions and of the Rule of Law

Two of the cases mentioned above involve the rule of law, namely accidental discrimination by creating incompatible duties and excluding access to the courts. In two other such cases, accidental discrimination infringes the rights to liberty and property. However, the human right which is most relevant for accidental discrimination is equality before the law, as expressed in Article 3 GG. This will be treated below in more detail. Suffice it to say at this stage that most cases of accidental discrimination fall quite clearly within the substantive scope of human rights provisions or of the rule of law.

C. Justification of Different Treatment

As has been explained above (IV), accidental discrimination occurs if a case which is linked to several legal systems is treated differently than comparable cases which are each linked to only one of those systems. This difference of treatment between purely national and international cases is frequently justified. It should also be kept in mind that if the different treatment is intended by an applicable rule, it will not amount to an *accidental* discrimination.

However, if the legislator treats international cases differently from cases which are only connected to its domestic legal system, such legislation may nevertheless be unconstitutional for violating the principle of equal treatment, as enshrined in Article 3 paragraph (1) GG. In 1979, the Federal Constitutional Court had to review legislation which subjected the payment of retirement pensions to the condition that the recipients either resided in Germany or were German nationals.[55] This was intended to exclude retired employees who had migrated to Germany to work and then returned to their country of origin. It also excluded Germans who had moved abroad and lost their German citizenship; German law then and now strips Germans of their citizenship when they assume a different nationality through a voluntary act, including marriage.[56] The Federal Constitutional Court held that the exclusion of pension rights violated Article 3 paragraph (1) GG and was unconstitutional. No justification could be found for the different treatment of the international cases. The Court held that those who had acquired pension rights through their work could not be taken hostage by the Federal Government for the purpose of improving its negotiation position with foreign governments on the corresponding treatment of German nationals under foreign pension schemes. A similar, more recent decision held that the exclusion from unemployment benefits for those employees who commute from abroad to their workplace in Germany was unconstitutional.[57] In a nutshell, international cases may be treated differently from purely German cases, but only where the different treatment can be justified.

[55] BVerfG 20.3.1979, in: *BVerfGE* 51, 1.

[56] § 25 Staatsangehörigkeitsgesetz, at the time: § 25 Reichs- und Staatsangehörigkeitsgesetz.

[57] BVerfG 30.12.1999, in: *RIW* 2000, 299.

A series of decisions by the Federal Constitutional Court makes it clear that the requirement that different treatment of like cases must be justified is not limited to legislation, but extends to any application of law by courts and other authorities. The Court held:

> 'The general principle of equality of the law is violated if one group of addressees of a legal norm is treated differently from other addressees of this norm, and when there is no difference between the two groups which by its kind or substance could justify the unequal treatment. (…) It is not only the legislator who can thus infringe basic rights. The same violation occurs when courts, by interpreting statutory provisions or by filling gaps, arrive at a distinction which the legislator would not be entitled to make.'[58]

This implies a constitutional duty on the courts to prevent accidental discrimination. The constitutional yardstick to be applied in all cases of unequal treatment of international cases is as follows: would the German legislator be free under Article 3, paragraph (1) GG to treat cases like the one to be decided differently from purely domestic cases? Could the legislator, for example, exclude a surviving spouse from the estate of her late husband if the couple was linked to several legal systems? Could a German Act of Parliament provide that no court should be allowed to hear certain types of divorce cases or commercial disputes? Would the German constitution allow the *Bundestag* to pass an act whereby children who live in certain foreign countries are not allowed to claim maintenance from parents who live in Germany? The answer in all those cases is 'no.' And because the answer is 'no' in these and the vast majority of other cases of accidental unequal treatment, the cases amount to discrimination which is unconstitutional under Article 3 paragraph (1) GG. It must be kept in mind, though, that a mere difference in treatment between a purely German and an international case is a necessary, but not a sufficient condition for accidental discrimination. The two other necessary conditions are (1) that the same difference must exist between the international case and a purely national case under the other legal system involved, and (2) that no applicable norm intends this difference in treatment.[59]

[58] BVerfG 11.6.1991, in: *BVerfGE* 84, 197, 199; my translation. Nearly identical wording can be found in BVerfG 3.7.1985, in: *BVerfGE* 70, 230, 239-240; BVerfG 22.10.1981, in: *BVerfGE* 58, 373-374. See DANNEMANN G. (note 1), pp. 365-9.

[59] See above, IV.

VII. No Adjustment without Accidental Discrimination

A. 'Gaps'

The leading case by the German Federal Court of Justice on adjustment seems to suggest that any gap within the applicable norms justifies adjustment and that courts are even free to construct such gaps.[60] The case concerned a works contract between two East German public sector companies made shortly before reunification. The client (defendant) was no longer in a position to use the installations to be provided by the contractor (claimant). The client therefore was to pay the agreed price minus any amount by which the claimant could have mitigated the damage, such as by selling the installations to a third party. The case turned on who had the burden of proving whether the claimant could have mitigated its damage.

There was a provision in the East German Contract Act which clearly placed this burden on the claimant. However, the Federal Court of Justice held that this provision, although not repealed, had nevertheless become 'meaningless' when East German procedural law shifted from an Eastern system of investigative judges to a Western style system where parties have to plead the facts. As this now 'meaningless' provision should not be applied, there was a gap. And that gap was duly filled by the Federal Court of Justice by way of adjustment, namely by inventing a burden of proof rule which placed the burden of proof on the defendant. The defendant could not possibly show how many other orders the claimant might have had and therefore lost the case. A touch of irony is added to this case by the fact that the same Federal Court of Justice later held in a different case that it is generally the contractors who must present their calculations in order for the court to establish whether they have been able to mitigate their damage.[61] That, however, was under the German Civil Code as now applied throughout Germany.

This case demonstrates the danger of using adjustment as a general gap-filling tool. Rather than preventing accidental discrimination, adjustment can easily be used to create such discrimination. The old East German law, the reformed East German law, and even the subsequent Federal German law agreed that the contractor had to present the facts which would allow the court to conclude whether any mitigation could have been made. The 'adjustment' in the present case discriminated against the client, who in this case – and only in this case – was improperly saddled with the burden of proof. There can be no constitutional justification for such judicial interference with the applicable law. On the contrary, constitutional concerns rally against such an extension of judicial law-making powers *contra legem*. It also went unnoticed that it was rather doubtful whether this case involved any conflict of laws, as only East German law was involved.

[60] BGH 1.4.1993, in: *DtZ* 1993, 278, 280, referred to as leading case by BGH 7.3.1995, in: *FamRZ* 1995, 1202.

[61] BGH 7.11.1996, in: *NJW* 1997, 733.

B. 'Contradicting Norms'

In scholarly writing, adjustment has traditionally been linked to so-called 'contradicting norms' (*Normenwidersprüche*).[62] There is no agreement on what should be precisely understood as 'contradicting norms.' Resorting back to the textbook case of the surviving spouse who is about to receive too little or too much of the deceased spouses' estate as a result of 'contradicting' rules in inheritance and matrimonial property laws, scholars frequently distinguish between the 'lack of norms' (*Normenmangel*, failing to give any share to the surviving spouse) and the 'abundance of norms' (*Normenhäufung*, surviving spouse receiving a double share of the estate).[63] Kegel additionally distinguishes between 'existential contradictions' (*Seinswidersprüche*) and 'normative contradictions' (*Sollenswidersprüche*), whereas the former ask for something that 'cannot be', for example the logically impossible, and the latter asks for something that 'should not be' (as in the case of the surviving spouse).[64]

As Stoll has observed, the category of 'cannot be' is not existential in a philosophical sense, and equally belongs to the sphere of the normative.[65] Moreover, the examples given for 'cannot be' do not hold up to scrutiny. One such textbook example concerns relatives who die in a car accident and where, due to different presumptions made by different legal systems involved, each of the passengers is presumed to have died before the other.[66] It is indeed logically impossible that both presumptions are true, but they can nevertheless make sense. They are made in two different legal proceedings, one to establish the heirs of the husband and another to establish the heirs of the wife.[67] The result of those two presumptions is that the heirs of the husband (and not those of the wife) inherit the husband's estate, and the heirs of the wife (and not those of the husband) inherit the wife's estate. That is neither a case of 'cannot' nor a case of 'should not,' and it is certainly not a situation that would call for adjustment.

The categories of 'lack of norms' and 'abundance of norms' are similarly questionable as a matter of logic and have little explanatory force. There is no lack

---

[62] WOLFF M., *Internationales Privatrecht*, 1st ed., Berlin 1933, pp. 39 *et seq.*; KEGEL G. *Internationales Privatrecht*, 7th ed. München 1995 § 1 VII 2 d; LOOSCHELDERS D. (note 37), p. 8.

[63] WOLFF M., KEGEL G. and LOOSCHELDERS D. *ibidem*; VON BAR C. and MANKOWSKI P. (note 15) § 7 VII.2; KROPHOLLER J. (note 19) § 34 III; see DANNEMANN G. (note 1), 220-227 with further references.

[64] KEGEL G. (note 62) § 8 II; slightly different now KEGEL G. and SCHURIG K., *Internationales Privatrecht*, 9th ed., München 2006, § 8 II, distinguishing between logical and teleological contradictions.

[65] STOLL H., Review of Jochen Schröder, Die Anpassung von Kollisionsnormen und Sachnormen, in: *FamRZ* 1963, pp. 318-9; SONNENBERGER, H.-J. (note 15) Einl. IPR no 606; OFFERHAUS J. (note 40) p. 193.

[66] KEGEL G. (note 62) § 8 III 4; KEGEL G. and SCHURIG K. (note 15) § 8 III 3. Similar SCHRÖDER J. (note 37), p. 127.

[67] LOOSCHELDERS D. (note 37), p. 117.

of norms for dividing the property of the deceased spouse in any variant of the widow's case. Nor are there too many norms for this purpose. And the applicable norms certainly do not contradict each other. It is just that they together produce a result that can be at odds with the intentions of any of the legal systems involved. If this is the case, this amounts to an accidental discrimination. But that is not necessarily so. The spouses may have been cousins, and the widow may inherit all as the closest living relative of the deceased husband. Although there is the same complete 'lack of norms' which give a share to the surviving spouse, this does not result in any accidental discrimination, and no adjustment is necessary. On the other hand, there are accidental discriminations which have nothing to do with 'lack' or 'abundance' of norms: for example in the above-mentioned case of the University exchange students who narrowly fail a German examination which they would probably have passed in England, without having the extended opportunities for a re-sit which are available to German students.[68]

In summary, the cases which are associated with 'lack' or 'abundance' of norms overlap with cases of accidental discrimination. However, it becomes clear on closer inspection that adjustment is necessary if there is accidental discrimination without any 'lack' or 'abundance' of norms, but no need for adjustment if a 'lack' or 'abundance' of norms does not result in an accidental discrimination.[69] The result oriented approach which establishes accidental discrimination, and which at the same time provides the constitutional justification for adjustment, is to be preferred over an analysis of 'contradicting' norms – which in fact are not even contradicting.

VIII. How to Adjust Rules

There has been some debate as to how rules are to be adjusted,[70] and, in particular, on whether a conflicts solution (choosing a different law) or a substantive law solution (modifying, ignoring, or creating new substantive rules) is preferred.[71] It may be helpful in this context to review the examples which have been given for accidental discrimination throughout this article.

(1) Only one solution is available for the 'case no court wants to hear:' to open emergency jurisdiction (i.e., a conflict of law solution), preferably in the first court seized of the matter, as was indeed done by the French *Cour de cassation* in our case.[72]

---

[68] See above, IV.B.

[69] Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 601.

[70] See DANNEMANN G. (note 1), pp. 429-457.

[71] See DANNEMANN G. (note 1), pp. 437-439.

[72] Cass. req. 30.12.1930, in: *Rev.dr.int.pr.* 1933.111.

(2) A conflict of law solution is also advisable for the widow's case, where interpretation (rather than adjustment) should normally suffice.[73] The conflict rules which together govern matrimonial property and inheritance law should be seen in the systematic context of the substantive rules which they invoke. Those rules which seek to give the surviving spouse a share of the assets of the deceased are selected by way of qualification. By such normal qualification of substantive rules, it is perfectly possible to qualify, for example, a matrimonial property law provision in Swedish law as belonging to those norms which Austrian conflicts law invokes for the succession. No conflicts or substantive rule needs to be modified or set aside. No adjustment is therefore required in order to prevent an accidental discrimination.

(3) In the cases where it appears impossible to establish the financial position of the party which owes maintenance, German courts have faced a choice of either assuming investigative powers within civil proceedings, or using adjustment to create a substantive claim for information under the applicable foreign maintenance law which knows of no such claim. The courts have consistently chosen the latter.[74] The reason is that this solution carries a lower risk of upsetting fundamental principles and causing knock-on effects.

(4) There is normally only one end from which a 'reference into the void' can be solved, namely from that of the legal system which makes the reference. It was impossible in our example to obtain any gown from German universities which had abolished them. Adjustment must occur within the legal system which creates a reference into the void. This essentially provides a choice between dispensation from wearing a gown or admitting the gownless academic to wear the gown associated with a degree from the university where he or she teaches. The latter will normally be the better solution, as this will save the potential victim of this accidental discrimination from 'sticking out,' and at the same time do more to achieve the formal atmosphere which rules on academic attire seek to create.[75]

(5) The couple with the limping marriage which could not be dissolved can most easily be saved by adjustment of the English jurisdiction rules, namely with English courts assuming emergency jurisdiction.[76] It would potentially be more damaging for German courts to dissolve a marriage which under German law does not exist, because such a divorce would entail recognition that the marriage was valid, with possible knock-on effects on matrimonial property and post-divorce maintenance rights. Quite generally, cases involving loss of jurisdiction (above VI.B) are best solved by adjustment of jurisdiction rules.

---

[73] DANNEMANN G. (note 1), pp. 466, 458-9.

[74] OLG Stuttgart, 4.10.1988, in: *IPRspr.* 1988 No. 89, p. 174 = *IPRax* 1990, 113; OLG Hamm 3.7.1992, in: *NJW-RR* 1993, 1155 = *IPRspr.* 1992 No. 119, p. 272; OLG Frankfurt 2.10.1990, in: *IPRspr.* 1990 No. 77, p. 152; AG Böblingen 16.1.1992, in: *IPRspr.* 1992 No. 85, p. 195; OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739 = *IPRspr.* 1994 No. 94, p. 193, 195.

[75] DANNEMANN G. (note 1), p. 450.

[76] OLG Düsseldorf 19.12.1956, in: *IPRspr.* 1956-57 No. 110.

(6) The case of the German convict who had be held on remand in Italy could have easily been solved by the competent court by acknowledging a gap in the statutory provisions and then applying the provisions on time spent abroad on remand before conviction in Germany by way of analogy, as indeed the court of first instance had done.[77] Adjustment was therefore unnecessary.

(7) The case involving the failed exams of exchange students could realistically be solved only by developing, by way of adjustment, a specific new substantive rule. The rule which the present author proposed during his time at University College London, and which was then accepted, was to count all examinations which the UCL students had taken in Germany together and consider the student as having failed only if the average of those examinations was below the pass line.[78] The case illustrates that sometimes solutions must be found by way of adjustments which are substantially different from what the laws of either one of the legal systems involved envisage for purely domestic cases.

(8) The case of the reduced pension could realistically be resolved only by adjustment within French law.[79] Pensions are based on payment of contributions, which would have been upset by creating a higher French (or UK) pension. The reduced money which the employee received as a result of this accidental discrimination corresponded to money gained by the French unemployment scheme, so this scheme should have made up for the difference.

In summary, in two of the above cases (2 and 6) accidental discrimination can be prevented by interpretation, which is naturally to be given preference over adjustment. This also demonstrates that the notion of accidental discrimination can be used as a tool for interpretation: if there is any doubt, an interpretation must be preferred which avoids accidental discrimination.

Another two of the above cases (1 and 5) are best solved by the adjustment of conflict norms, in both cases by creating emergency jurisdiction.

The remaining four cases are best solved by the adjustment of substantive rules.

This also shows that no general preference can be established between adjustment of conflicts norms and substantive norms. It is usually advisable to choose the path of least resistance and minimal destruction.[80] In the majority of cases, the best solution is fairly obvious.

---

[77] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

[78] DANNEMANN G. (note 1), pp. 448-9.

[79] Judgment of 7 July 1994, C-146/93, *Hugh McLachlan / Caisse nationale d'assurance viellesse des travailleurs salariés de la région d'Ile-de-France (CNAVTS)*, in: *ECR* 1994 I 3229; DANNEMANN G. (note 1), p. 445.

[80] KEGEL G. and SCHURIG K. (note 15), § 8 III 1; DANNEMANN G. (note 1), pp. 435-437.

WHAT'S IN A NAME?
GRUNKIN-PAUL AND BEYOND

Matthias LEHMANN*

* Privatdozent (University of Bayreuth, Germany), currently holding the Chair for Private Law, Commercial and Business Law, European Law, Private International and Comparative Law at the Martin Luther-University Halle-Wittenberg (Germany).

Yearbook of Private International Law, Volume 10 (2008), pp. 135-164

I. A Seminal Decision in a Complex Field

A. Name, Identification, and Identity

'What's in a name?' Juliet asks Romeo in Shakespeare's famous play, to which she answers herself: 'That which we call a rose, by any other name would smell as sweet. So Romeo would, were he not Romeo call'd, retain that dear perfection which he owes without that title. Romeo, doff thy name; and for that name, which is no part of thee, take all myself.'[1] With this poetic remark, Juliet wishes to express that Romeo's name is of no importance to her love for him, although his family, the 'Montague' clan, is the hated enemy of her own family, the Capulets.

Outside the realms of desperate love, however, the family name *is* of crucial importance, so much so that the Court of Justice, after its decisions in *Konstandinis*,[2] *Garcia Avello*,[3] and *Standesamt Niebüll*,[4] was again called upon to decide on a reference for a preliminary ruling concerning how names in the European Community are treated. Before analyzing the recent decision in the case *Grunkin-Paul*,[5] some general remarks on the role of a name seem to be appropriate. In fact, one can distinguish between four different purposes served by a name.[6]

First, it is the basis of identity – who I am and who you are, is, to a considerable extent, determined by the name. There are men and women who are so attached to their name that they want to preserve it even after marriage. Other people seek a change of identity by applying for a new name. The name is not just what one is called; it is part and parcel of one's personality.

Next, the surname determines the integration into a specific family. In many legal cultures, it is handed down from generation to generation. The common name within a family may be important for its cohesion. And again, there is a certain aspect of identity, this time related to one's 'kin'.

Furthermore, the State is also very much concerned by names, which serve as a means of identification. Without them, it would be impossible to determine who must pay taxes, who has the right to vote, who may enter the country, etc. In short, the name belongs to the 'status' of a person. From this flows the interest of the State in its certainty.

Finally, the name is a visible sign of integration into a society. This is of particular interest for immigrants who must cope with the problem that their name is misunderstood or misspelled. Many countries therefore provide for the

---

[1] SHAKESPEARE W., *Romeo and Juliet*, II, ii, 1-2.

[2] ECJ, case C-168/91, *Konstantinidis*, [1993] ECR I-1191.

[3] ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

[4] ECJ, case C-96/04, *Standesamt Niebüll*, [2005] ECR I-3561. The decision concerned the same case as *Grunkin-Paul*, see *infra* II.

[5] ECJ, case C-353/06, *Grunkin-Paul*, not yet published.

[6] See, e.g., BUREAU D./ MUIR WATT H., *Droit international privé*, vol. 2, Paris 2007, p. 26.

transliteration of names that are written in a different alphabet.[7] Others allow for the assimilation of a foreign name to the names of the new country, e.g. to 'Gallicize', 'Americanize' or 'Germanize' a name.[8] In darker times, people were also forced to adapt their names to the customs of the country in which they lived or even to drop it for another.

The four different purposes cited above result in the particularity of the field of names: It is complicated because public law aspects are intertwined with those of the private sphere. There is an obvious tension between the interests of the individual to determine and change his name, on the one hand, and the interest of the State in identifying its subjects, on the other. Moreover, judicial courts as well as administrative bodies interfere in the establishment of names. Finally, the whole area is further complicated by the fact that it is also closely connected to fundamental rights.[9] The Strasbourg Court has decided that the name of a person is part of the right to respect private and family life and is thus protected by Article 8 of the European Convention on Human Rights.[10] Many other international conventions contain specific provisions which guarantee certain rights with regard to names.[11]

All of this must be borne in mind when matters regarding names are discussed.

B. Limping Legal Relationships

From the point of view of conflict of laws, the field is complex because legal systems differ on how the law applicable to the name is to be determined. While some refer to the nationality of the person, others use residence as a connecting factor.[12] There are also some attempts to apply the law of the nationality of the parents[13] or

[7] The rules on transliteration were the subject of the first case brought to the ECJ with regard to names, ECJ, case C-168/91, *Konstantinidis*, [1993] ECR I-1191.

[8] See, *e.g.*, Art. 47 of the Introductory Law to the German Civil Code (EGBGB).

[9] See MONEGER F., 'Actualité du nom de famille en droit international privé', in: *Travaux du Comité français de droit international privé* 2004-2005, p. 7 (8).

[10] European Court of Human Rights, *Burghartz v. Switzerland*, Decision of 22 February 1994, Series A No. 280-B, No. 24.

[11] See International Covenant on Civil and Political Rights, Article 24(2); Convention on the Rights of the Child of 20 November 1989, Articles 7 and 8; American Convention on Human Rights, Article 18.

[12] On the different conflict-of-laws rules regarding names, see *infra* section V 3. See also the report of the International Commission on Civil Status (ICCS), 'Loi applicable à la détermination du nom', available at <http://web.lerelaisinternet.com/CIECSITE/ Documentation/LoiApplicablealaDeterminationduNom.pdf> (last visited 21.12.2008); GIESKER-ZELLER H., *Der Name im Internationalen Privatrecht*, Zurich 1915; SCHERER M., *Le nom en droit international privé: Étude de droit comparé français et allemand*, Paris 2004.

[13] See, for French law, Cour de cassation, 1st Chamber in Civil Matters, Decision of 7 October 1997, *Rev.crit.dr.int.priv.* 1998, p. 72. The decision does, however, seem to be

the law in force at their (last) common residence.[14] Furthermore, there are various events related to family law that might have an influence on the name, such as marriage, divorce or adoption. This leads inevitably to the question of what law should be applied to such relationships.[15]

From a comparative law viewpoint, it must be noted that different legal orders determine names in different ways. Let us take as an example the surname of a child. Some countries use patronymic names, *i.e.* the name of the father is transmitted to the child, while others (notably Spain) combine the paternal surname of each of the parents. Portuguese law permits the surname to be composed of up to four elements, while in Iceland the father's *given* name is transmitted to the child and supplemented by the syllable 'son' or 'daughter'.[16] Things get even more complicated when the parents of the children are not married: in this case, they sometimes receive the name of the mother, in other systems that of the father, or the parents are allowed to choose.[17]

Legal systems also diverge with regard to name changes in case of certain events such as marriage, divorce or adoption. With regard to voluntary alterations, some follow the principle of 'immutability' and restrict changes to very exceptional cases.[18] Others are much more lenient and allow alterations quite generously.[19]

Different legal cultures and traditions clash with one another in the field of names. The combination of conflicts and divergent substantive rules has a very undesirable effect: a person may have a different legal name in State A than in State B. These so-called limping legal relationships appear as well in other status-related matters, such as capacity, marital status, adoption, parentage or gender. They are one of the most visible deficiencies of the current system of private international law. If the States cannot even provide a person with a unified name, what good is the global legal order? It is critical to avoid such situations.

---

contradicted by recent legislation, see MONEGER F. (note 9), p. 27; BUREAU D./ MUIR WATT H. (note 6), p. 27.

[14] This is the case in Greek law, see Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 7, footnote 4.

[15] See STURM F., 'Selbständige und unselbständige Anknüpfung im deutschen IPR beim Vor- und Familiennamen', in: *Das Standesamt (StAZ)* 1990, pp. 350-356.

[16] For a comparative overview of the different ways in which surnames of children are formed in European countries see Advocate General Jacobs, Conclusions in case C-148/02, *Garcia Avello*, [2003] ECR I-11613, Nos. 10-18; STURM F., 'Europäisches Namensrecht im Dritten Jahrtausend', in: GOTTWALD P./ JAYME E./ SCHWAB D. (eds.), *Festschrift für Dieter Henrich*, Bielefeld 2000, pp. 611 (613).

[17] See STURM F. (note 16), pp. 614-615.

[18] See the argument of the Belgian government in ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 40.

[19] As is the case in the Common law countries, see Advocate General Jacobs, Conclusions in case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 14.

C. A New Episode in the Relationship between Community Law and Private International Law

A few years ago, an unexpected actor rose to the occasion and intervened to end limping names: the European Court of Justice. In its notorious *Garcia Avello* judgment,[20] it held that the Belgian authorities had violated Article 12 of the EC Treaty by refusing to recognize a name given by the Spanish embassy to Belgian-Spanish dual-nationals residing in Belgium. It did so in order to avoid the children Esmeralda and Diego having different surnames in Spain and in Belgium. But by this decision, the Court ventured into territory that was hitherto the *domaine réservé* of the Member States. No wonder the decision was abundantly commented and sometimes heavily criticized.[21]

One cannot but confirm the prophecy[22] that the decision in *Garcia Avello* could prove 'revolutionary' for conflict of laws within the European Union. It is to be expected that the consequences of *Grunkin-Paul* will be no less dramatic. In fact, the ECJ has taken a large step beyond its previous case law. It has thereby opened a new chapter in the already tense relationship between European Community Law and the conflict of laws.[23] The difficulties of this *concubinage* are most

[20] ECJ, case C-148/02, [2003] ECR I-11613.

[21] See, e.g., ACKERMANN TH., Comment on ECJ case C-148/02, Garcia Avello, in: *Common Market Law Review* 2007, pp. 146-154; BOGDAN M., 'EG-fördragets direkta inverkan på medlemsstaternas internationella namnrätt: några funderingar kring EG-domstolens Avello-dom', in: *Svensk juristtidning* 2003, pp. 1057-1068; FRANK R., 'Die Entscheidung des EuGH in Sachen Garcia Avello und ihre Auswirkungen auf das internationale Namensrecht', in: *Das Standesamt (StAZ)* 2005, pp. 161-165; DE GROOT G.-R./ RUTTEN S., 'Op weg haar een Europees IPR op het gebied van het personen- en familierecht', in: *Neederlands Internationaal Privaatrecht* 2004, pp. 273-282; HELMS T., 'Europarechtliche Vorgaben zur Bestimmung des Namensstatuts von Doppelstaatern: Anmerkung zu EuGH, Urteil vom 2.10.2003, C-148/02 - Garcia Avello', in: *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 2005 pp. 36-39; LAGARDE P., Comment on ECJ, case C-148/02, Garcia Avello, in: *Rev.crit.dr.int. priv.* 2004, pp. 192-201; LARA AGUADO A., 'Libertades comunitarias, doble nacionalidad y régimen de los apellidos (Caso García Avello y el avance irresistible de la autonomía de la voluntad)', in: *Diario La Ley* 2004 No. 6107, pp. 1-13; MÖRSDORF-SCHULTE J., 'Europäische Impulse für Namen und Status des Mehrstaaters', in: *IPRax* 2004, pp. 315-326; PALMERI G., 'Doppia cittadinanza e diritto al nome', in: *Europa e diritto privato* 2004, pp. 217-230; POILLOT-PERUZZETTO S., Comment on ECJ, case C-148/02, Garcia Avello, in: *JDI* 2004, pp. 1225-1237; QUIÑOMES ESCÁMEZ A., 'Ciudadana Europea, doble nacionalidad y cambio de los apellidos de los hijos: Autonomía de la voluntad y conflicto positivo entre las nacionalidades de dos Estados miembros', in: *Revista jurídica de Catalunya* 2004, pp. 203-224; REQUEJO ISIDRO M., 'Estrategias para la 'comunitarización': descubriendo el potencial de la ciudadanía europea', in: *Diario La Ley* 2003 No. 5903 pp. 1-12; VERLINDEN J., Comment on ECJ, case C-148/02, Garcia Avello, in: *Colum.J.Eur.L.* 2004, pp. 705-716.

[22] DE GROOT G.-R., 'Towards European Conflict Rules in Matters of Personal Status', in: 11 *Maast.J.Eur&Comp.L.* 115 (2004).

[23] On that relationship, see, *e.g.*, BASEDOW J., 'Spécificité et coordination du droit international privé communautaire', *Travaux du Comité français du droit international privé*

visible in two fields: the law of legal entities, *i.e*. corporations, and the law of natural persons, in particular with regard to their names.

II. Factual Background

The facts of the case can be quickly summarized: little Leonhard Matthias was born in Denmark as the son of two German nationals, Mr Grunkin and Ms Paul. The Danish authorities registered 'Paul' as his last name. Subsequently, at the parents' request, they changed it to 'Grunkin-Paul'.

When Mr Grunkin and Ms Paul sought recognition of the child's name in Germany, the registry office refused. It based its decision on a German conflict-of-laws rule according to which the name must be determined under the law of the nationality of the child,[24] *i.e.* in this case, German law. The applicable German civil code (BGB) does not allow for hyphenated surnames composed of the names of the parents.[25] The purpose of that prohibition is to avoid clumsy family names if the child gets married in the future and wants to combine his name with that of the spouse.

A particularity of the case is that it has reached the Court of Justice twice. Initially, a reference for a preliminary ruling was submitted by the Court of First Instance of Niebüll, Germany, who was called upon to decide on a request by the registry's office to transfer the right to determine the family name to one of the spouses.[26] Although Advocate General Jacobs pleaded fiercely in favour of holding

---

2002-2004, pp. 275-296; FALLON M., 'Les conflits de lois et de juridictions dans un espace économique intégré', 253 *Recueil des Cours* 9-282 (1995); KOHLER CH., 'Verständigungsschwierigkeiten zwischen europäischem Gemeinschaftsrecht und internationalem Privatrecht', in: MANSEL H.-P./ PFEIFFER TH./ KRONKE H. ET AL. (eds.), *Festschrift für Erik Jayme*, vol. I (2004), pp. 445-459; DE LIMA PINHEIRO L. (ed.), *Seminário Internacional sobre a Comunitarzação do Direto Internacional Privado*, Coimbra 2005; MICHAELS R., 'EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory', available at <http://eprints.law.duke.edu/1573/1/EU_Law.pdf> (last visited 28.12.2008); VAREILLES-SOMMIÈRES P., 'Un droit international privé européen?', in: VAREILLES-SOMMIÈRES P. (ed.), *Le droit privé européen*, Paris 1998, pp. 136-147.

[24] Art. 10(1) of the German Introductory Law to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*). Art. 10(3) EGBGB, however, allows parents having a different nationality than the child to choose a name that is permitted under the national law of one of the parents. It also allows the parents to submit the name to German law if at least one of them is residing in Germany, irrespective of the nationality of the child. German law is less generous, however, with regard to German nationals living abroad. See *infra* section III 2.

[25] Art. 1617 BGB.

[26] This was necessary because the spouses refused to agree to give one of their surnames to the child, as German law required them to do. Instead, they insisted on the joint name that had been accepted by the Danish authorities. A sign of the parent's perseverance

the German rules to be incompatible with Community law,[27] the Court was able to dodge the question on the ground that the submitting tribunal was not acting in a capacity necessary for a reference under Article 234 of the EC Treaty.[28]

It was different when the case reached the Court a second time. The reference was filed in a lawsuit between the parents and the registry's office over the latter's refusal to register the name 'Grunkin-Paul'. This time the case was decided on the merits. The Court accepted none of the German government's justifications for the refusal of registration. Instead, it required the German authorities to accept the surname given to Leonhard Matthias in Denmark.

III. Comparison with *Garcia Avello*

To understand the importance of the judgment, it is particularly interesting to contrast it with the Court's decision in *Garcia Avello*. One similarity is that the *Garcia Avello* Court also intervened to amend a limping legal relationship.[29] Leonhard Matthias would have been required to use a different surname in two Member States, as would have been the case for the children in *Garcia Avello*, Esmeralda and Diego Garcia Weber. On the other hand, there are three major aspects that distinguish these cases.

A. No Issue of Double Nationality

One difference is that, unlike Esmeralda and Diego Garcia Weber, Leonhard Matthias Grunkin-Paul had no second nationality. He acquired only German nationality from his parents. As a result, the Court of Justice could not argue the case on the basis of the principle of non-discrimination on grounds of nationality, as it had done in *Garcia Avello*. There, it had found discrimination in the fact that Belgian law treated the children in the same way as Belgian mono-nationals notwithstanding their dual nationality.[30] In *Grunkin-Paul*, there was – at least from the point of view of citizenship – no difference between Leonhard Matthias and other German mono-nationals. The name issue was handled by the German authorities in exactly the same way as in any case involving German citizens. There was diffe-

---

in pursuing their demand is their application to the German Constitutional Court, which was, however, not accepted, see *Bundesverfassungsgericht*, Decision of 27.2.2003 – 1 BvR 297/03, unpublished. See also Advocate General Jacobs, Conclusions in case C-96/04, *Standesamt Niebüll*, [2005] ECR I-351, No. 24.

[27] Advocate General Jacobs, Conclusions in case C-96/04, *Standesamt Niebüll*, [2005] ECR I-351, Nos. 13-14.

[28] ECJ, case C-96/04, [2005] ECR I-351, No. 20.

[29] On limping legal relationships, see *supra* section I B.

[30] ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613, Nos. 32-36.

rent treatment with regard to Danish nationals, but this was justified by the fact that the child was German. Hence, the Court found that there was no discrimination on grounds of nationality.[31]

Nor was there any risk that the law applied by the German authorities would be at odds with any well-established usage in the home country of one of the parents, as had been the case in *Garcia Avello*. In the latter case, the name given by the Belgian authorities created the impression in Spain that the father and the children were siblings.[32] In *Grunkin-Paul*, no such confusion was caused by the application of German law, because the name that the German authorities wanted to give to the child was exactly in line with the usage in the home country of the whole family. It was Mr Grunkin and Ms Paul who wanted to break away from the law of their and the child's State of origin.

Nor did the Court find any infringement of the general principle of equal treatment. The Advocate General had in fact argued that this principle was violated because German law would put persons that do not acquire the nationality of the State in which they are born at a disadvantage in comparison to those that become citizens of their State of birth.[33] The judgment, however, does not refer to that argument.

B. Decision by the State of Birth and Residence

A further difference resides in the fact that Germany was required to recognize the name given by the State in which the child was born. In *Garcia Avello*, the name that the Belgian authorities were forced to accept by the Court of Justice was given by Spain, and both the children and their father were Spaniards. It is worth noting that German law would have been able to cope with this case, because it allows for the choice of the national name regime of one of the parents if it differs from that of the child.[34] German law thus would have avoided the result of *Garcia Avello*. But it provides no exception from the application of national law if the child was born in a different State than that of his or her origin. It was thus unable to achieve the result that the ECJ wanted in *Grunkin-Paul*, because neither the parents nor their offspring had Danish nationality. The only link that the case had to Denmark was that the child was born there and lived there. Thus, the connecting factor was residence, not nationality.

[31] ECJ, case C-353/06, *Grunkin-Paul*, Nos. 19-20.

[32] See on that point Advocate General Jacobs, Conclusions in case 148/02, *Garcia Avello*, [2003] ECR I-11613, No. 38.

[33] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 69.

[34] Art. 10(3) of the Law introducing the Civil Code (EGBGB). See also *supra* note 24.

C. Decision on Name Change

When little Leonhard Matthias was born in Denmark, he was not yet called 'Grunkin-Paul'. Rather, his family name was 'Paul'. That was because Danish law, like German law, does not favour hyphenated surnames. Where the parents have a common surname, it demands that this name be given to the child as well. If they have different names, the name of one of them will be used as the family name, while the other one's name becomes a middle name.[35]

Thus, the name of the child at birth was 'Leonhard Matthias Grunkin Paul'. This name superficially resembles the one he bore later, the only difference seemingly being the missing hyphen. But note that 'Grunkin' was merely a middle name, while 'Paul' was the only family name. The German authorities would have had no problem recognizing this surname, which is totally in line with German custom. It was only months after the birth that the Danish authority issued a birth certificate indicating 'Grunkin-Paul' as the surname. They did so at the request of the parents.

Thus, the case was not about recognition of the name given at birth, but rather of a name change. The Advocate General, however, tried to obscure this fact by arguing that the change intervened in Denmark before any application was made to the German authorities to register the name of the child.[36] This argument misses the point. The name that had been registered in Denmark was later changed. What the parents sought, then, was the recognition of a changed name and not of the name given at birth. It is of no relevance in this respect that the change intervened very shortly after birth. Nor does it matter that the German authorities had not yet registered the name that was given first. Even without such a registration, the child was not nameless in Germany; rather, his name was determined in accordance with German law. The Danish authorities could at any rate not change this name, but only the name in their own name register. This they did. Thus, the Court of Justice's decision concerns the recognition of a name change.

IV. Freedom of Movement vs. Discrimination

These differences allow us to see the additional impact of the new decision more clearly. The holding of the case can be summarized as follows: even where a person has only one nationality, his or her home State may not refuse to recognize a name change by the State in which he or she is born and resides. This represents a threefold extension of the holding in *Garcia Avello*, since a Member State may no longer refuse to recognize a name (1) of its mono-nationals (2) that was issued

[35] See Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 14.

[36] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 51.

by the State of residence, and (3) which was given at birth, but subsequently changed. How did the Court of Justice arrive at this result?

A. The Scope of the EC Treaty

The Court uses a classical three-step-analysis. The first point is, as always, whether the case falls within the scope of the EC Treaty. Here, the Court of Justice seemed to have fewer problems than in *Garcia Avello*. In that case, in addition to their Spanish nationality, the children had the nationality of Belgium, the country in which they had lived since birth and which they had never left. Because all elements besides the dual-nationality pointed to this State, the ECJ was criticized for having decided a purely internal case.[37] In *Grunkin-Paul*, it seemed to be completely different: in that case, Leonhard Matthias resided in a State other than that of his nationality. This made it easier to argue that he had 'made use' of his right to move freely within the Union and that a Community dimension was present.[38]

On the other hand, one cannot overlook the fact that the connections to Denmark were rather weak when seen from the point of view of Germany. The child and the parents were German nationals. The only link to Denmark was that they resided in this country when Leonhard Matthias was born and some time after. Viewed from the perspective of nationality, the case was even more internal to Germany than *Garcia Avello* had been to Belgium, because in the latter case the children were at least also nationals of another State. Here, the Court forced Germany to recognize a name issued to its own mono-nationals by another State.

What gives the case a Community dimension, in the eyes of the Court of Justice, is that Leonhard Matthias was born and resides in a different State than that of his nationality. The judgment, however, does not at this point highlight the fact that he actually travels back and forth between the two countries. The Court shows no interest in how long the family had lived in Germany or that the child was visiting the father in Germany.[39] It simply refers to its interpretation in *Garcia Avello* according to which it is sufficient in order to establish a link with Community law that a person lives in a country different from that of his or her nationality.[40] This interpretation is somewhat dubious, because Community law allows a move from one country to another, rather than presupposing it.

Nevertheless, the Court uses the fact that Leonhard Matthias resides in a different country than that of his nationality to conclude that he can rely, in principle, on Articles 12 and 18 of the EC Treaty.[41] Again, the reasoning 'slides' from the

---

[37] See LAGARDE P. (note 21), p. 197; QUIÑOMES ESCÁMEZ A. (note 21), pp. 209-210.

[38] Cf. Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 57.

[39] This fact is mentioned only in No. 27 of the judgment, after it has already been established that the case falls within the scope of the EC Treaty.

[40] ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 17.

[41] ECJ, case C-353/06, *Grunkin-Paul*, Nos. 17-18.

applicability of Community law to the application of specific provisions, a situation which already complicated the understanding of *Garcia Avello*.[42] This time, however, the Court does not rely on Article 18 to apply Article 12, but refers directly to both provisions. This makes their relation even more unclear: is the applicability of Article 18 a condition of Article 12, or are they simultaneously applicable? The Court gives no satisfactory answer.

B. The Application of Article 18

The main innovation of *Grunkin-Paul* is that the Court bases its decision on the freedom to move and reside freely within the territory of the Member States under Article 18 of the EC Treaty rather than on the prohibition of discrimination on grounds of nationality in Article 12. It had already referred to Article 18 in *Garcia Avello*, but only in order to justify that the case had a Community dimension.[43] This time, the Court uses it as the material standard against which the effects of the application of national law are measured.

Article 18 of the EC Treaty is of course a very fertile ground to rebuff all sorts of national laws. The provision is not restricted to movements involving economic activities.[44] It also applies to short trips, holidays, studies or time spent for any other purpose in another Member State. Furthermore, Article 18 is not only broader, but also much more dynamic than Article 12 of the EC Treaty: It allows the citizens of the Union to travel at any time within the territory of the Member States and to take up their residency there. Nationality, on the other hand, is comparatively static. It is mostly obtained at birth and rarely changed during a person's lifetime. People are therefore not likely to become victims of discrimination with regard to a newly acquired nationality. In contrast, citizens who have never travelled abroad may decide at any point to avail themselves of their freedom to move freely and take up residence in another Member State. It is therefore much more probable that they will invoke Article 18 of the EC Treaty because of a new residence than that they will rely on Article 12 because of a newly acquired citizenship.

Furthermore, almost everything can be considered to be an impediment to the right to freely move and reside within the territory of the Member States of the Community. Even the application of national law to a national may encumber the exercise of the right guaranteed in Article 18 of the EC Treaty. In the case at hand, the Court of Justice considered the freedom of movement to be hampered by the

---

[42] See POILLOT-PERUZZETTO S. (note 21), p. 1229.

[43] ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613, Nos. 25, 27.

[44] See KLUTH W., in: CALLIES CH./ RUFFERT M., *EUV/EGV* (Commentary on the EU and the EC Treaty), 3. ed., Munich 2007, Art. 18 EGV, No. 4; KOLONOVITS D., in: MAYER H., *Kommentar zu EU- und EG-Vertrag* (Commentary on the EU and the EC Treaty), leaflet, Vienna 2005, Art. 18 EGV, No. 2; HILF M., in: GRABITZ E./ HILF M. (eds.), *Das Recht der Europäischen Union* (Commentary on the EU and the EC Treaty), leaflet, Munich 2008, Art. 18 EGV, No. 6.

fact that Leonhard Matthias must use a different surname in the State of his nationality than that which is conferred by and registered in the Member State where he was born.[45] As illustrations, the Court of Justice cites a number of disadvantages that the child must suffer. One of them is the fact that his passport, which is usually issued by the State of nationality, will bear a different name than that which was given in the State of birth.[46] Another is the increasing number of documents that will be issued by Germany and Denmark in which his or her name will be different.[47] The Court denounces the fact that Leonhard Matthias will always be required to dispel doubts about his identity and the authenticity of the documents.

There is, without a doubt, some truth to the argument. The divergent conflicts and substantive rules on surnames within the Union may indeed result in difficulties for people living abroad. That being so, the question remains why the Court did not use Article 18 of the EC Treaty in the *Garcia Avello* decision. Obviously, the same problems could have been invoked concerning the children Esmeralda and Diego. It is irrelevant that they did not actually travel to another State; in the interpretation by the Court of Justice, Article 18 protects them from *potential* impediments to the freedom to move and reside freely within the Union. Why did the ECJ then refer to Article 12 of the EC Treaty and did not apply Article 18? It seems that, now, more importance is given to the freedom to move and reside freely within the Union than to the prohibition of discrimination. The latter is included in Article 18, so far as the case falls within its scope. This will make a separate reference to Article 12 superfluous.

The shift from Article 12 to Article 18 is not without its problems. If one stretches the freedom to move and reside freely within the Member States to its limits, it could become a weapon that can be used against almost any diverging provisions of national law. The Community could intervene in many areas over which it normally has no competence. Different name rules can be obstacles to free movement, as can different rules on homosexual marriages or succession. No doubt the differences in traffic rules and units of measurement are also problematic when seen from the point of view of free movement and residency.

The idea of using Article 18 of the EC Treaty in the present case was launched by Advocate General Jacobs.[48] Although he admitted that there is no discrimination of the child by attributing to him a name according to the German rules, he found that from a 'practical point of view' his position would be comparable to that of the Garcia Weber children. It resulted from the 'combined effect of Articles 17 and 18 EC' that it is 'now unnecessary to establish any economic link in order to demonstrate an infringement of the right to freedom of movement'.[49]

---

[45] ECJ, case C-353/06, *Grunkin-Paul*, No. 22.

[46] *Ibid.* No. 25.

[47] *Ibid.* Nos. 27-28.

[48] Advocate General Jacobs, Conclusions in case C-96/04, *Standesamt Niebüll*, [2005] ECR I-3561, no. 14.

[49] *Id*.

One author has called the reasoning of the Advocate General a package with a 'highly explosive' content.[50] Now delivery has been accepted by the addressee in Luxembourg. Nevertheless, it would be premature to say that the bomb has gone off in the hands of the Court of Justice. Everything depends on how the powerful new weapon will be employed in the future. It is to be hoped that the ECJ will be careful enough not to use it against national rules that may have a minor impact on the right to freely move and reside in the territory of the Member States. Rather, it should stick to the advice to apply it proportionally.[51]

The desire to give EU citizenship some visible relevance is certainly at the root of the extension of the freedom to move and reside.[52] As this freedom is totally unrelated to the activities of the EC (and therefore not properly placed in the EC Treaty), it would be wrong to measure its interpretation against the purposes of the Community, as has been suggested in the literature.[53] Instead, the standard of measurement can only be Article 18 itself: the bigger the obstacle to the freedom of movement and residence, the more strictly the justification proffered by the national legislator must be scrutinized. What is required, therefore, is a careful weighing of the rights as an EU citizen against the policies that are pursued by the Member States.

C. The Justification of Limitations

One may have legitimate doubts concerning whether the Court of Justice observed these requirements when rejecting the German government's justifications for the application of national law in the *Grunkin-Paul* decision. Sometimes, the grounds for specific holdings are not clearly reasoned. One is left with the impression that the true basis of Germany's arguments was not sufficiently explored.

First, the Court of Justice rejects the government's claim that the application of law of the State of the child's nationality was necessary in order to determine a person's surname with certainty and continuity. It does so by noting that the rule would result in an outcome contrary to what is sought, because every time that the child crosses the border it will change his name.[54] That argument fails to convince, however, since the name change is as much a result of the German rules as of the Danish rules. What the German government meant, in effect, is that the criterion of nationality is necessary because it leads to stable results and is therefore in line

---

[50] HENRICH D., 'Anerkennung statt IPR: Eine Grundsatzfrage', in: *IPRax* 2005, p. 422. ACKERMANN TH. (note 21), p. 150, demanded at least an explanation of the reasons for the application of Article 18 of the EC Treaty.

[51] See KOHLER CH. (note 23), pp. 456-459.

[52] For an account of the symbolic importance of names for EU citizenship, see former Advocate General JACOBS F.G., 'Citizenship of the European Union – A Legal Analysis', in: *ELJ* 2007, 597, at p. 598.

[53] See KOHLER CH. (note 23), at p. 456.

[54] ECJ, case C-353/06, *Grunkin-Paul*, No. 32.

with the need to determine the name accurately. The residency requirement of Danish law, on the contrary, entails the risk that the name will be changed every time the person moves from one state to the other. The Court of Justice (wilfully?) ignored this point, presumably because it found itself unable to prefer the rule of one Member State over the other.

The second justification put forward by the German government was that the criterion of nationality guarantees that siblings have the same name. The Court rejects it by simply stating that this issue would not arise in the case in the main proceedings.[55] This argument is equally dubious. First, it may not be valid in the case decided: even though the parents are divorced, it would not be impossible for them to have another child together. Moreover, the Court should bear in mind that the effects of its decision extend way beyond the dispute at hand: they alter the law of names for the whole European Union. What the Court of Justice is actually doing in *Grunkin-Paul* and similar judgments is engaging in social engineering. From a methodological point of view, it is therefore indispensable to also consider the repercussions of its decision on other cases.

Finally, the Court did not accept the Government's argument that the prohibition on hyphenated surnames would be necessary to prevent the requirement that the next generation give up a part of the family name. It merely noted that such 'considerations of administrative convenience' could not suffice to justify an obstacle to the freedom of movement.[56] Once again, it thereby misses the point. The government was preoccupied with the fact that children with long family names would be forced to give up a part of that name if they wanted to marry and couple their surname with that of the spouse.[57] This is not a matter of administrative convenience, but of preserving cohesion in the family. Of course, it would theoretically be possible to extend the name endlessly by just adding another surname. But that seems to be an unrealistic alternative. It is more probable that the person in question will give up a part of his or her name. That is why German law has chosen to prohibit hyphenated surnames for children. It is interesting to note that Danish law has adopted the same rule;[58] the only difference with respect to German law being that it allows for exceptions if the parents file a specific application.

Overall, there hardly seems to be any justification for a restriction of the freedom to move and reside freely within the territory of the Member States that the Court of Justice might be willing to accept. This is troubling: Should this right really trump any other reasonable policy in fields such as family and name law? If that were so, many other national rules would soon succumb to Article 18 of the EC Treaty. This is not to say that the result reached in the present case was not justified. But the Court missed the opportunity to carefully weigh the freedom of

[55] *Ibid.*, No. 33.

[56] *Ibid.*, No. 36.

[57] See also *supra*, section II.

[58] See *supra*, section III C.

EU citizens to move and reside within the territory of the Member States against the family and name policies pursued by the national legislature.

V. The Effects on Nationality

A. No Preference for Nationality or Residence

It is clear that the decision in *Grunkin-Paul* has a negative effect on nationality as a criterion for determining the applicable law. The German authorities have been prevented from applying their law to a mono-national of their country and were forced to recognize an act rendered in the country of residence.

Before worrying about this effect, it is important to note that the Court of Justice did not hold that residence is to be preferred over nationality as a connecting factor in private international law. It merely said that in the event that the authorities of two Member States issue different acts concerning the surname of a person, the one must recognize the act of the other. The Court's decision would also work the other way around: if the parents of Leonhard Matthias had applied to the Danish authorities to recognize the name of the child given in Germany, they would have been required to satisfy this demand.

It must therefore be emphasized that Article 18 of the EC Treaty does not rule out nationality as a connecting factor in private international law. The decision in *Grunkin-Paul* does not necessarily demand a change in the determination of the applicable law. It would suffice to adapt the national substantive law so that it allows the use of names that have been attributed in another State, as is the case in the law of Ireland and the United Kingdom.[59] In that sense, it is fair to say that the Court's decision is neutral with regard to conflict of laws.

B. The Vanishing Power of Member States over Their Nationals

Nevertheless, one can hardly ignore the repercussions of the judgment on nationality as a connecting factor in private international law. Whereas *Garcia Avello* limited the power of a State over the name of dual-nationals, the Court in *Grunkin-Paul* withdraws the name even of mono-nationals from the competence of their home State. It requires its authorities to accept decisions on the name by the country in which the child is born and resides, even if the child does not possess the nationality of that State.

It thus goes directly against nationality. Many States use it as a criterion to determine the law applicable to the name.[60] This is no coincidence, but rather the

[59] See Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 7, footnote 5.

[60] See *infra*, section C.

expression of a fundamental conviction: the power over a person belongs to its State of origin. The name is part of one's status, which must be determined by the law of that State. It would go too far to call this a rule of customary international law, because there are States which refer the issue of the name to the law in force at the residence or to other legal systems.[61] But it cannot be denied that a State can, if it so desires, submit the status of its own nationals to its law. This is part of its sovereignty over its citizens ('Personalhoheit').

The nationality criterion also reflects quite well the public law nature of names.[62] As a national is submitted to the rules of public law of his or her home State, one of the main questions that may be regulated by that law is how he or she is called.

The decision in *Grunkin-Paul* intervenes deeply in the relationship between nationals and their State of origin. Its result is that the names of persons which were born in another Member State and have their residence there are not necessarily determined by their national law. The home State loses some of its grip over its nationals. If the decision were to be extended to other status-related problems, *e.g.* parentage or marital status, it would result in a serious reduction of the weight of nationality. The latter's effects would be restricted to questions such as the duty to perform military service or the right to vote, but would no longer comprise civil matters such as name or marital status.

One could try to justify that consequence by referring to the new EU citizenship that would supersede the nationalities of the Member States. Yet in reality, the one does not take precedence over the other, but rather presupposes its existence: EU citizens are defined as nationals of the Member States.[63] Therefore, the nationalities within the Union are not replaced, but instead determine the scope of EU citizenship. What *Grunkin-Paul* does, however, is to restrict their effects in favour of the freedom to move and reside freely which is conferred by Article 18 of the EC Treaty. Thus, the competences of the Member States with regard to their nationals are slightly shifted to the Union.

C. Contradiction with Comparative Private International Law

It would be wrong to consider the question of names exclusively from the point of view of private and public international law. What is at stake in private international law is not the search for the competent legal order, but for that which is most closely connected to the case.[64] An analysis of the different national conflicts rules,

[61] See *infra* footnotes 66 and 71.

[62] See *supra*, section I A.

[63] See Art. 17(1)2 of the EC Treaty.

[64] On the limited value of public-international-law arguments based on nationality in conflict of laws, see MANSEL H.-P., *Personalstatut, Staatsangehörigkeit und Effektivität*, Munich 1988, pp. 60-64.

however, reveals that most legal systems refer to nationality when determining matters related to names.

This is the case for the laws on the European continent. Insofar as they provide specific conflicts rules for names, they overwhelmingly employ nationality as the connecting factor.[65] The practice in most other EC Member States goes in the same direction. Only Denmark, Finland and Lithuania choose a different approach and apply the law of residence.[66] Swiss law is original because it submits the name of persons domiciled in Switzerland to Swiss law and that of other persons to the law designated by the conflict rules in force at their domicile.[67] But in any case, it allows everyone to select its national law.[68]

Outside Europe, special conflicts rules for names also refer to the law of origin.[69] In those jurisdictions that do not have such special rules, the applicable law is determined either by referring to the law of the status of the person or the matrimonial law of the parents.[70] This very often leads to the applicability of the national law. A very original rule is provided by the Family Act of the Republic of Congo, which refers all questions related to names to Congolese law.[71] Thus, the method of applying foreign law is abandoned. This is undoubtedly an effect of the

[65] See German Introductory Law to the Civil Code (EGBGB), Art. 10(1); Austrian Federal Act on Private International Law (*Bundesgesetz über das Internationale Privatrecht*) of 15 June 1978, § 13(1); Rumanian Law for the Regulation of Private International Law Relationships (*Legea cu pivire la reglementarea raporturilor de drept internaţional privat*) No. 105 of 22 December 1992, Art. 14; Hungarian Law Decree on Private International Law (*törvényerejű rendelet a nemzetközi magánjogról*) No. 13/1979 of 31 May 1979, Art. 45(1). These laws are reprinted in: RIERING W., *IPR-Gesetze in Europa*, Munich 1997. Some of them can be downloaded from www.glin.org (last visited 21.1.2009).

[66] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 7, footnote 4.

[67] Swiss Private International Law Act (*Bundesgesetz über das Internationale Privatrecht*) of 18 December 1987, Art. 37(1). On the interpretation of this provision, see, *e.g.*, STURM F./ STURM G., 'Der renvoi im Namensrecht', in: MANSEL H.-P./ PFEIFFER TH./ KRONKE H. ET AL. (eds.), *Festschrift für Erik Jayme*, Munich 2004, p. 919 (924).

[68] Swiss Private International Law Act, Art. 37(2).

[69] See, *e.g.*, Burkina Faso Act on Persons and Family (*Code des personnes et de la famille*), Art. 1020; Senegalese Family Act (*Code de la famille*) of 12 June 1972, Art. 842(1); Togolese Family Act (*Code de la famille*) of 31 January 1980, Art. 704; Tunesian Private International Law Act (*Code de droit international privé*), Art. 42. These texts can be found in KROPHOLLER J./ KRÜGER H./ RIERING W. ET AL. (eds.), *Außereuropäische IPR-Gesetze*, Hamburg and Würzburg 1999, or downloaded from <www.glin.org> (last visited 21.1.2009).

[70] See STURM F./ STURM G. (note 67), pp. 927-928.

[71] See Congolese Family Act (*Code de la famille*) No. 073/84 of 17 October 1984, Art. 21. See KROPHOLLER J./ KRÜGER H./ RIERING W. ET AL. (note 69), pp. 428-449, or <www.glin.org> (last visited 21.1.2009).

strong connections of names to public policy that have been previously mentioned.[72]

Apart from such exceptional rules, it is not an exaggeration to say that nationality is the criterion that is most used by the existing private international law systems to determine the law applicable to names. The underlying idea is that how an individual is to be called is best determined under the rules of his or her country of origin. This is in line with the view of Mancini who never tired of emphasizing the usefulness of applying national law to all matters related to a person.[73] Since the time of Mancini, nationality has been in constant retreat with respect to more flexible criteria such as residence. Questions regarding names are one of their last strongholds. This may be due to the fact that these questions need a stable point of reference from the perspective of the countries that cling to the principle of the immutability of names.[74] Moreover, to submit names to a person's national law also increases the commonality of the surname within a family, as the German government highlighted in its observations to the Court of Justice.[75] It ensures that siblings have the same surname, as they have according to most legal systems in the world, and 'preserves relationships between members of an extended family'.[76] It should also not be forgotten that names are often associated with the history, tradition and culture of a given community.[77] Names are composed in accordance with the structure of a national language, which has been called a 'fundamental part of its national heritage' by the Lithuanian government in its observations to *Grunkin-Paul*.[78] The Court did not address these claims convincingly.

A further argument of the German government, according to which nationality makes it possible to determine the name with certainty and continuity,[79] was however less pertinent. The same effect can be achieved by applying the law of the residence at birth. Thus, nationality is not totally indispensable in order to obtain a stable name.

---

[72] See *supra*, section I A.

[73] MANCINI P.S., 'De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles', Report to the *Institut de Droit International*, session of Geneva August 31, 1874, reprinted in MANCINI, P.S., Della nazionalità come fondamento del diritto delle genti (1851, reprint Giappichelli 1994, Eric Jayme ed.), p. 154; also published in 1 *JDI* 221 (1874).

[74] See *supra*, section I B.

[75] Cf. ECJ, case C-353/06, *Grunkin-Paul*, No. 30.

[76] *Id*.

[77] See PALMERI G. (note 21), p. 223.

[78] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 84.

[79] Cf. ECJ, case C-353/06, *Grunkin-Paul*, No. 30.

D. Existing International Conventions

The nationality criterion is not only frequently employed in national conflict-of-laws rules, but is also reflected in most international conventions on names. Numerous examples of treaties concluded under the auspices of the International Commission on Civil Status (ICCS) use it as a criterion. Thus, the Istanbul Convention on changes of surnames and forenames precludes the signatories from changing the names of nationals of another State unless they also possess the nationality of the State that wants to change the name.[80] The Bern Convention on the recording of surnames and forenames in civil status registers provides that in the event of a discrepancy regarding the spelling, the person shall be designated according to the records or documents drawn up in the State of their nationality.[81] Most visible is the connection between nationality and names in the Munich Convention on the law applicable to surnames and forenames.[82] Its Article 1(1) sets out the principle that the surnames and the forenames of a person shall be determined by the law of the State of which he or she is a national.

The most recent ICCS treaty on names, signed in Antalya in 2005,[83] was amended at the last minute to accommodate the Court of Justice's decision in *Garcia Avello*.[84] Its Article 4 reads as follows:

> 1. Le nom attribué dans l'État contractant du lieu de sa naissance à un enfant possédant deux ou plusieurs nationalités est reconnu dans les autres États contractants si cet État est l'un de ceux dont cet enfant a la nationalité.
>
> 2. Toutefois, par dérogation au paragraphe précédent, le nom attribué à la demande des parents dans un autre État contractant dont l'enfant a la nationalité est reconnu dans les autres États contractants. Avis de cette attribution est adressé à l'officier de l'état civil du lieu de naissance de l'enfant, pour inscription dans les registres officiels pertinents.

---

[80] *Convention CIEC no. 4 relative au changement de noms et de prénoms*, concluded in Istanbul on 4 September 1958.

[81] *Convention CIEC no. 14 relative à l'indication de noms et de prénoms dans les registres de l'état civil*, concluded in Bern on 13 September 1973.

[82] *Convention CIEC no. 19 sur la loi applicable aux noms et prénoms*, concluded in Munich on 5 September 1980.

[83] *Convention CIEC no. 31 sur la reconnaissance des noms*, concluded in Antalya, on 16 September 2005. On this convention, see NAST CH., 'La Convention CIEC (n° 31) sur la reconnaissance des noms comme contribution à la résolution de conflits,' Intervention lors du 6ème Congrès de l'Association des officiers de l'état civil, Engelberg, 22.-23.5.2006, available at <http://ciec1.org/Documentation/AccueilDroitComp.htm> (last visited 23.12.2008).

[84] On the procedure that led to the changes, see MONEGER F. (note 9), p. 8; NAST CH. (note 83), p. 4; DE GROOT G.-R. (note 22), p. 118; FRANK R. (note 21), pp. 165-166. On the first version of the convention, see LAGARDE P. (note 21), p. 202.

This rule obliges the authorities of the signatory States to recognize the name attributed by the State in which a child was born. However, it does not discard nationality as a criterion. On the contrary, the other contracting parties are forced to accept only names which are given by a State whose nationality the person in question possesses. Even paragraph 2, which was adopted as a reaction to *Garcia Avello*, presupposes that the child is a national of the State who issued the name to be recognized.[85] At any rate, the provision concerns only dual- or multi-nationals ('enfant possédant deux ou plusieurs nationalités'). It does not apply to a name issued by the State of residence at birth to a mono-national, such as in *Grunkin-Paul*.

What was at stake in the latter case was a name that was changed after birth.[86] One might therefore wonder whether Article 5 of the same convention is applicable:

> 1. Le changement de nom d'une personne possédant deux ou plusieurs nationalités, intervenu dans un État contractant dont cette personne a la nationalité, est reconnu dans les autres États contractants. Toutefois, lorsque ce changement est la conséquence d'une décision de justice ayant modifié l'état des personnes, un État contractant peut refuser de reconnaître ce changement de nom s'il ne reconnaît pas cette décision.
>
> 2. Le paragraphe précédent ne s'applique pas aux changements de nom résultant d'un mariage, d'un partenariat enregistré, d'une dissolution ou d'une annulation de mariage ou de partenariat enregistré.

But this rule equally applies only to persons that have the nationality of two or more States.[87] Thus, it does not concern the situation which was present in *Grunkin-Paul*.

In order to include the new decision in the ICCS system, it would be necessary either to amend the previous conventions or to negotiate a new treaty. It is not uncommon for EC law to replace conventions that are binding between certain Member States. However, it must be borne in mind that two of the ICCS conventions regarding names have also been ratified by Turkey,[88] which is not a member of the Union. There is at least a possibility that the new decision in *Grunkin-Paul* might conflict with the Member States' obligations towards this State, for instance under the Bern Convention. One cannot but conclude that the case law of the Court

[85] See also ICCS, *Rapport explicatif de la Convention CIEC n° 31 signée à Antalya le 16 septembre 2005*, p. 10.

[86] See *supra*, section III C.

[87] See also ICCS, *Rapport explicatif de la Convention CIEC n° 31 signée à Antalya le 16 septembre 2005*, p. 10.

[88] Turkey is a party to the Istanbul and the Bern Conventions, see the link to the list of contracting States cited *infra* note 91.

of Justice shows much less respect for binding treaties with third States than the statutory private international law of the Community.[89]

But the technicalities of international law-making are much less problematic than another consequence that follows from *Grunkin-Paul*. Thus far, nationality is the prevailing connecting factor in all ICCS conventions regarding names. In fact, the ICCS never even envisaged the possibility that the State of which a person is a national could be obliged to recognize a name given by a State that is not connected to that person by nationality. The only means that is foreseen in cases like this is the issuance of a certificate that shows the different names.[90] At no time however was a State forced to accept a name given by the State of residence at birth. Such an obligation is at odds with the general spirit of the current system, which is based on nationality.

It is true that the ICCS conventions have been signed only by a minority of the Member States, even if Advocate General Sharpston downplays their importance too much by saying that 'none has been ratified by more than seven Member States'.[91] The main point is not how many of the Member States or third States have adhered to these treaties. Rather, their importance derives from the fact that *nothing else* exists on the international level. The ICCS conventions are the only treaty models regulating the law of names, and they use nationality as the main connecting factor. Community law has taken a different stance with the ECJ's decision in *Grunkin-Paul*. To include it in the existing international system will require nothing less than a paradigm shift.

E. Socio-demographic Consequences of the Decision

Apart from these legal aspects, the Court's judgment in *Grunkin-Paul* will also change, at least to a certain extent, the way in which societies in the Community function. Until now, in most countries, the surname of mono-nationals was determined in conformity with the law of their home State, without exception. Now there will be some citizens of a State who may have a name that is determined differently. That difference might not be as minor a one as in *Grunkin-Paul*. It suffices to think of legal systems according to which the family name precedes the

[89] See, *e.g.*, Rome I Regulation, Art. 25(1), and Rome II Regulation, Art. 28(1).

[90] *Convention CIEC no. 20 relative à la délivrance d'un certificat de diversité de noms de famille*, concluded at the Hague on 8 September 1982. On that convention, see LAGARDE P. (note 21), p. 201.

[91] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 8. The Istanbul Convention has effectively been signed by eight Member States: Austria, France, Germany, Italy, Luxemburg, the Netherlands, Spain, and Portugal. See the list of contracting States on the website of the ICCS: <http://web.lerelaisinternet.com/CIECSITE/SignatRatifConv.pdf> (last visited 23.12.2008).

forename.[92] A person called that way will hardly be recognizable as a French, Italian or German citizen.

As the Court of Justice rightly remarked in *Garcia Avello*, even now 'different national systems for the attribution of surnames coexist in the same Member State',[93] but that was true only for names of persons within a given territory. It will now apply to people with a common nationality. The surnames of citizens of the same State will no longer necessarily be determined in the same way.

Obviously, this will have its most visible effects on immigrants. The logic followed by the judgment in *Grunkin-Paul* with regard to their integration is one of tolerating differences rather than forcing assimilation.[94] Persons born in another State can keep the name they have received there and 'import' it to the State of their nationality. Thus, multiculturalism is favoured over national uniformity.

These consequences are important and underline the political dimension of the Court's decision. But they should not cause anyone to decry them as the end of Western civilization. After all, the Community is evolving in the direction of the Common law States, which already have an extremely liberal regime.[95] Undoubtedly, this has something to do with their history of receiving huge numbers of immigrants. The same liberalism was already present in classic Roman law.[96] It also corresponds to the modern tendency to stress the personality aspect of names and to their connection to human rights.[97]

It is true that, from the point of view of today's continental laws, the resulting regime comes close to disorder. The nationality of a person can no longer be deduced from his or her name. But even now, the way in which a surname is determined is a weak indicator of nationality, because it can be deceptive in the case of multinationals. Whether or not a person is a citizen of a State can be seen by his passport. There is no need for the name to show it as well.

Moreover, it must be borne in mind that the decision does not affect all or even a major part of a people. It applies only to persons born in a State different from that of their nationality whose conflicts rules refer to the place of birth when determining the law applicable to names. The risk that parents could circumvent their national law by moving to such a State and giving birth there seems minor. Even though there are, indeed, people who like more liberal laws, the cost of transferring one's residence to another State seems prohibitive. In addition, the

---

[92] As is the case under Hungarian law, see Advocate General Jacobs, Conclusions in case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 6. However, under the conflict-of-laws rules of Hungary, the name will be determined according to nationality, not residency. See *supra* note 65. See also ICCS (note 12), p. 3.

[93] ECJ, case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 42.

[94] See, with respect to *Garcia Avello*: PALMERI G. (note 21), p. 222.

[95] See Advocate General Jacobs, Conclusions in case C-148/02, *Garcia Avello*, [2003] ECR I-11613, No. 14; Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 7, footnote 5.

[96] See STURM F./ STURM G. (note 67), p. 619.

[97] See *supra*, section I A.

Advocate General has indicated that a refusal to register the name might be justified in cases in which there is no 'real connection' of the person with the place of birth.[98]

Obviously, there are disadvantages to the judgment. One of them will be a departure from the traditional rules of name determination. Another is that there will likely be an increase in the number of strange names that may be hard to spell and to pronounce in their State of origin. A further drawback is that persons born outside their State of nationality will have more liberty with regard to how they are called than those who were born at home, which is not without problems from the point of view of equal treatment.

But those disadvantages must be weighed against the benefits. The effects of the judgment seem to be rather positive for immigration within the Union. Its most important advantage is that limping legal relationships are reduced. The annoying situation of a person being called differently in different places inside the Union will be avoided. This will indeed bolster the exercise of the freedom of movement and residence. Moreover, plurality with regard to surnames will be introduced in national law. The surnames of the citizens of one State will no longer necessarily all be determined in the same way. As a result, it will not be possible to spot an immigrant with a different nationality just by such person's last name. One potential criterion for discrimination is vanishing.

It is true that *Grunkin-Paul* demands a radical shift from almost universally accepted principles of public and private international law. But from the point of view of Community law, it represents an important step to further common EU citizenship. When seen from a European perspective, the resulting names in the Member States will be much more harmonious than they have ever been before, precisely because some disorder is now introduced into the law of States that adhered to a rigid name regime.

VI. Optional Recognition

A. Recognition vs. Application of Foreign Law

The Court of Justice's decision in *Garcia Avello* had re-opened a discussion about the preferred way to avoid limping relationships within the European Union: is it better to unify the rules of private international law or to force recognition of foreign decisions?[99] The debate sometimes became ideological.

---

[98] Advocate General Sharpston, conclusions in case C-353/06, *Grunkin-Paul*, No. 86.

[99] See, e.g., JAYME E./ KOHLER CH., 'Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?', in: *IPRax* 2001, pp. 501-514; LAGARDE P., 'Développements futures du droit international privé dans une Europe en voie d'unification: quelques conjectures', in: *RabelsZ* 2004, pp. 225-243; COESTER-WALTJEN D., 'Das

With regard to names, it would be unrealistic to expect that the States will unify their conflicts rules at any time in the near future. Moreover, harmonized private international law does not guarantee that the administrative bodies involved in the determination of names will apply the foreign law correctly. Indeed, it is not even certain that they will apply it at all, since they often do not follow the written conflicts rules.[100] Furthermore, many of the questions regarding names are not finally decided by black letter substantive law, but are explicitly left to the discretion of the agencies, for instance with regard to the grant of a voluntary name change. Therefore, recognition is the only promising way to avoid limping relationships.[101]

Treaty law is already evolving in this direction. The latest convention elaborated by the ICCS does not determine the applicable law directly, but instead requires the signatory States to recognize foreign decisions regarding names.[102] The unification of private international law, which had been at the centre of earlier activities[103], has been pushed into the background.

The Court of Justice's decisions in *Garcia Avello* and *Grunkin-Paul* are perfectly in line with the tendency towards more recognition instead of the application of foreign law. However, as has been rightfully remarked, one drawback is that they cannot be accompanied with the reservations or provisions regarding the scope that are usual in the case of conventions.[104] Moreover, the judgments of the Court of Justice lack the precise conditions and procedures which are set out in existing treaties for the recognition of foreign names.[105] Names given in other States are forced upon the Member States without any caveats or clear indications on how to apply them.

This is indeed regrettable. Case law is a weapon that is often cruder than treaty law. It is, however, the only one available to the ECJ. As long as the States do not agree on common rules for names, limping legal relationships can only be

---

Anerkennungsprinzip im Dornröschenschlaf?' in: MANSEL H.-P./ PFEIFFER TH./ KRONKE H. et al., *Festschrift für Erik Jayme*, vol. I, Munich 2004, pp. 121-130; MANSEL H.-P., 'Anerkennung als Grundprinzip des Europäischen Rechtsraums', in *RabelsZ* 2006, pp. 651-731. In the context of the law of the name, see ACKERMANN TH. (note 21), at p. 152; MÖRSDORF-SCHULTE J. (note 21), at p. 321; HENRICH D. (note 50); LAGARDE P., Remark in 'Débats du 26 novembre 2004' after the communication by MONEGER F., *Travaux du Comité français de droit international privé* 2004-2005, at p. 23.

[100] For an account of practice, see STURM F./ STURM G. (note 67), pp. 925-926.

[101] In the same vein, FOYER J., remark in 'Débats du 26 novembre 2004' after the communication by MONEGER F., *Travaux du Comité français de droit international privé* 2004-2005, p. 24.

[102] See *Convention CIEC n° 31 sur la reconnaissance des noms*, *supra* note 83, Arts. 4 and 5.

[103] See *Convention CIEC n° 19 sur la loi applicable aux noms et prénoms*, *supra* note 82.

[104] HENRICH D. (note 50), pp. 422-423.

[105] HENRICH D. (note 50), p. 423.

avoided by deciding that a State must recognize the name given by another Member State. One can hardly blame the Court of Justice for having taken the step forward, even if the conditions and consequences are not precisely spelled out. The Member States remain free to impose a different regime if they wish to do so.[106]

B. The End of Conflict-of-Laws Rules with Regard to Names?

The decisions in *Garcia Avello* and *Grunkin-Paul* naturally raise a general methodological question: will private international law be eclipsed by recognition? The short answer is no. Although conflicts rules regarding names will lose their impact to a considerable extent due to the case law of the ECJ, they have not become useless. They will still be applied when the name is given at birth. The State whose decision must be recognized determines the applicable legal system by using its rules of private international law. These rules will not be changed as they are beyond the reach of Community law.[107] Moreover, in the majority of cases a need for recognition will never appear. Most persons will be attributed a name by just one State. The situations in which decisions are issued by different authorities will remain rare.

It is therefore too early to lament the end of private international law regarding the name as we know it since the times of Savigny. It will simply be superseded in some cases in which it leads to limping relationships. Conflict of laws and Community law will live side by side, even if their interaction is not without problems.[108]

C. Recognition Combined with Party Autonomy

Although the discussion about the dichotomy between applying foreign law and recognizing decisions of other States is an important one, it is in some way misleading. *Grunkin-Paul* does not simply install a system of full faith and credit for names within the European Union. It does not force the authorities of one State to recognize every act that has been previously rendered by those of another Member State. Instead, it does something very different: it gives the parents the power to choose which of the different acts shall be valid. In the literature, this has been referred to as an 'option of legislation'.[109] This label would be fitting for the Swiss Private International Law Act, which indeed allows the individual to choose

[106] See also *infra*, section VII, where legislative action will be suggested.

[107] LAGARDE P., Remark in 'Débats du 26 novembre 2004' after the communication by MONEGER F. (note 99), p. 23.

[108] See *infra*, section 4 D.

[109] MONEGER F. (note 9), pp. 9, 13 ('option de législation'); QUIÑONES ESCÁMEZ A. (note 21), p. 861 ('opción de legislación').

the law that will be applied to its name.[110] EC law, however, does not provide for a choice of the applicable law, but only between conflicting decisions. Therefore, it is more precise to speak of 'optional recognition'.

In order to demonstrate the particularity of optional recognition, it is worthwhile to compare it with recognition regimes that have been in existence until now. The Brussels I Regulation, which excludes questions of status[111], requires recognition of judgments given in other Member States.[112] A party does not have a say concerning which decision will be recognized: if the judgment is contradicted by a judgment of the forum State, the latter prevails; in case of a conflict with a judgment of another Member State, the earlier decision must be recognized.[113]

In contrast, under *Garcia Avello* and *Grunkin-Paul* it is up to the parties to decide which of the conflicting judgments must be accepted by the other Member States. This introduces an element of individual will in the area of recognition that was previously unknown. There are several advantages to this solution which might have influenced the Court of Justice to adopt it.

First, the ECJ is spared from making a potentially dangerous decision: it need not decide whether it prefers nationality or residence as the criterion for the law applicable to names.[114] It can simply leave this decision up to the individual will of the parents.

Second, free choice insulates names from the principle that the prior act must be recognized.[115] If applied to names, this principle would often lead to purely coincidental results. Furthermore, it would give parents an incentive to hide the birth from the authorities of a certain State with an unwelcome legal system. With the principle of free choice, such camouflage is no longer necessary.

Finally, and most importantly, the freedom to choose the act that must be recognized increases individual autonomy with regard to names. The latter aspect is in conformity with the development of the substantive law. It has been observed that in the national legal systems, the function of the name as a means of identification is increasingly replaced by the identity problem; the name therefore loses its public policy character and becomes an institution that is concerned with the private individual.[116] That implies an extension of liberty. Private international law now follows suit.

It must, however, be borne in mind that the liberty thus introduced is not unlimited. It cannot be compared to that which reigns, for instance, in the area of

---

[110] See *supra*, note 68.

[111] Council Regulation (EC) No. 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J.* No. L 12 of 16 January 2001, p. 1, Art. 1(2)(a).

[112] Brussels I Regulation, *supra*, note 111, Art. 33(1).

[113] See Brussels I Regulation, note 111, Art. 34 Nos. 3, 4.

[114] How undesirable such a decision would have been has been spelled out by Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 50.

[115] See ACKERMANN TH. (note 21), p. 153.

[116] See MONEGER F. (note 9), p. 9; PALMERI G. (note 21), p. 224.

contract law. The parents cannot choose any legal system they like. They can only select between conflicting decisions that have been rendered by the State of birth or by a State of nationality.

D. Questions Left Open by the Court of Justice

It has already been said that case law is necessarily cruder than treaty law because it does not set out a comprehensive legal regime with conditions and procedures to apply.[117] Nevertheless, it is remarkable how many practically important questions have been left open by the decision in *Grunkin-Paul*.

The most crucial of them concerns the modalities of the choice: what formal requirements must be fulfilled by the parents?[118] Must the choice be declared to an official, or is an authenticated act necessary? How much time do the parents have to exercise the option? Is it binding or can it be revoked?[119] What if the parents do not agree on the name? Under what law would their conflict be decided?[120] Can the child choose itself after it has reached the age of majority? All these questions need definite answers, which the Court of Justice must provide in the future.

Another point that is still open concerns the precise contours of the residency requirement. Advocate General Sharpston took pains to highlight the fact that the child's residence in Denmark was 'habitual', 'genuine' and 'stable'.[121] The Court imposed on its ruling the condition that the person 'was born and has been resident since birth' in the Member State that has given the name.[122] However, this condition was not fulfilled in the case at hand when the judgment was rendered, because in 2001-2002 little Leonhard Matthias had lived for some months with his parents in Germany.[123] Thus, the details of the residency requirement remain somewhat unclear. In particular, it has not been determined whether the child must be resident in the State when the name is given, or when recognition is requested.

A further question that is left undecided is how much weight should be given to the circumstances of birth. As has been seen, the Court of Justice was careful to limit the holding of its decisions to persons who are 'born' in a Member

---

[117] See *supra* A.

[118] See ACKERMANN TH. (note 21), p. 153.

[119] See *id*. For a most generous possibility to revoke and change a choice of name, see the plea by STURM F., 'Namenserklärungen Auslandsdeutscher vor Berliner Hürden?', in: COESTER M./ MARTINY D./ PRINZ VON SACHSEN GESSAPHE K.A. (eds.), *Privatrecht in Europa, Festschrift für Hans Jürgen Sonnenberger*, Munich 2004, pp. 711 (725).

[120] See LAGARDE P. (note 21), p. 200.

[121] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, Nos. 51 and 87.

[122] ECJ, case C-353/06, *Grunkin-Paul*, No. 39.

[123] See Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 21.

State other than that of which they possess nationality.[124] Why is that the case? The birth requirement is written nowhere in Community law. The freedom of movement is not limited to persons having been born in another Member State. Consequently, it seems that a European citizen who takes up residency in another Member State after birth and obtains a name change there must also have a right of recognition of that name vis-à-vis his or her home State. That would considerably extend the import of the Court of Justice's reasoning.

The fate of gender specific last names (*e.g.* 'Karenina' from 'Karenin') and of last names that are derived from the first name of the father or mother is also open.[125] What about forenames? Do they also fall under the new case law? And middle names?[126]

Moreover, circumstances of name changes other than voluntary application must be taken into consideration, such as adoption, marriage or divorce. They all might have an impact on the surname. Must they be recognized by other Member States?

Furthermore, it has not been decided what grounds could be used to justify a refusal to recognize a name given in another Member State. The question is of particular practical relevance since many legal systems contain prohibitions of certain names that are part of their public policy. It is unclear whether they can be enforced in spite of the freedom of movement and residency in the territory of the Member States. Advocate General Sharpston has indicated that some justifications are imaginable, for instance with regard to ridiculous or offensive names.[127] But there are many other grounds that need to be considered. It suffices to think of certain titles of nobility that are prohibited in some countries but part of the family name in others. They might pose intricate questions for Community law.

Finally, and importantly, it is an open question whether the new doctrine of the Court of Justice applies to other status-related problems. Its implications for capacity, gender, marital status, adoption or parentage are totally unclear. If one follows the reasoning of the Court, it seems that the freedom of movement must have consequences for them as well. Many new references for a preliminary ruling are to be expected.

E. The Situation from the Point of View of Third States

A problem that the Court of Justice could not consider but which is nevertheless important in practice is the name from the point of view of third States. Are they also bound by the Court's ruling? The question will be considered in turn for Member States and non-Member States of the EU.

---

[124] See *supra* introductory paragraph IV.

[125] See DE GROOT G.-R./ RUTTEN S. (note 21), p. 279.

[126] *Id.*

[127] Advocate General Sharpston, conclusions in case 353/06, *Grunkin-Paul*, No. 86.

If one were to take it literally, the holding of *Grunkin-Paul* does not concern every Member State, but only that Member State whose nationality the person possesses. The same was true for the decision in *Garcia Avello*, which therefore was interpreted as not being directly binding on third Member States.[128] In that case, however, the Court based its reasoning on the prohibition of discrimination on grounds of nationality. It is possible to argue that this prohibition is not violated by a third State C which applies to a dual-national of State A and State B the law of the latter State. The legal basis of *Grunkin-Paul*, the freedom of movement and residence, is very different. It applies throughout the Union and can be violated by the State of origin as well as by any other State.[129] Thus, it seems unavoidable that the holding of the decision must be respected by third Member States as well.

The situation of non-Member States is different. As the freedom of movement and residence does not apply to the territory of those countries, the holding of *Grunkin-Paul* is not directly binding on them. This means, in the first place, that it does not apply to persons moving from or to third States. With regard to these persons, it is up to the national law to decide whether it wants to allow optional recognition or not.[130]

The more delicate question is how the name of an EU-citizen in a situation like that of Leonhard Matthias 'Grunkin-Paul' will be determined by third States. As was pointed out above, most legal systems submit the name to the national law of the person.[131] This would mean that, in the case at hand, German law would be applicable. The question is whether a third State will take the issuance of a different name in Denmark into consideration when establishing the name of a German national. Would *e.g.* a Tunisian registry accept the name 'Grunkin-Paul' in our case, although under its conflicts rules only German law applies to the name?

Without conjecturing about what it actually will do, it can at least be said that it should do so. The law of the Member States is not only composed of national legislation and judicial decisions, but as well of the EC Treaty which applies as supranational law throughout the European Union. Thus, acts and decisions that have been rendered by another Member State and which must be recognized according to the holding of *Grunkin-Paul* need to be taken into consideration when the law of Germany or any other State of the Union is determined.

A problem arises, however, as long as recognition of the name issued by the birth State has not been sought and granted by the home State. Must the third State – be it a Member of the EU or not – accept it nevertheless if the parents invoke it? Thus far, it seems that the answer is negative. The Court's holding in *Grunkin-Paul* gives the parents a right to recognition of a decision, not a right to the use of a specific name. As long as the acts or decisions of the State of birth have not been recognized by the home country, they do not need to be recognized by third States.

---

[128] See MÖRSDORF-SCHULTE J. (note 21), p. 320.

[129] Accord MÖRSDORF-SCHULTE J. (note 21), p. 320.

[130] See DE GROOT G.-R./ RUTTEN S. (note 21), p. 280.

[131] See *supra*, section V C.

Any other result would lead to enormous uncertainty, because the parents might change their mind in the interim and thus create themselves a 'limping name'.

VII. Summary and Outlook

In *Grunkin-Paul*, the Court of Justice has reached another milestone in the conflict of laws regarding names after its seminal decision in *Garcia Avello*. For the first time, it has forced the home State of a mono-national to recognize an act issued by the State in which its citizen was born and is residing. Although the Court shied away from an outright condemnation of nationality, this will contribute to its further demise as a criterion in private international law. The home State is no longer exclusively competent to determine the name of its citizens who possess no other nationality.

Parents can now effectively choose between the name given to their child by the State of birth and the name according to his or her national law. There is no prevalence of the name issued by the home State. Nor, however, is there a priority of the name given by the State of birth. The parents can discard either of them.

As the legal basis of its decision, the Court of Justice has used the freedom of movement and residence laid down in Article 18 of the EC Treaty. The strictness with which it rejected any possible justifications indicates that the Court is prepared to use its powers to the full extent. The judgment demonstrates a willingness to end limping legal relationships in the European Union at almost any cost.

There will probably be considerable ramifications for other matters, such as gender, capacity, marital status, adoption or parentage. A number of important practical problems have not been dealt with by the Court. Moreover, there is an obvious tension with international conventions concluded under the auspices of the ICCS.

The Court of Justice has thus raised more questions than it has actually answered. It would probably take years if it were to decide them on a case-by-case basis. Against this background, one should ask whether it would not be preferable for the Community legislator to address the issues by way of a directive or regulation. As a possible legal basis, it could rely on the powers conferred upon it by Articles 61(c), 65(a), third indent, and 65(b) of the EC Treaty. I am fully aware that this proposition is likely to arouse the anger of those who are against any further incursions by the European Community into the field of private international law. However, it may be permitted to ask whether we would not be better off with a comprehensive and logical statutory regime than with a case law that is full of uncertainties.

ROME I REGULATION: SELECTED TOPICS

THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

SOME GENERAL REMARKS

Andrea BONOMI*

I. The Adoption of the Rome I Regulation

The final text of the 'Rome I' Regulation on the Law Applicable to Contractual Obligations was adopted by the European Parliament and the Council of the European Union on 17 June 2008,[1] less than one year after the adoption of the 'Rome II'

* Professor at the University of Lausanne.

[1] 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'), in: *O.J. of the European Union*, L 177, of 4 July 2008, at 6 *et seq.* For the first commentaries, see: CASHIN RITAINE E. / BONOMI A. (eds.), *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles*, Zurich 2008 (with contributions by WILDERSPIN M. / LEIN E. / NICHOLAS C. / LEIBLE S. / ANCEL B. / HEISS H. / MANKOWSKI P. / GARCIMARTIN ALFÉREZ F.J. / CASHIN RITAINE E. and BONOMI A.); GARCIMARTIN ALFÉREZ F. J., 'The Rome I Regulation: Much ado about nothing?', in: *The European Legal Forum* 2008, atI-1 *et seq.*; LEIBLE S. / LEHMANN M., 'Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht («Rom I»)', in: *Recht int. Wirtschaft* 2008, at 528 *et seq.*; UBERTAZZI B., *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milan 2008; WAGNER R., 'Der Grundsatz der Rechtswahl und das mangels Rechtswahl

Yearbook of Private International Law, Volume 10 (2008), pp. 165-176

Regulation on the law applicable to non contractual obligations. Thus, more than thirty years after a 1972 draft on the law applicable to contractual and non-contractual obligations, which was soon abandoned and replaced by the text of the future Rome Convention, the conflict of laws rules concerning the entire field of obligations are unified in 26 Member States of the European Union, Denmark being the only exception.[2]

The conversion of the Rome Convention into an EC Regulation had been prepared by a Green Paper of 2003[3] and by the Proposal presented by the European Commission in 2005.[4] Such conversion was necessary in order to assure a formal consistency amongst the various private international law instruments adopted by the European institution since 2000 on the basis of Arts 61 and 65 of the EC Treaty. The vast majority of these instruments – and in particular all private international law texts – have been adopted in the form of regulations. The Rome Convention was the last remaining text of European private international law which was still in the form of an international treaty. Because of the complementarity of all these instruments, the Commission rightly pointed out in the Green Paper that the rules on jurisdiction and choice of law applicable to contractual and non-contractual obligations 'form an entity', and maintaining an instrument which has the form of a treaty 'does not improve the consistency of this entity'.[5] This is important not only from a formal point of view, but also in order to facilitate the uniform and teleological interpretation of each individual text.[6]

---

anwendbare Recht (Rom I-Verordung)', in: *IPRax* 2008, at 377 *et seq*. See also the file on Regulation Rome I in: *Dalloz* 2008, at 2155 *et seq.* (with contributions by LEMAIRE S. / BOLLÉE S. / D'AVOUT L. / AZZI T. and BOSKOVIC O.) and BOSCHIERO N. (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Turin 2009 (to be published).

[2] The United Kingdom has finally decided to 'opt in' to the Rome I Regulation. See the press communication of the session of the Council of the European Union of 24 and 25 July 2008, No. 11653/08, at 25.

[3] 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation', COM(2002) 654 final, of 14 January 2003. On this text see BONOMI A., 'Conversion of the Rome Convention into an EC Instrument: Some Remarks on the Green Paper of the EC Commission', in this *Yearbook* 2003), at 53-98; BOSCHIERO N., 'Verso il rinnovamento e la trasformazione della convenzione di Roma: problemi generali', in: PICONE P. (ed.), *Diritto internazionale privato e diritto comunitario*, Padoue 2004, at 319 *et seq.*; LEIBLE S. (ed.), *Das Grünbuch zum internationalen Vertragsrecht*, Munich 2004.

[4] Proposal of the Commission of 15 December 2005 (COM(2005) 650 final). For an analysis of the proposed regulation, see FRANZINA P. (ed.), *La legge applicabile ai contratti nella proposta di regolamento 'Roma I'*, Padua 2006; MANKOWSKI P., 'Der Vorschlag für die Rom I-Verordnung', in: *IPRax* 2006, at 101 *et seq.*; FERRARI F. / LEIBLE S. (ed.), *Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom I-Verordnung*, Jena 2007; *Il nuovo diritto europeo dei contratti: dalla convenzione di Roma al regolamento 'Roma I'*, in: Quaderni della Fondazione Italiana per il Notariato 2007.

[5] Green Paper, § 2.2.

[6] See *infra* in this *Yearbook*, the contribution by LEIN E.

The conversion of the Convention into a Regulation also entails some obvious practical advantages. The new regulation enters into force on the date provided for therein[7] and will be directly applicable as of 17 December 2009 in all Member States concerned, without the necessity of ratification by the national institutions. This will also be true for all modifications as they may appear appropriate in the future and for any future new Member States of the EU. It will thus not be necessary to conclude separate accession conventions, as was the case in the past,[8] nor to wait until the conclusion of the long ratification procedures within the Member States. Another significant advantage of the conversion is the fact that it will automatically confer on the European Court of Justice (ECJ) the jurisdiction to interpret the new instrument, thus promoting its uniform application.[9]

With regard to its content, the text of the Regulation is far less innovative than one might imagine (and perhaps fear) based on the Green Paper and the Commission's Proposal.[10]

The most significant changes concern the determination of the applicable law in the absence of choice (Art. 4). Several contributions included in this special section of the Yearbook analyse the treatment of a particular contract under the new Art. 4 of the Regulation (transfer of intellectual and industrial property, distribution, franchising and financial services). Others discuss the new special rule for insurance contracts (Art. 7) and the changes concerning the notion and effects of 'overriding mandatory provisions' (*lois de police*, Art. 9). New provisions have also been included for contracts of carriage (Art. 8), contractual subrogation (Art. 14), multiple liability (art. 16) and set-off (Art. 17).

Other rules of the Regulation simply repeat the rules of the Rome Convention with only minor modifications. This is the case of Arts. 1 (material scope), 2 (universal application), 3 (freedom of choice), 6 (consumer contracts), 8 (individual employment contracts), 10 (consent and material validity), 11(formal validity), 12 (scope of the law applicable) 13 (incapacity) and 18 (burden of proof). In this short introductory text, we will briefly comment on three of these rules, those of Arts. 2, 3 and 4.

[7] According to Art. 29, the Regulation entered into force on the 20th day following its publication in the *Official Journal of the European Union*, *i.e.*, on 24 July 2008.

[8] See the 'accession conventions' of 1984 (Greece), 1992 (Spain and Portugal) and 1996 (Austria, Finland and Sweden).

[9] Art. 68 EC-Treaty reserves to the national courts of last instance the power to refer an interpretative question to the ECJ. The same limitation was also provided by the First Protocol on the interpretation of the Rome Convention, which entered in force in 2007.

[10] See also WILDERSPIN M., in: CASHIN RITAINE E. / BONOMI A. (note 1), at 13 ss.

II. Universal Application

The scope of application *ratione loci* of the Regulation is unchanged. Like the Rome Convention, the Regulation is applicable *erga omnes*, *i.e.*, even in the absence of reciprocity and if it leads to the application of the law of a third State (Art. 2).

This approach reflects that of the Rome II Regulation (Art. 3) and of the newly adopted EC Regulation on maintenance obligations, at least with respect to the rules on applicable law.[11] The same approach will most probably be followed in future proposals concerning wills and successions and on matrimonial property *régimes*.

Universal application has the obvious merit of avoiding the coexistence of two different sets of applicable conflict rules, respectively, in purely 'intra-European' situations and in relation to third States. From the point of view of national courts and lawyers, this is an important simplification.

It is true that certain European instruments in the field of international civil procedure limit their scope of application to situations having a significant connection with one Member State (such as the domicile of the defendant, or of one of the parties, in a Member State, or the fact that proceedings are pending, or that a decision has been rendered in another Member State). It should be noted, however, that such considerations as reciprocity and 'mutual trust' play a much more significant role with respect to jurisdiction and recognition of judgments than in choice-of-law. This is true, in particular, in a field like that of contracts, where the parties' freedom is widely recognized.

Moreover, the *inter partes* limitations of several jurisdictional rules of the Brussels Convention and Regulation have proved, in certain situations, not to be fully justified.[12] The European institutions are now considering the opportunity of including in the Brussels I Regulation a set of residual grounds of jurisdiction applicable in the relation to third States.[13]

---

[11] In this respect, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance (in: *O.J.*, L 7 of 10 January 2009), simply refers in its Art. 15 to the Hague Protocol on the law applicable to maintenance obligations of 23 November 2007, which also has a universal scope of application (Art. 2). See BONOMI A., 'The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations', see *infra* in this *Yearbook*.

[12] See Art. 3(2) of the Italian Private International Law Act of 31.5.1995 No. 218, which provides for the application of sections 3 to 5 of the Brussels Convention 'even if the defendant is domiciled in a third State'. The national jurisdictional systems of other (current or future) Member States are almost entirely modeled on that of the Brussels Convention: this is for instance the case in Spain and in Hungary.

[13] See the *Study on Residual Jurisdiction*, prepared by prof. NUYTS A. and accessible at the address <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>.

These considerations show that the distinction between 'intra-Community' and external situations is not always necessarily justified. This is also confirmed – to a certain extent – by the United States experience, since it is well known that the American private international law rules, originally conceived for interstate situations, are often applied to international cases. This is not only true for choice-of-law rules, but also for fundamental jurisdictional principles such as Due Process.[14]

Another argument in favour of an *erga omnes* approach can be inferred from the functional link existing between choice-of-law rules and the free circulation of judgments. One of the main *raisons d'être* of the Rome Convention is to prevent *forum shopping*, a phenomenon that – in the absence of uniform conflict rules – can be favoured by the principles of the Brussels Convention and Regulation (concurrent *fora*, a strictly chronological *lis pendens* rule and a simplified mechanism of recognition and enforcement of foreign decisions). Now, it is easy to observe that the interest of uniformity not only exists in purely 'intra-Community' cases, but also in presence of 'external' elements, and even if the applicable law is that of a third State.[15] The establishment of an 'area of freedom, security and justice' implies that the place of the proceedings should have no influence on the issue of the dispute. In the absence of uniform substantive rules, the only way to achieve this result is by way of uniform conflict rules applicable *erga omnes*.[16]

III. Freedom of Choice

A. A Broad Recognition of Party Autonomy, But No Choice of Non-State Rules

The freedom of choice of the applicable law by the parties, which was one of the cornerstones of the Rome Convention, has been reaffirmed in the Regulation.

As was the case under the Convention, the parties to the contract will have the right:

[14] The extension of personal jurisdiction over a defendant domiciled in a foreign State must be in accordance with the Due Process clause and the 'minimum contact test', such as in the case of a defendant domiciled in sister state.

[15] If, for instance, a US-corporation, who has delivered goods to the Belgian branch of a Dutch company, wants to bring proceedings for the payment of the purchase price, the 'Brussels I' Regulation is applicable and gives the plaintiff the choice between the Dutch and the Belgian courts (domicile of the defendant, Art. 2 – place of delivery and seat of the branch, Arts. 5(1) and 5(5) of the 'Brussels I' Regulation). In the absence of an *erga omnes* choice-of-law instrument, the conflict rules in Belgium and in The Netherlands could be different, and lead to diverging results. Nevertheless, the decision of the court first seized will work to the benefit of the European system of mutual recognition.

[16] The elimination of the reference to the 'proper functioning of the internal market' in Art. III-170 of the Draft Treaty establishing a Constitution for Europe (note 21) appears to confirm this point of view.

- to choose the law of a State even if their relationship has no other objective connection with that State;

- to 'split' the contract by making a partial choice of law, and

- to conclude a choice of law agreement at any time, *i.e.*, before or even after the conclusion of their contract.

On the question of the admissibility of a choice of non-State rules, however, the final text of the Regulation takes a rather conservative approach. Contrary to the Commission's Proposal, which allowed the choice of 'the principles and rules of the substantive law of contract recognised internationally or in the Community',[17] the final text of Art. 3 still refers, as did the Rome Convention, to the 'law chosen by the parties', thus implicitly excluding the choice of such 'rules of law' not belonging to a national system.

This approach is implicitly confirmed by paragraph 13 of the preamble to the Regulation, where it is affirmed that the Regulation 'does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.' This possibility has always been recognised under the Convention, because it flows from the contractual freedom that the parties normally enjoy under domestic law.

The effects of incorporation, however, are obviously different from those of a true choice of law. Since the 'choice' of non-State rules is not recognised as a valid choice of law, the applicable law is to be determined through the objective connecting factors of Art. 4 of the Regulation. The 'incorporation' is only effective insofar the parties are free to determine the content of their contract under the applicable domestic law. As a result, *all* mandatory rules concerning the applicable law (and not only the 'overriding mandatory rules' of Art. 9) always take priority over the non-State rules chosen by the parties.[18]

As we have previously mentioned,[19] this solution is not satisfactory because it implies an unnecessary restriction of party autonomy. It is inconsistent with the admission of *dépeçage* in Art. 3 of the Regulation and it also runs counter to the solution that will normally prevail if the dispute is submitted to arbitration, since

[17] Art. 3(2) of the 2005 Proposal. The Explanatory Memorandum described such non-State rules as including the 'Unidroit Principles, the Principles of European Contract Law and a possible future optional Community instrument', but excluded 'the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community.' That text also provided that '[…] questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation'.

[18] This means, for instance, that in the case of the choice of the UNIDROIT principles, the rules on lack of consent of the law applicable to the contract (which are regarded as mandatory under most national laws) will always prevail on the Articles 3.4 to 3.9 of the Principles.

[19] BONOMI A. (note 3), at 66.

arbitrators tend (and are generally allowed) to respect the parties' choice even if it refers to non-State rules.[20]

B. Tacit Choice of Law and Choice of Forum

The Regulation is also silent on another issue, which was discussed in the Green Paper: that of implicit choice of law. According to the second sentence of Art. 3(2) of the Convention, the choice does not need to be express, but can also be 'demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case'. In its Proposal, the Commission intended to render more precise this vague wording by establishing that a presumption of choice of law should be inferred by a choice of forum, at least when the latter confers jurisdiction upon the courts of a Member State.[21]

The proposed solution was contrary to that adopted by courts in some Member States. It was also in opposition to a proposal made by the European Group of Private International Law, who had suggested indicating that 'the choice of a court or of the courts of a given State *shall not* in itself be equivalent to a choice of the law of that State' (emphasis added).[22] The final text of the Regulation is silent on this issue, but the preamble states (recital 12) that an exclusive choice of forum agreement 'should be one of the factors to be taken into account in considering whether a choice of law has been clearly demonstrated'.[23]

C. Purely 'Intra-Community' Contracts and Mandatory EC Provisions

In the system of the Rome Convention, freedom of choice – although very broad – is subject to some restrictions in order to prevent derogation from mandatory rules. Most of these restrictions have been retained in the Regulation, although with some more or less important modifications.

A first restriction results from Art. 3(3) and applies to purely 'internal' contracts. With respect to these contracts, the parties' choice is possible, but it cannot prevent the application of the mandatory provisions of the State where 'all other elements relevant to the situation' are located.

---

[20] See Art. 28(1) of the UNCITRAL Model Law on International Commercial Arbitration and Art. 187(1) of the Swiss PIL Statute of 18 December 1987.

[21] Art. 3(1), paragraph 2, of the Proposal: 'If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State'.

[22] EUROPEAN GROUP OF PRIVATE INTERNATIONAL LAW, 'Second consolidated version of a proposal to amend Articles 1, 3, 4, 5, 6, 7 and 9 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, and Article 15 of the Regulation 44/2001/EC (Brussels I)' (2002), paragraph III.

[23] See LEIBLE S., in: CASHIN RITAINE E. / BONOMI A. (note 1), at 65 *et seq*.

On the other hand, when the situation presents some international elements, the freedom of choice is only subject to the general restrictions of Articles 9 and 21 (former Art. 7 and 16 of the Convention), *i.e.*, to the application of 'overriding mandatory rules' (*lois de police*, *norme di applicazione necessaria*) of the forum State or of a third State, and to the public policy exception.

Special restrictions apply to consumer and employment contracts; the choice of law cannot deprive the weaker party of the protection that is granted to such party by the mandatory rules of the law that would be applicable in the absence of a choice (Arts. 6 and 8, former Arts. 5 and 6 of the Convention).

In certain cases, these limitations have proved to be insufficient to guarantee the application of the mandatory provisions of EC law, in particular of rules included in harmonization directives. If the contractual relation is an international one (and if the special rules concerning consumers and employees are not applicable), the parties to the contract can choose the applicable law without the restrictions of Art. 3(3), even if the situation is exclusively connected with two or more EU Member States (*e.g.*, a contract between two parties established in two Member States); they can, for instance, designate the law of a third State, in which EC law is obviously not in force, or the law of a Member State where an EC directive has not yet been implemented, and thus avoid the mandatory application of EC law.

In such situations, the application of EC law can only be assured if the relevant provisions are characterised as 'internationally mandatory rules' or by the way of the public policy exception.

In order to assure a more efficient protection of the 'minimum standard' provided for by EC law, the Regulation takes up a proposal of the EGPIL[24] and includes in Art. 3 a new paragraph 4, which reads as follows:

> Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a member State shall not prejudice the application of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

This solution is reasonable, because it takes into account the special features of EC law as a 'supranational' system of law, whose rules are directly applicable in the Member States. The application of the Community standard is thus assured in all purely European situations, in particular in all relationships which are relevant for the functioning of the common market.

It is however important to note that the new rule will apply only to purely 'intra-Community' situations, as for instance those which gave rise to the well-known '*Gran-Canaria-Fälle*' before German courts.[25] In such situations, the choice

[24] See note 22.

[25] In those cases, the disputes concerned contracts (in particular, sale and time-sharing contracts) concluded by German tourists during their holidays in Spain. The application of the Community rules on withdrawal from the contract was not assured because

of the law of a third State would not exclude the application of mandatory provisions of EC law.

A contrario, the new rule would not have the same wide scope resulting from certain 'rules on applicability' included in several directives in the field of consumer protection. These rules tend specifically to impose the mandatory application of the directive implementation rules even in situations which present some 'extra-Community' element (*i.e.*, situations which are not purely 'internal' from the point of view of the EC), subject only to the condition that there is 'a close connection' with the territory of a Member States.'[26] It appears therefore that the inclusion of the proposed 'Community standard clause' in Art. 3 would not be sufficient to allow for the repeal of the rules of such directives.

For similar reasons, the proposed rule would not tackle the kind of situations decided by the ECJ in the well-known *Ingmar* case.[27] In that case as well, the contractual relation was not a purely European one, since one of the parties (the principal) was established in a third country.

As a consequence, the application of Community law standards in real 'international' (*i.e.*, not purely European) situations will have to be assured – in the future as well – by the means of 'overriding mandatory provisions' within the meaning of Art. 9.[28]

IV. Applicable Law in the Absence of Choice

The determination of the law applicable to the contract in the absence of parties' choice is one of the key issues dealt with by the 'Rome I' Regulation. The mechanism provided for by the Rome Convention is knowingly based on the interaction between the general principle of the closest connection (Art. 4, para. 1 and 5) and

---

Spain had not yet implemented the relevant EC directives. Art. 5 of the Rome Convention could not apply because the buyers were not 'passive' consumers within the meaning of that provision.

[26] Such formulation is used in several directives in the field of consumer protection: see *e.g.* Art. 7(2) of the EC Directive No. 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, in: *OJ* L 171, of 7 July1999, or Art. 6(2) of the EC Directives No. 93/13 of 5 April 1993 on unfair terms in consumer contracts, in: *OJ* L 95, of 21 April 1993.

[27] ECJ, 9 November 2000, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, C-381-98, in: *ECR* 2000, at 9305; *Rev. crit. dr. int. priv.* 2001, at 107, note IDOT L.; in: *JDI* 2001, at 511 *et seq.*, with note by JACQUET J.-M. In this decision, the ECJ found that certain rules of the EC directive on commercial agents (notably Articles 17 and 18) are to be applied in favour of an agent domiciled in a Member State, despite the fact that the contract had been explicitly submitted to the law of a third State.

[28] See also LEIBLE S., in: CASHIN RITAINE E. / BONOMI A. (note 1), at 73, and *infra* in this *Yearbook*, our contribution on overriding mandatory provisions.

the presumptive concretisation of that principle through the concept of characteristic performance (Art. 4, para. 2), thus jeopardizing uniformity and predictability, two of the main objectives of the Convention.

To avoid such difficulties, the provision of Art. 4 has been restructured in the Regulation. The general principle of the closest connection of Art. 4(1) and the presumptions of Arts. 4(2) to 4(4) of the Convention have been abandoned and replaced by a catalogue of conflict rules for various categories of contracts based on rigid connecting factors (Art. 4(1) of the Regulation).

Some of these rules are clearly based on the idea of characteristic performance. This is obviously the case of the provisions in subparagraphs *a* and *b*, concerning contracts for the sale of goods and the provision of services. Like Art. 5(1)(b) of the Brussels I Regulation, these rules are based on the assumption that the delivery of the goods and the provision of the services, respectively, are the characteristic performances of these two important and wide categories of contracts. As a result and in line with former Art. 4(2) of the Convention, the applicable law will be that of the country of the habitual residence, respectively, of the seller and of the service provider.[29]

By contrast, other rules in Art. 4(1) of the Regulation are not based on the criteria of the characteristic performance but rather on the idea of closest connection.[30] This is the case of the rule in subparagraph *c*, which, for contracts relating to *rights in rem*, refers to the law the of the country where the property is situated; here the law of the debtor of the characteristic performance (the seller) gives way to the law of a country (the *situs*) which is more closely connected with the object of the contract. The same is also true with respect to subparagraphs *g* and *f*, which, for auction contracts and for contracts concluded 'within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments' (typically, stock exchanges and other regulated markets), refer, respectively, to the law of the country where the auction takes place and to the law that governs the multilateral system concerned.

For a third group of rules included in Art. 4(1) it is more difficult to identify the underlying rationale.[31] This is the case of subparagraphs *e* and *f*, which submit franchise and distribution contracts to the law of the country of the habitual residence of the franchisee and the distributor. Although these controversial solutions could be based on the idea of characteristic performance, the Commission had justified them in its proposal by the opportunity to protect the weaker party.[32]

---

[29] Contrary to Art. 5(1) of the Brussels I Regulation, however, the connecting factor used by the Rome I regulation to determine the applicable law is not the place of performance of the characteristic obligation, but rather the habitual residence (or the central administration, see Art. 19) of the party who is to perform such obligation.

[30] ANCEL B., in: CASHIN RITAINE E. / BONOMI A. (note 1), at 83.

[31] ANCEL B., in: CASHIN RITAINE E. / BONOMI A. (note 1), at 85.

[32] Proposal (note 4), at 6.

In any case, the new rules in Art. 4(1) no longer constitute simple presumptions, but are conceived as real conflict of law rules, which the courts in the Member States will be bound to apply for the determination of the applicable law.

A direct reference to the notion of characteristic performance will only be possible under Art. 4(2), where the contract is not covered by paragraph 1 or where its elements would be covered by more than one point of that paragraph.

The practical role of this subsidiary rule will depend, to a significant extent, on the interpretation and construction of paragraph 1, in particular with respect to the characterisation of the categories of contracts referred to under that rule. Thus, Art. 4(1)(b) refers to the provision of service; if this notion is given a very broad meaning – as appears likely under the influence of both Arts. 59 and 60 of the EC Treaty and Art. 5(1)(b) of the Brussels I Regulation – only some residual categories of contract will fall under Art. 4(2) of the Regulation. Art. 4(1)(e) and (f) refer to franchise and distribution contracts; if these categories cover all such contracts, there will be no place left for Art. 4(2). By contrast, if those rules are interpreted in a restrictive way, based on their alleged protective function, certain types of franchise and distribution contracts (*e.g*. master franchising agreements) could fall under Art. 4(2) (or even Art. 4(4)), which could lead to very different results.[33] Characterisation of the contract acquires therefore an importance that it does not have under the Rome Convention.

Where the law applicable to the contract cannot be determined pursuant to paragraphs 1 and 2, the principle of the closest connections comes into play as a default rule under Art. 4(4). This subsidiary rule, which corresponds to the first sentence of Art. 4(5) of the Rome Convention, will be applicable to all those contracts for which a characteristic performance cannot be determined (*e.g*. exchange of currencies, barter and counterparty, joint venture and other cooperation contracts, perhaps certain categories of license contracts as well).[34] In such cases, nothing will change with respect to the current situation and the courts of the Member States will continue to be confronted with the difficult task of 'counting' and 'weighing' the contacts existing between the contractual relationship and the countries involved.

A further source of complexity derives from the rule of Art. 4(3), which enables the court to set aside the connecting factors of paragraphs 1 and 2 'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected' with a different country. This escape clause, which had been dropped by the Commission, has been included in the final text of the Regulation; this is certainly an improvement with respect to the Proposal, since it ensures an appreciable degree of flexibility to the law-selection process.

Although it is clearly inspired by Art. 4(5) of the Rome Convention, the new rule is drafted in a more prudent and restrictive manner. A 'manifestly' closer connection must 'clearly' result from the circumstances; the use of these and simi-

[33] See *infra* in this *Yearbook*, the contributions of ANCEL M.-E. and GARCÍA GUTIERREZ L.

[34] See *infra* in this *Yearbook*, the analysis by DE MIGUEL ASENSIO P. A.

lar adverbs ('*manifestement*' in French, '*chiaramente*' and '*manifestamente*' in Italian) is supposed to make clear that the escape clause is only an exceptional device, is designed to correct the 'normal' connecting rules of paragraphs 1 and 2 only if and when it really appears necessary to do so. While showing that 'proximity' is still the underlying principle of Art. 4, the careful wording of the Regulation is intended to prevent the abuse of the escape clause and thus to assure a higher level of uniformity and predictability within the European area.

THE NEW ROME I / ROME II / BRUSSELS I SYNERGY

Eva LEIN*

I. Introduction

'The whole is more than the sum of its parts' (Aristotle)[1]

The notions of 'synergy' and 'synergism' refer to a combination of several factors that allows for a higher level of effectiveness than does the sum of individual efficiencies as a result of their complementarity or cooperation. We speak here of a concomitance or an interaction of various forces, elements and factors. This phenomenon is also present in the field of law and can be expressed through a paral-

* Staff Legal Adviser, Head of the Section Civil Law Jurisdictions at the Swiss Institute of Comparative Law. A French version of this article has been published in: CASHIN RITAINE E./BONOMI A. (eds.), *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles, Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*, Zurich 2008, p. 27 *et seq*.

[1] Aristotle, Metaphysics, 10f-1045a.

Yearbook of Private International Law, Volume 10 (2008), pp. 177-198

lelism of underlying fundamental principles, of structures and of solutions offered by different legal instruments, through a synchronicity of interpretation of legal norms or through the transferability of legal thought and jurisprudential arguments.

An effect of ostensible synergies is revealed when a parallel is drawn among the EC Regulations referred to as 'Rome I',[2] 'Rome II'[3] and 'Brussels I.'[4] These instruments, conceived as a 'trilogy' of community law[5] and intended to create a uniform private international law of civil and commercial obligations[6] are characterised by a common concern: to favour the predictability of law, judicial certainty within the European legal space and transparency.[7] By covering the domains of conflicts of jurisdiction and of law applicable to contractual and extra-contractual obligations, the Regulations create a normative complex intended to complete itself in such a manner that the collective normative scheme leads inevitably to certain synergies. These effects are even expressly desired by the community legislator[8] as the paragraphs 7 of the respective preambles of the Rome I and II Regulations, in particular, demonstrate.

The following reflections should offer additional clarification of these effects of synergy and their respective limits. They will be categorised as synergies of fundamental principles (II), synergies of structures and solutions (III) and synergies of interpretation (IV).

---

[2] (EC) Regulation 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* L 177, S. 6 *et seq.*, 4.7.2008). The Regulation will enter into force on 17 December 2009.

[3] (EC) Regulation 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* L 199, p. 40 *et seq.*, 31.7.2007), which entered into force on 11 January 2009.

[4] (EC) Regulation No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I') (*OJ* L 12, p. 1 *et seq.*, 16.1.2001).

[5] Other instruments will follow, such as a Regulation providing for uniform rules of conflicts of jurisdictions and conflicts of laws in succession matters. A proposed Regulation, currently being drafted in accordance with the green paper of 2005 on successions and wills (COM (2005) 65 final), will certainly have an impact on the national laws concerning immovables, gifts or the recognition of structures such as the trust.

[6] These initiatives fit within the framework of the harmonisation of private international law in civil and commercial matters at the community level, work on which has been ongoing since the end of the 1960's; see COM (2003) 427 final, at point 1.2.

[7] Paragraph 11 of the preamble to Regulation Brussels I, paragraph 6 of the preamble to Regulation Rome II, paragraph 16 of the preamble to Regulation Rome I. The Rome I and II Regulations allow the parties to study a single regime of conflict rules, thus reducing litigation costs and reinforcing the 'foreseeability of solutions and certainty as to the law': see COM (2003) 427 final, at point 2.1.

[8] The Commission speaks of 'indispensable adjuncts' and, with respect to Regulation Rome II of the 'natural extension of the unification of the rules of private international law relating to contractual and non-contractual obligations in civil or commercial matters in the Community': COM (2003) 427 final, at point 1.2.

II. Synergies of Fundamental Principles

All three Regulations are based on the same pillars of private international law: the principle of freedom of choice (A), the principle of proximity, also referred to as the principle of 'closest connection' (B) and the principle of the protection of the weaker party (C). These foundations of private international law are accompanied by the principle of judicial certainty, a key characteristic of the basic notion of the law,[9] and the principle of foreseeability of the law which is 'almost invariably associated'[10] with it. Both play a central role in European private international law.[11]

These principles can be complementary but can also be diametrically opposed and require reconciliation. The latter phenomenon, *i.e.* the need for reconciliation, can notably be seen between, on the one hand, the principle of freedom of choice and, on the other hand, the principles of proximity and of protection of the weaker party of which one is tempted to say that it is in their very nature to be in opposition. The Regulations, in attempting this reconciliation, give priority to the same principles and adopt analogous mechanisms in order to create an equitable balance in this amalgamation of principles.

A. The Principle of Freedom of Choice

Freedom of choice, also sometimes referred to as one of the general principles of law recognised by civilised nations,[12] has become a key principle in the field of contractual obligations. It takes precedence both in substantive law and in private international law, whether its origin be in national, supranational or treaty law.[13]

---

[9] ROMANO G.P., 'Principe de sécurité juridique, système de Bruxelles I/Lugano et quelques arrêts récents de la CJCE', in: BONOMI A./CASHIN RITAINE E./ROMANO G.P., *La Convention de Lugano, Passé, présent et devenir*, Zurich 2007, p. 165, at p. 167, citing LOPEZ DE OÑATE F., *La certezza del diritto*, ed. 1968, p. 164.

[10] See. ROMANO G.P. (note 9), p. 165, at p. 168.

[11] See paragraph 11 of the preamble to Brussels I, paragraph 6 of the preamble to Regulation Rome II, and paragraph 16 of the preamble to Regulation Rome I. Pursuant to paragraph 16 of the preamble to Regulation Rome I, legal certainty in the European legal area is the general objective of the Regulation.

[12] As used in Article 38(c) of the Statute of the International Court of Justice.

[13] See the essays on party autonomy in private international law of GIALDINO A. C., 'L'autonomie des parties en droit international privé', in: *Recueil des Cours* 1972 – III, p. 751; LEIBLE S., 'Parteiautonomie im IPR – Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?', in: MANSEL H.P. et al., *Festschrift E. Jayme*, München 2004, p. 485 *et seq.*; LEHMANN M., 'Liberating the Individual from Battles Between States – Justifying Party Autonomy in Conflict of Laws', in: *Vanderbilt J. Trans. L.* 2008, p. 381 *et seq.*; CARBONE S. M., 'L'autonomia privata nei rapporti economici internazionali ed i suoi limiti', in: *Riv.dir.int.priv.proc.* 2007, p. 891 *et seq.*; for a comparison with the Restatement (Second) of Conflict of Laws, see: RÜHL G., 'Party Autonomy in the Private International Law of

This principle is the consequence of the economic freedom of the parties; it allows them to create their own conception of their legal relationship and to better take into account the particularities of a given situation. In private international law, it is essentially expressed by the liberty of the parties to choose the applicable law.

This possibility for the parties of designing, themselves, the legal aspects of their relationship seems to go hand in hand with legal certainty which is thereby guaranteed directly – provided that the parties know how to handle this freedom of choice, being conscious of the range of rights at their disposal, and that they are able to make use of such range of rights in an informed manner.[14]

Finally, 'conflictual' freedom is also the expression of the loss of the degree of proximity between a cross-border legal relationship and a national legal order. A relationship characterised by cross-border elements is, in some ways, situated outside the area of state sovereignty, in a sphere in which the specific determination of the legislator, who holds the normative power, remains uncertain. The farther a cross-border legal relationship is removed territorially, the more the State's interest in submitting the individual to its rules diminishes, thereby strengthening the parties' normative intent.[15] This interpretation of situations characterised by cross-border elements also explains the limits on choice of law. The choice of law must not contravene the application of the provisions which cannot be derogated from by agreement in the event of a close connection with a single country,[16] imperative norms of Community law[17] or overriding mandatory provisions.[18]

These considerations are reflected in the texts of the three Regulations that are the subject of this article. Paragraph 11 of the preamble to Regulation Rome I ascribes to the freedom of the parties to choose the applicable law the role of 'one of the cornerstones of the system of conflict-of-laws in matters of contractual obligations.' The importance given to party autonomy could have been even greater if the final version of the Regulation had followed the original proposal of the Com-

---

Contracts: Transatlantic Convergence and Economic Efficiency' in: GOTTSCHALK E./ MICHAELS R./RÜHL G./VON HEIN J. (eds.) *Conflict of Laws in a Globalized World*, Cambridge (CLPE Research Paper No. 4/2007).

[14] KESSEDJIAN C., 'Le principe de proximité vingt ans après', in: *Mélanges P. Lagarde*, Paris 2005, p. 507, at p. 508.

[15] See also ROMANO G.P., 'Le choix des Principes UNIDROIT par les contractants à l'épreuve des dispositions imperatives', in: CASHIN RITAINE E./LEIN E., *The UNIDROIT Principles 2004*, Zurich 2007, p. 35, at p. 41, with respect to the threshold of proximity of a situation with one or more States.

[16] Article 3(3) of Regulation Rome I and 14(2) of Regulation Rome II.

[17] Article 3(4) of Regulation Rome I; see, *e.g.*, Article 6(2) of the Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95 of 21.4.1993, p. 29-34.

[18] Article 9 of Regulation Rome I and, notably, BONOMI A., 'Le régime des règles impératives et des lois de police dans le Règlement 'Rome I' sur la loi applicable aux contrats', in: CASHIN RITAINE E./BONOMI A. (eds.), *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles, Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*, Zurich 2008, p. 217 *et seq.*

mission,[19] whose purpose was to extend the 'classical' limits on choice of law by eliminating the state legislative monopoly and by permitting the choice of a law other than a national law under a new Article 3(2).[20] Regulation Rome II, in turn, dedicates its Article 14 to party autonomy but, as compared to Rome I, accords it a less important role. This 'demotion' of party autonomy in Chapter IV of Regulation Rome II below the 'general rules' can be explained, above all, by the lesser practical importance of choice of law in extra-contractual matters as a result of the structure of legal relationships resulting from a tort/delict: in most cases, the parties

[19] COM (2005) 650 final.

[20] The proposed formulation 'The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.' was intended to authorise, in particular, the choice of the UNIDROIT Principles, the Principles of European Contract Law or some potential future optional European contract law instrument but aimed at prohibiting the choice of the *lex mercatoria*, which is not sufficiently precise, or of private codifications that are not well drafted and not sufficiently recognised by the international community. The proposed formulation was not adopted, and any attempts to better formulate such a paragraph have thus far been unfruitful. See Doc. n° 8022/07 of the Council of 13 April 2007, Doc. n°1150/07 of the Council of 25 June 2007, the compromise amendments of the Commission of Legal Affairs of the Parliament EP 374.427v01-00 of 28 August 2007, the draft report of 22 August 2006 (EP 374.427v01-00) and the modifications of 7 December 2006 (EP 382.371v01-00) and of 5 March 2007 (EP 386-328v01-00). This latter document proposed no fewer than three alternative wordings. In the final text of the Regulation, the preamble paragraphs 13 and 14 declare that the Regulation 'does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.' and provides, in addition, that if the Community should adopt 'in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.' This mention has far-reaching consequences: it will now be even more difficult, if not impossible, to justify the choice of *soft law* instead of a national law even though many arguments can be put forth in favour of those who advocate such a choice. See, *e.g.* for an acceptance of the choice of the UNIDROIT Principles as applicable law: BOELE-WOELKI K., 'The UNIDROIT-Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts', in: *Rev. dr. unif.*, 1996, pp. 652, at p. 664 *et seq.* and 'Die Anwendung der UNIDROIT-Principles auf internationale Handelsverträge', in: *IPRax*, 1997, pp. 161, at p. 166 *et seq.*; LANDO O., 'Some Issues Relating to the Law Applicable to Contractual Obligations', in: *King's. Coll. L. J.* 1996-1997, p. 55, at p. 62; LEIBLE S., 'Außenhandel und Rechtssicherheit', in: *ZVglRWiss* 1998, p. 286, at p. 312 *et seq.*; ROTH W.H., 'Zur Wählbarkeit nichtstaatlichen Rechts', in: MANSEL H.P. et al. (eds.), *Festschrift E. Jayme*, vol. 1, München 2004, p. 757, at p. 768 *et seq.*; VISCHER F., 'The Relevance of the UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts', in: *EJLR* 1998/1999, p. 203, at p. 210 *et seq.*; WICHARD J.C., 'Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte', in: *RabelsZ* 1996, p. 269, at p. 275 *et seq.*; VISCHER F./ HUBER L./OSER D. (eds.), *Internationales Vertragsrecht*, 2nd ed., Berne 2000, n° 102 *et seq.*, n° 118 *et seq.* See also SCHINKELS B., 'Die (Un-)Zulässigkeit einer kollisionsrechtlichen Wahl der UNIDROIT Principles nach Rom I: Wirklich nur eine Frage der Rechtspolitik?', in: *Rev.dr.priv.com.* 2007, p. 106 *et seq.*

will have had no prior relationship. Nonetheless, the choice of law has its place in Rome II. Generally admitted after the birth of the non-contractual relationship,[21] it is similarly in line with the purpose of respecting the wishes of the parties, expressed *en connaissance de cause*, and of reinforcing legal certainty. The precursors of this approach are found in national rules of private international law, for example, in Germany, in Article 42 EGBGB.[22]

Moreover, Rome I and II offer similar limits on the freedom of choice. They contain parallel norms in the event of localisation of the elements of the situation in a single country or within the European Community. In the first hypothesis, they provide for the application of the imperative rules of a legal system as per its internal law (Article 3(3) of Regulation Rome I and Article 14(2) of Regulation Rome II); in the second hypothesis, the European imperative norms take precedence, in order to guarantee a minimal European standard, in the event that the parties submit their relations to the laws of a third State, even if their situation is purely *intra-community* (Article 3(4) of Regulation Rome I and Article 14(3) of Regulation Rome II).[23] The two Regulations incorporated the concept of overriding mandatory provisions, distinguishing however the overriding mandatory provisions of third countries for which only Article 9(3) of Regulation Rome I[24] offers the judge the

[21] 'By an agreement entered into after the event giving rise to the damage occurred', Article 14 (1)(a) of Regulation Rome II, except in the case of merchants, Article 14(1)(b) of Regulation Rome II.

[22] See, also, VON HEIN J., 'Rechtswahlfreiheit im Internationalen Deliktsrecht', in: *RabelsZ* 2000, p. 595; DÖRNER H., 'Alte und neue Probleme des Internationalen Deliktsrechts', in: HOHLOCH G./FRANK R./SCHLECHTRIEM P. (eds.), *Festschrift Stoll*, Tübingen 2001, p. 491; *Münchener Kommentar zum BGB*/JUNKER, 4th ed., Munich 2006, Article 42 EGBGB, n. 1-29; HERKNER W.R., *Die Grenzen der Rechtswahl im internationalen Deliktsrecht*, Frankfurt 2003.

[23] The proposed draft of Article 3(5) (now 3(4) of Regulation Rome I), COM 650 (2005) final, did not restrict itself to purely intra-community cases. Such a limitation did not appear to be coherent in light of the jurisprudence of the ECJ in the *Ingmar* case (C-381/98, 9 November 2000, *ECR* 2000-I, p. 9305); see also BONOMI A., 'Conversion of the Rome Convention into an EC Instrument', in: this *Yearbook* 2003, p. 53, at p. 69.

[24] Article 9(3) of Regulation Rome I refers to overriding mandatory provisions of the country in which the obligations resulting from the contract must be or have been executed, to the extend that said overriding mandatory provisions render the execution of the contract illegal. No difference is made between the overriding mandatory provisions of a third State and those of other Member States. Article 3(4) of Regulation Rome I however prevents the purely *intra-community* cases from being subject to the alternatives of Article 9(3) and thus to judicial discretion, which would be that much more unfavourable in the event that their courts had concurrent jurisdiction. See, on this subject, FURRER A., *Zivilrecht im gemeinschaftsrechtlichen Kontext*, Berne 2002, p. 314 *et seq*.; FREITAG R., 'Einfach und international zwingende Normen', in: LEIBLE S. (ed.), *Das Grünbuch zum Internationalen Vertragsrecht*, Munich 2004, p. 167, at p. 184-186; BONOMI A. (note 23), p. 53 at p. 92 and 'Le régime des règles impératives et des lois de police dans le Règlement 'Rome I' sur la loi applicable aux contrats', in: CASHIN RITAINE E./BONOMI A. (eds.), (note 18), p. 217 *et seq.*

option of their application while Article 16 of Regulation Rome II excludes it, being limited to the overriding mandatory provisions of the forum law.[25]

Regulation Brussels I is based on the same principles when, in its Article 23, it provides for a forum selection clause giving the parties the option of agreeing to have their differences heard by a court of a Member State, except where an exception is made for the purpose of protecting the weaker party.[26] Moreover, a subsequent effect of synergy between Regulation Rome I and Regulation Brussels I was provided for in the form of a presumption of a choice of law in the event of an agreement concerning a choice of forum, which was worded as follows:[27] 'If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.' However, the solution of *qui elegit iudicem elegit ius*[28] was rejected and is only mentioned in the preamble.[29] A forum selection agreement is only one factor among others in the determination of whether a choice of law is clearly expressed.[30]

[25] One must also emphasise a failing in the French text of Regulations Rome I and II that speaks of 'lois de police' (Rome I) and the 'dispositions impératives dérogatoires' (Rome II).

[26] See Articles 13, 17 and 21 of Regulation Brussels I.

[27] Article 3(1) clause 3 of the proposal for Regulation Rome I, COM 650 (2005) final.

[28] See, in this regard, JUENGER F.K., 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons', in: *Am. J. Comp. L.* 1994, p. 381, at p. 388; MORSE R., 'The Substantive Scope of Application of Brussels I and Rome I', in: MEEUSEN J./PERTEGÁS M./STRAETMANS G. (eds.), *Enforcement of International Contracts in the European Union*, Antwerp 2004, p. 191, at p. 199; GIULIANO/LAGARDE, 'Rapport concernant la convention sur la loi applicable aux obligations contractuelles', *JO* 31.10.1980, C 282, p. 1, at p. 17; AUDIT B., *Droit international privé*, 3rd ed., Paris 2000, p. 796; STURM F./STURM G, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum IPR*, Berlin 2003, n. 186 and LEIBLE, S., 'Choice of the Applicable Law', in: CASHIN RITAINE E./BONOMI A. (eds.), (note 18), p. 61 *et seq.*

[29] See paragraph 12 of the preamble to Regulation Rome I; LEIBLE S., 'Rechtswahl', in: FERRARI F./LEIBLE S. (ed.), *Ein neues Internationales Vertragsrecht für Europa*, Jena 2007, p. 41, at p. 44; LAGARDE P., 'Remarques sur la proposition de Règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)', in: *Rev. crit. dr. int. priv*. 2006, p. 331, at p. 335.

[30] See also the solution of Article 7(2) of the Inter-American Convention on the Law Applicable to International Contracts (Mexico, 17 mars 1994) ('*selection of a certain forum by the parties does not necessarily imply selection of the applicable law*').

B. The Principle of Proximity

The three Regulations are also similar with respect to the role they accord to the principle of proximity. Two examples demonstrate how they draw the precise outlines of this principle: on the one hand, there is the role of the habitual residence or domicile, either as a principal criterion for the objective determination of the applicable law, or as a territorial connection with the litigation; on the other hand, the Regulations provide for escape clauses in the event of other – more close – connections. It should be emphasised that there is also an interaction between these two examples. Although they both spring from the same idea of proximity, they are, in some respects, in opposition: the habitual residence can be rejected as a connecting factor in the event that a closer connection exists. The second example is therefore the purest and most striking expression of the principle of proximity.

1. The Role of Habitual Residence and Domicile

In the absence of a choice by the parties, Article 4 of Regulation Rome I is based on the habitual residence of the party whose performance characterises the contract (as is the case for the Rome Convention, but in a more precise manner, via the fixed connecting factors in the new paragraph 1). This criterion rightly prevails over that of the place of execution, which has given rise to significant controversy in the context of Article 5(1) of the Brussels Convention/Regulation Brussels I.[31]

The role of the habitual residence also becomes apparent in Article 4(2) of Regulation Rome II, pursuant to which application of the law of the country in which the harm occurred is rejected in favour of the law of the place of habitual residence when the person harmed and the potentially liable person both have their habitual residence in the same country. A derogation of the general rule of connection appears to be justified when the two parties are subject to the same legal order with which they are presumably familiar.

Similarly, Article 2 of the Regulation Brussels I, the general rule on allocation of jurisdiction, around which all jurisdictional rules must be based, opts for jurisdiction based on the principle of the defendant's domicile.[32] This forum must always be available, except in certain well-defined cases where the litigation in question or the autonomy of the parties justifies, on an exceptional basis, another jurisdiction.

---

[31] See ANCEL B., 'La loi applicable à défaut de choix', in: CASHIN RITAINE E./BONOMI A. (eds.), (note 18), p. 77 *et seq.*; LEIN E., 'La compétence en matière contractuelle: un regard critique sur l'article 5 § 1er de la nouvelle Convention de Lugano', in: BONOMI A./CASHIN RITAINE E./ROMANO G.P. (ed.), (note 9), p. 41 *et seq.*

[32] Paragraph 11 of the preamble to Regulation Brussels I.

2. Rigidity Versus Flexibility – 'Escape Clauses'

A conflict between the principle of proximity and the principle of legal certainty appears notably with respect to the 'escape clauses' to the rules for the determination of the applicable law in the absence of a choice in Regulations Rome I and II, clauses which argue for closer connections to another country.

The second subparagraph of Article 4(5) of the Rome Convention, which sets aside the characteristic performance concept stipulated in Art. 4(2) when the consideration of all of the circumstances reveals that a contract presents closer connections with another country, is a very controversial provision because it opens the door to avoidance of the basic rule of determination of the applicable law in the absence of a choice.[33] The flexibility of this sentence allowed national judges too broad a discretion in the application of the *lex fori* and, as a result, led to the loss of legal certainty. This clause which allows for an exception in the case of 'closer connections', thereby permitting an escape from the presumptions of Article 4, has sacrificed legal certainty in favour of proximity or at least has 'brought it back to its just proportions',[34] without offering an acceptable equivalent through the possibility of *professio juris* to which cross-border operators do not appear to be sufficiently accustomed.[35] After discussions concerning whether Art. 4(5) should be sacrificed in favour of a greater rigidity,[36] the Council, in order to avoid adopting a 'one-rule-fits-all approach', opted for an escape clause[37] and Article 4(3) of Regulation Rome I finally adopts (almost) the same principle: if, taking into consideration all of the circumstances, the contract has a manifestly closer connection[38] to a country other than that to which the preceding paragraphs refer, it is the law of that country that applies.[39] The stricter wording of this clause notwith-

---

[33] A more adequate formulation of such a clause is difficult to find; for attempts to do so in the context of private international law see: Article 15 of the Swiss LDIP ('*Le droit désigné par la présente loi n'est exceptionnellement pas applicable si, au regard de l'ensemble des circonstances, il est manifeste que la cause n'a qu'un lien très lâche avec ce droit et qu'elle se trouve dans une relation beaucoup plus étroite avec un autre droit*') and Art 48 para. 1 sentence 2 of the Austrian IPR-Gesetz which refers to a '*stärkere Beziehung zum Recht ein und desselben anderen Staates*'; see also HIRSE T., *Die Ausweichklausel im Internationalen Privatrecht, Methodentheoretische und -kritische Gedanken zur Konkretisierung einer besonderen kollisionsrechtlichen Generalklausel*, Tübingen 2007.

[34] LAGARDE P., 'Le principe de proximité dans le droit international privé contemporain', in: *Recueil des Cours* 1986, vol. 196, p. 9 *et seq.*, at p. 117.

[35] KESSEDJIAN C. (note 14), p. 507 *et seq.*, at p. 508.

[36] See FERRARI F., 'Objektive Anknüpfung' in: FERRARI F./LEIBLE S. (eds.), (note 29), p. 57 *et seq*.

[37] See Article 4(3), Cons. doc. 8022/07 of 13 April 2007.

[38] Article 4(5) of the Rome Convention refers only to a 'closer connection'.

[39] Art 4(4) of Regulation Rome I corresponds to Article 4(5) 1st sentence and Art. 4(1) of the Rome Convention and requires that the contract be governed by the law of the country with which it has the closest connections if no other provision of the applicable national legal order is possible.

standing, this norm, just as was its predecessor norm, will be subject to the judge's discretion.[40]

The situation is similar under the regime of Regulation Rome II. One finds, systematically, escape clauses expressing the principle of proximity. This begins with the general conflict rule of Article 4(3) of Regulation Rome II, expressly designated as an escape clause in paragraph 18 of the preamble, and continues through most of the specific conflict rules: with respect to products liability in Article 5(2), in Article 10(4) relating to unjust enrichment, in Article 11(4) concerning *negotiorum gestio* and with respect to *culpa in contrahendo* in Article 12(2)(c). All of these articles provide for the option of derogation of the principle rule of connection in the case of 'manifestly closer connections' with another country.

Moreover, Regulation Brussels I follows in the same line of offering flexibility in a particular case by authorising, exceptionally, *fora* other than that of the defendant's domicile pursuant to Article 2. This flexibility is intentional, as paragraph 12 of the preamble to Regulation Brussels I demonstrates: 'In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

C. The Principle of Protection of the Weaker Party

In areas in which the contracting parties are not on the same plane, the three European instruments tend to assure an adequate protection of the weaker party.[41] They thereby limit the autonomy of the parties and attempt to propose compromise solutions.

Article 6(2) of Regulation Rome I concerning consumer contracts is an example. Compared to the initial draft of the Regulation, which included a simpler and more predictable conflict rule consisting of the application in all cases of the law of the habitual residence of the consumer,[42] the European legislator finally adopted the compromise of the Rome Convention – a 'limited' choice of law that aims to assure the consumer of the application of the imperative provisions of the law of his or her habitual residence but which results in a parallel application of the two legal systems. A choice of law is therefore always permitted, but cannot result in depriving the consumer of the protection that is assured by those provisions of

[40] Nonetheless, the judge may now be assisted by the ECJ in clarifying the elements that can constitute a closer connection.

[41] See paragraph 23 of the preamble to Regulation Rome I.

[42] COM 650 (2005) final. The complete elimination of party autonomy in conflicts of law concerning consumer contracts and the application of the law of the consumer's habitual residence appear both reasonable and controversial - it deprives the consumer of the potential benefit offered by the choice of a law other than that of the consumer's habitual residence. For additional modifications during the legislative process, see Cons. doc. 11150/07 of 25 June 2007.

the law that would have been applicable in the absence of choice which cannot be avoided by contract. In a similar manner, Article 8 (individual employment contracts) fits within the protective norms of Regulation Rome I.[43] The idea of protection of the weaker party also appears in Article 4(1)(e) of Regulation Rome I concerning franchise contracts for which the applicable law is that of the habitual residence of the franchisee.[44] This inverses the principle of Article 4 in favour of the party presumed to be the weaker one.

A parallel to this concept is revealed through a comparison with the regime of Regulation Brussels I and its Articles 15 *et seq.* (jurisdiction concerning consumer contracts) or its Articles 18 *et seq*. (jurisdiction concerning individual employment contracts). A new parallelism is also established between Article 7 of Regulation Rome I concerning insurance contracts and the related Article 8 *et seq.* of Regulation Brussels I (jurisdiction in insurance matters). In the area of conflicts of jurisdictions, autonomy of the parties is nonetheless subject to even more limitations: any derogation of the above-mentioned norms is subject to strict exceptions and is rejected if it may interfere with the protection of the presumably weaker party.[45]

In Regulation Rome II, the idea of the protection of the weaker party initially seems to be less apparent. The comparison between Articles 14(1)(a) and (b) demonstrates, nonetheless, that the modalities of the choice of law also depend on whether the parties are merchants. Parties who have a commercial activity need less protection. This norm incorporates the idea expressed in paragraph 31 of the preamble to Regulation Rome II: 'Protection should be given to weaker parties by imposing certain conditions on the choice.' In addition, Articles 5(1)(a) (in a case of products liability, the law of the country of habitual residence of the person harmed will apply if the product was marketed in that country) and Article 6(1) (in a case of unfair competition, the law of the country in whose territory competition or the interests of consumers are affected will apply) follow the same line of reasoning. Moreover, even the general rule, providing for a connection to the country in which the direct damages have occurred (*lex loci damni*) and which does not correspond to most of the national solutions (primacy of the *lex loci delicti commissi*),[46] was inspired by the idea of creating a better balance between the interests of the person harmed who, in such circumstances, is in the position of the 'weaker party', and those of the person whose liability is claimed. In a broader

[43] See, with respect to Article 8 of Regulation Rome I: MAUER R./SADTLER S., 'Rom I und das internationale Arbeitsrecht', in: *DB* 2007, p. 1586 *et seq.*; VENTURI, P., 'Alcune ossarvazioni sui contratti individuali di lavoro nella proposta di regolamento Roma I', in: FRANZINA, P. (ed.), *La legge applicabile ai contratti nella proposta di regolamento 'Roma I'*, Padova 2007, p. 62 *et seq.*

[44] See the contribution of GARCÍA GUTIÉRREZ L., 'Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts', in this publication.

[45] See Articles 13, 17 and 21 of Regulation Brussels I.

[46] The Regulation targets, for reasons of legal certainty, the country where the harm occurs regardless of the country in which the event that caused the damage arose and the countries in which the indirect consequences may be felt.

sense, the idea of protecting the weaker party is not only found in the exceptions to the general rules determining the applicable law, but also lies at the very origin of the general rule of Article 4 of Regulation Rome II.

III. Synergies of Structures and Solutions

A. Structures

1. Universal Character of the Regulations

A key notion of the three instruments is the reinforcement of the legal protection of persons established within the EU by providing common rules that guarantee certainty with respect to the application of the same law as well as the allocation of jurisdiction among the courts of the countries likely to be seized. Consequently, the law designated by Regulations Rome I and Rome II will be applied even if it is not the law of a Member State, as is demonstrated by Article 3 of Regulation Rome II and Article 2 of Regulation Rome I.

The situation is different for Regulation Brussels I which, applying only when the defendant is domiciled in one of the Member States,[47] cannot offer as high a degree of universality. Nonetheless, in certain cases, its scope of application is broadened even when the defendant is domiciled outside the Community, in particular by Articles 22 and 23 of Regulation Brussels I. This approach has been reinforced by the Court of Justice opinion in the *Owusu* case relating to the doctrine of *forum non conveniens.*[48]

[47] Paragraph 8 of the preamble to Brussels I.

[48] ECJ, 1st March 2005, C-281/02, *Owusu, ECR* [2005] I-1383. According to the Court of Justice, the courts of a contracting State to the Brussels Convention cannot decline to exercise the jurisdiction granted to them under Article 2 of the Convention on the grounds that a court of a non-contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other contracting State is in issue or the proceedings have no connecting factors to any other contracting State. See, on this subject, FENTIMAN R., 'National Law and the European Jurisdiction Regime', in: NUYTS A./WATTÉ N., *International Civil Litigation in Europe and Relations with Third States*, Bruxelles 2005, p. 83, at p. 85; MUIR WATT H., 'note sous l'arrêt *Owusu v. Jackson* du 19 juin 2002', in: *Rev. crit. dr.int.priv.* 2003, p. 335 *et seq.*; PALAO MORENO G., 'El forum non conveniens es incompatible con el convenio de Bruselas – Comentario a la STJE de 1 de Marzo de 2005 en el asunto C-281/02, Owusu', in: *Diario La Ley* n° 6306, 29.7.2005; BALLARINO T., 'I limiti territoriali della Convenzione di Bruxelles secondo la sentenza Owusu', in: *Liber amicorum P. Sarcevic*, Munich 2004, p. 3 *et seq.*

2. Parallelism and Complementarity in the Scope of Application of the Regulations

It is not surprising that three Regulations forming a homogenous group of civil and commercial obligations exclude the same matters from their scope of application, *e.g.* administrative and customs matters, family relations, bills of exchange, checks etc.[49] The European legislator was expressly concerned that the substantive scope of application and the provisions of Regulations Rome I and II and Brussels I be consistent.[50]

The distinctions between the respective scopes of application of Regulations Rome I and II (contractual and non-contractual obligations), conceived as complementary, nonetheless remain vague. Given that the concept of non-contractual obligations varies from one Member State to another, according to the European legislator, it should be understood as an autonomous concept, covering two large categories, *i.e.* obligations resulting from a tort/delict and those resulting from an event other than a tort/delict.[51] Nonetheless, a lack of clear definition of the subject matters covered by the two conflict of law Regulations can give rise to a problem in practice. In order to make this distinction, it is possible, in an initial phase, to refer to Article 2(1) of Regulation Rome II that contains an indirect 'quasi-definition' of an extra-contractual relation (*i.e.* a damage resulting from a harmful event, unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*). In a second phase, the borderline between contractual obligations and non-contractual obligations is supposed to correspond to that between Articles 5(1) and (3) of Regulations Brussels I.[52] The difficulty, however, in drawing the line between contractual and non-contractual relations is well recognised in the jurisprudence relating to Articles 5(1) and (3) of the Brussels Convention and Regulation Brussels I. In several cases, the ECJ defined the notion *matters relating to a contract* in an

[49] See also the attempt at parallelism in the definitions of paragraphs 8 and 9 of the preamble to Regulation Rome I, 9 and 10 of Regulation Rome II which is, however, of limited success.

[50] Paragraph 7 of the preamble to Regulation Rome II.

[51] Paragraph 11 of the preamble to Regulation Rome II; COM (2003) 427 final, at point 3.

[52] See COM (2003) 427 final, point 3. Reference is made to decisions of the ECJ, 22 March 1983, C- 34/82, *Martin Peters*, *ECR* [1983] I-987; 17 June 1992, C-26/91, *Jacob Handte*, *ECR* [1992] I-3697; 17 September 2002, C-334/00, *Fonderie Officine Meccaniche Tacconi*, *ECR* [2002] I-7357. See also the discussion concerning the relationship between Regulations Rome I and Bruxelles I in PERTEGÁS M., 'The Notion of Contractual Obligation in Brussels I and Rome I', in: MEEUSEN J./PERTEGÁS M./STRAETMANS G. (eds.), (note 28), p. 175 *et seq*. The German wording of Article 5(1) Brussels I is more precise ('Vertrag oder Ansprüche aus einem Vertrag') but also more similar to that of contractual obligations ('vertragliche Schuldverhältnisse'). See also KOZIOL H., 'Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich', in: *JBl.* 1994, p. 209 *et seq.*

autonomous manner,[53] without referring to national law. In order for Article 5(1) to apply, the dispute must concern an undertaking freely assumed by one party towards another'.[54] This criterion forms a framework for the notion of *matters relating to a contract* both in the pre-contractual stage and with a view towards the inclusion of third parties. Pursuant to the *Effer* case, Article 5 applies even if the formation of the contract is disputed.[55] The *Tacconi* decision specifies, nonetheless, that only the presence of undertakings freely assumed by one party with respect to another during negotiations intended to result in the formation of a contract confers on the precontractual phase a *contractual* character. The *Handte* and *Réunion européenne* cases state that the notion of *matters relating to a contract* does not, in principle, extend beyond the contractual relationships *inter partes:* a litigation commenced by a third party does not fall under Article 5(1).[56] The fact that this demarcation remained insufficiently precise was revealed, particularly with respect to Regulations Rome I and II, during the discussions of the qualification of *culpa in contrahendo*.[57] Completely excluded from the sphere of contractual obligations under Article 1(2) (j) of Regulation Rome I, from now on, precontractual liability falls under Article 12 Regulation Rome II and is a clear example of the complementarity of Regulations Rome I and II. Its delictual characterisation, however, remains controversial and cannot be explained solely on the basis of the jurisprudence relating to Article 5(3) of Regulations Brussels I.

3. General Rules – Specific Rules – Clauses of Derogation

The legislator was careful to introduce a parallel legal structure into the texts of Regulations Rome I, II, and Brussels I. Here, as well, it seems banal to point out this parallelism, but it is crucial in practice. The fact that the European 'trilogy' follows the same logic allows increased comprehensibility and transparency for

[53] Specifically with respect to Article 5(3). See ECJ, 22 March 1983, C-34/82, *Peters/Zuid Nederlandse Aaneemers vereniging, ECR* [1983] 987; 8 March 1988, C-9/87, *Arcado/Haviland, ECR* [1988] 1539; 17 June 1992, C-21/91, *Handte/TMCS, ECR* [1992] I-3967; SCHLOSSER P., *EU-Zivilprozessrecht*, 2nd ed., Munich 2003, Articles 5(3), 16.

[54] MANKOWSKI P., 'Die Qualifikation der culpa in contrahendo – Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR', in: *IPRax* 2003, p. 127 *et seq.*, at p. 129; KÖNDGEN J., *Selbstbindung ohne Vertrag*, Tübingen 1981, pp. 156-164; ECJ *Handte* C-26/91, *ECR* [1992] I-3967, I-3994 para. 15; ECJ *Réunion européenne*, C-51/97, *ECR* [1998] I-6511, I-6542, para. 17, 19; ECJ C-334/00, *Tacconi/HWS*, 17.9.2002, *ECR* [2002], I-7357, para. 25 and Opinion of Advocate General GEELHOED, 31.1.2002, para. 75, 82.

[55] ECJ, 4 March 1982, C-38/81, *Effer Spa/Kantner, ECR* [1982] 825, points 7 and 8.

[56] ECJ, 17 June 1992, C-26/91, *Handte/TMCS, ECR* [1992] I-3967, point 21.

[57] *See infra* and VOLDERS B., 'Culpa In Contrahendo in the Conflict of Laws, A Commentary on Article 12 of the Rome II Regulation', in: this *Yearbook* 2007, p. 127 *et seq.*; MANKOWSKI P. (note 54), p. 133 *et seq.*; LEIN E., 'Reflections on the Proposal for a Regulation Concerning the Law Applicable to Contractual Obligations («Rome I»), A Short Commentary', in: this *Yearbook* 2005, p. 391, at p. 395 *et seq*.

those called upon to apply the law: the general rules are followed by specific rules concerning particular contractual and extra-contractual relationships and are accompanied by escape clauses notably based on the principle of proximity previously described.[58]

4. Parallelism of Notions and Their Limits

The European legislator has often been the subject of criticism concerning its legislative style, deemed insufficiently oriented towards consistency among the various European instruments covering identical or similar matters. Different definitions of the same notions were not rare.[59] In the new private international law instruments, however, parallelism is actively sought or, when it is not, differences are retained consciously. Thus, the same definition of 'habitual residence' appears in Article 23 of Regulation Rome II and Article 19 of Regulation Rome I, both for individuals and for legal entities. This example could, however, just as well be cited as one of express divergence with respect to Regulation Brussels I: under Regulations Rome I and II, only the place of the central administration is important for the determination of the habitual residence of legal entities, a different solution compared to the definition in Article 60 of Regulation Brussels I, which proposes three criteria of determination.[60] Only Regulation Rome I offers a justification for this divergence: pursuant to paragraph 39 of its preamble, the definition of habitual residence of companies, associations and other legal entities must, for reasons of legal certainty, be different from that of Article 60(1) of Regulation Brussels I and be limited to one criterion, otherwise the parties would be unable to predict which law would be applicable to their situation.

Similarly, paragraphs 7 and 24 of the preamble to Regulation Rome I expressly provide for a harmony between the texts of Regulation Rome I and Brussels I, as well as paragraph 7 of the preamble to Regulation Rome II. Some differences remain, however, notably between Regulations Brussels I and Rome I. An example is that between Article 6(1)(a) and (b) of Regulation Rome I and Article 15(1) (c) of Regulation Brussels I, the conflict of laws and jurisdictional rules for consumer contracts. Out of concern for consistency, the proposed Regulation Rome I was intended, like Brussels I, to target only those consumers residing in a Member State. The proposed text referred to a professional exercising his or her 'trade or profession in the *Member State* in which the consumer has his

[58] See *supra* section II B.

[59] As an example, the notion of 'damage' is defined differently in the Directives 85/374/EEC (Article 9) and 86/653/EEC (Article 17), whereas the Directive 90/314 EEC includes no definition of the notion. This criticism was confirmed in COM (2003) 68 final, p. 9.

[60] Article 60 of Regulation Brussels I: 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.

habitual residence or, by any means, directs such activities to that *Member State.*' Regulation Rome I chooses a much more open formulation: a contract between a consumer and a professional is governed by the law of the habitual residence of the consumer, on condition that the professional pursues his commercial or professional activities in the *country* where the consumer has his habitual residence, or directs such activities, by any means, *to that country or to several countries* including that country, and the contract falls within the scope of such activities. Article 5(1) of the proposed draft would have resulted only in the application of the law of a Member State but not that of a third State, as opposed to Article 5 of the Rome Convention. The rule initially proposed would have lead to too precise an adoption of the solution of Art. 15 of Regulation Brussels I. The wording of Art. 15 of Regulation Brussels I, totally understandable in the area of conflict of jurisdiction, would have been too rigorous with respect to conflicts of law.[61] In order to protect consumers whose habitual residence is outside the EU, who would not have benefited from the application of the provision but would have been subject to the requirements of Articles 3 and 4, the final text of Regulation Rome I provides for a 'reduced' parallelism with Brussels I.

B. Solutions

Several examples of parallelism of solutions have already been addressed in the context of the discussion of synergies of principles. Nonetheless, one such example must be emphasised that is probably the most apparent and positive between Regulations Rome I and II. It appears through a parallelism with the law declared applicable pursuant to both instruments in Articles 4(3) clause 2,[62] 10(1),[63] 11(1),[64] and 12(1)[65] of Regulation Rome II that demand the application of the *lex contractus*

[61] SOLOMON D., 'Verbraucherverträge', in: FERRARI F./LEIBLE S. (eds.), (note 29), p. 89 *et seq.*

[62] Article 4(3) clause 2 of Regulation Rome II: 'A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.'

[63] Article 10(1) of Regulation Rome II: 'If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.'

[64] Article 11(1) of Regulation Rome II: 'If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.'

[65] Article 12(1) of Regulation Rome II: 'The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.'

in all cases where the extra-contractual relationship in question presents connections with an envisioned or existing contractual relationship. This parallelism clearly simplifies the parties' relations. In case of proximity to the contractual sphere, e.g. due to a pre-existing contractual relationship, the parties of a tort/delict are not exposed to the application of different legal orders. Looking again at the example of *culpa in contrahendo*, Regulation Rome I excludes the obligations arising from negotiations prior to the conclusion of the contract and submits them to the provisions of Regulation Rome II.[66] The qualification as tortious/delictual liability of violations of precontractual obligations that can be deduced provoked discussions concerning the respective scope of application of the Rome I and II instruments. This was notably the case among the 'heirs' of *von Jhering* who are opposed to the attribution of a generally tortious/delictual nature to precontractual liability, the contractual character of which had already found support in Article 284(1) clause 5 of the Prussian codification of 1794.[67] To settle the controversy, it was proposed that this antagonism be resolved by the interpretation of the notion of 'pre-contractual relationship' by means of a functional analysis in order to allow the differentiation of qualifications in accordance with the various functions of *culpa in contrahendo*. Such a functional approach is now partially followed by Article 12 of Regulation Rome II, not on the qualification level, but at the solution level: in the case of a pre-contractual obligation arising from negotiations conducted prior to the conclusion of a contract, Article 12(1) of Regulation Rome II calls for the application of the *lex contractus.* All other cases are subject to the general rule of Article 4(1) of Regulation Rome I. This effect of synergy with the law applicable to contractual relationships allows greater predictability: if the French supplier who relied on the application of his law to a contract with an Italian client breaks off negotiations, he can also expect the application of French law to questions of pre-contractual liability. The synchrony with the *lex contractus* is similar in cases of unjust enrichment and *negotiorum gestio.*

IV. Synergies of Interpretation

Once Regulations Rome I and II are effective,[68] the Court of Justice will have jurisdiction to interpret the three instruments, jurisdiction which was lacking under the Rome Convention due to the absence of ratification of its second protocol, precondition to the application of the first protocol which, in turn, aimed to confer such an interpretive power on the Court but without providing for any obligation to submit

[66] See also Article 2(1) of Regulation Rome II.

[67] Art. 284(1) clause 5 APLR: '*Was wegen des bei Erfüllung des Vertrages zu vertretenden Grades der Schuld Rechtens ist, gilt auch für den Fall, wenn einer der Contrahenten bei Abschliessung des Vertrages die ihm obliegenden Pflichten vernachlässigt hat.*'

[68] Date of the application of Regulation Rome II: 11 January 2009 (Article 32), for Regulation Rome I: 17 December 2009 (Article 29).

a reference to the ECJ for a preliminary ruling.[69] The required number of signatory states was only achieved in 2004 by the signature of Belgium,[70] too late to gain practical importance during the years of the Convention's application.

A. A Synergy Desired

The intention of the legislator to synchronise the interpretation of the three European texts becomes clearly apparent in their respective preambles. Above all, the Regulations must be interpreted in an autonomous manner, without reference to national law, and, in addition, in a concerted manner. Paragraph 7 of the respective preambles to Regulations Rome I and Rome II provide explicitly that their scope of substantive application and their provisions must be coherent with respect to Regulation Brussels I and their respective corresponding provisions of Regulations Rome I or Rome II.

Paragraph 17 of the preamble to Regulation Rome I seems equally to impose a parallel interpretation, albeit in a limited manner. With respect to the law applicable in the absence of a choice, the notions of 'provision of services' and of 'sale of goods' must be interpreted in the same way as that retained for the application of Article 5(1)(b) of Regulation Brussels I, to the exclusion of franchise and distribution contracts which are the subject of particular rules.[71] From this demand also follows a clarification of Regulation Brussels I. The legislator seems, indeed, to consider franchise or distribution contracts to be 'service contracts' as understood under Article 5(1) of Regulation Brussels I.[72] This realisation appears to be insignificant, but is not so in the least when viewed in light of the abundant jurisprudence on the subject of Article 5(1)(b) Brussels I that has led to multiple problems of interpretation[73] relating to international contracts containing both

[69] *JO* 1989 Nr. L 48/1 and Nr. L 48/17.

[70] *Moniteur belge*, 18.08.2004, p. 62135; VOLDERS B./DUTTA A., 'Was lange währt, wird endlich gut? Zur Auslegungskompetenz des EuGH für das EVÜ', in: *EuZW* 2004, p. 556-558, at p. 556.

[71] See the contributions of ANCEL M.-E., 'The Rome I Regulation and Distribution Contracts' and GARCÍA GUTIÉRREZ L., 'Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts', in this *Yearbook* 2008.

[72] See paragraph 17 of the preamble: 'although they are contracts for services'.

[73] See MAGNUS U./MANKOWSKI P. (eds.), *Brussels I Regulation*, Munich 2007 and the bibliography relating to Article 5, pp. 80-89. See, *e.g.* several decisions that demonstrate the problems of interpretation: LG München II, 23.3.2004, 1 O 6972/02; BGH 1.6.2005, VIII ZR 256/04, in: *NJW-RR* 2005, p. 1518 *et seq.* and the observations of MANKOWSKI P., in: *LMK* 2005, 155248 and LEIBLE S./SOMMER E., 'Tücken bei der Bestimmung der internationalen Zuständigkeit nach der EuGVVO: Rügelose Einlassung, Gerichtsstands- und Erfüllungsortvereinbarungen, Vertragsgerichtsstand', in: *IPRax* 2006, p. 568 *et seq.*; Cass. civ. 1ère, 23.1.2007, n° 05-12.166, D. 2007, p. 511, obs. CHEVRIER; OGH, 4 Ob 147/03a; 1 Ob 94/04m; and 2Ob 211/04z, 20.2.2006; Tribunale di Padova – Sez. Este, 10.1.2006, <www. unilex.info>; Corte di cassazione, 27.9.2006, SS. UU., n° 20887, *Saneco s.a. c. Toscoline s.r.l.*

elements of sales and service contracts. To cite only one example – the qualification of an exclusive concession contract posed a problem in French jurisprudence. A French trial court had characterised it as a contract presenting both elements of a sale and of a service and subjected it to Article 5(1)(b). The French *Cour de Cassation* came to the opposite conclusion: being neither exclusively one nor the other, the disputed contract could not be characterised either as a contract for the sale of goods or as a service contract under Article 5(1)(b).[74] The characterisation of a contract including both elements of a sale and of a service as a service contract, moreover, contradicts Article 3(2) of the Vienna Convention on the International Sales of Goods (CISG), that provides, in certain cases, that such a contract is to be deemed a sales contract.

There have already been attempts at such 'inverse' synergy, *i.e.* the use of the Rome Convention as a model for the interpretation of the Brussels Convention. Two examples should be mentionned: in the *Arcado v. Haviland*[75] case**,** la ECJ referred to Art 10 of the Rome Convention in order to determine whether the consequences of a failure to execute the obligations pursuant to an autonomous commercial agency contract fall under 'contractual matters' under Article 5(1) of the Brussels Convention;[76] similarly, in its decision in *Ivenel v. Schwab*,[77] the Court made reference to Article 6 of the Rome Convention – which provides that the employment contract is governed by the law of the country where the employee usually accomplishes his work – in order to interpret Article 5(1) of the Brussels Convention.[78] Further examples will follow under the new regimes.

---

[74] Cass. civ. 1ère, 23.1.2007, n° 05-12.166, D. 2007, p. 511, obs. CHEVRIER; see also GAUDEMET-TALLON H, 'Quelques reflexions à propos de trois arrêts récents de la Cour de cassation française sur l'art. 5-1 et de l'avis 1/03 de la Cour de justice des Communautés sur les compétences externes de la Communauté', in: BONOMI A./CASHIN RITAINE E./ROMANO G.P. (eds.), (note 9), p. 97 *et seq*., at p. 100.

[75] ECJ, C- 9/87, 8.3.1988, *Arcado/Haviland, ECR* [1988] 1539.

[76] It concerned the question of whether a dispute relating to the abusive termination of an autonomous commercial agency contract and the payment of commissions due as execution of the contract is a dispute of a contractual nature under Article 5(1) of the Brussels Convention. The Court decided to consider the notion of a 'contractual matter' figuring in Article 5(1) of the Brussels Convention as an autonomous notion that must be interpreted referring principally to the system and the objectives of the Convention with a view towards assuring its full efficiency. In its point 15 it refers to Art 10 of the Rome Convention: 'Article 10 of the Convention on the Law Applicable to Contractual Obligations of 19 June 1980 confirms the contractual nature of judicial proceedings such as those in point inasmuch as it provides that the law applicable to a contract governs the consequences of a total or partial failure to comply with obligations arising under it and consequently the contractual liability of the party responsible for such breach.'

[77] ECJ, C- 133/81, 29.5.1982, *Ivenel/Schwab, ECR* [1982] 1891.

[78] The arguments were as follows: Article 5 aims particularly to establish the jurisdiction of the country that has a close connection to the dispute; in the case of a labour contract, this connection consists notably in the law applicable to the contract; this law is determined by the obligation that characterises the contract in question - normally that of completing the work.

B. A Possible Synergy?

The intention to create a parallel system among the three instruments examined notwithstanding, the limits on the effect of synergy among these instruments in matters of conflict of law and of jurisdiction must be mentionned, limits already alluded to above. Certain elementary differences among the instruments in matters of conflict of jurisdiction and conflict of law will prevent absolute parallels. Two arguments are often evoked in this regard: first, that the purpose of Regulation Brussels I is to offer the greatest possible protection of the defendant, which is reflected in the principle of the forum of the defendant's domicile, whereas Regulations Rome I and II put more emphasis on the application of the law best adapted to the situation. Second, Regulation Brussels I allows, nevertheless, the option of several *fora* whereas Regulations Rome I and II aim, in principle, to designate only one applicable law. Objections can be made to both. [79] Other examples previously mentioned seem to speak more clearly in this regard, such as the definition of Articles 19(1) of Regulation Rome I and 23(1) of Regulation Rome II that differs from that of Article 60(1) of Regulation Brussels I[80] or the example of the notions of 'contractual obligations' in Regulation Rome I and 'matters relating to a contract' in Brussels I: the latter extends to a moment in the past and must necessarily include, for example, cases in which the existence of a contract is questioned by one of the parties, to avoid the contractual *forum* being rejected by virtue of a simple claim that no contract was concluded.[81] In Regulation Rome I, the 'obligation' is linked to the conclusion of a contract, as Article 12 of Regulation Rome II now confirms. As a result, prudence is required in order to avoid an automatic adoption of concepts as between the instruments of conflicts of law and of jurisdiction. Foreseeability requires, for example, the attempt to reach a common notion of 'contract.' The delimitation of the notion of 'matters relating to a contract' created by the Court of Justice that targets *a freely assumed undertaking* can thus serve as a basis for a definition, but may also pose a problem, for example, in the case of a contract with parties in a monopolistic position. One may also be inspired by the jurisprudence of the ECJ, as it states with respect to prize notifications that the conclusion of a 'classic' contract is not necessarily required.[82] On the other hand, an automatic application here of the jurisprudence relating to Article 5(1) of the Brussels Convention/Regulation Brussels I can, because it remains somewhat obscure, camouflage the scope of application of Regulation Rome I and negatively affect the interpretation of Regulation Rome I. Similarly, in extra-con-

[79] One can, indeed object that, once a forum has been determined, the situation under the regime of Brussels I is no different from that presented under the regimes Rome I and Rome II. In addition, Regulations Rome I and II do not always end in the application of a single law, as is clear under Article 6 of Regulation Rome I, even though it is the underlying principle of the Regulation in matters of conflicts of law.

[80] See *supra* and paragraph 39 of the preamble to Regulation Rome I.

[81] ECJ, 4 March 1982, C-38/81, *Effer Spa/Kantner, ECR* [1982] 825, points 7 and 8.

[82] ECJ, 20.1.2005, C-27/02, *Engler, ECR* [2005] I-481.

tractual matters, several decisions of the Court concerning Article 5(3) of the Brussels Convention/Regulation Brussels I cannot be automatically transposed onto Regulation Rome II. Even if there were a consistent jurisprudence of the Court to the effect that in the case where the place of the event giving rise to liability and that where such event caused damages are not the same, the plaintiff can choose to sue the defendant in either such place,[83] this option cannot be applied under the regime of Regulation Rome II.

In addition, in cases which have both contractual and extra-contractual aspects, one may doubt the capacity of potential litigants, in all Member States, to know which of the two instruments – Rome I or II – must be applied or whether both must be applied in parallel. A practical example would be a contract with a foreign company in the context of which an employee destroys or steals something. This raises the issue of the cumulation (typically in Germany) or the non-cumulation of contractual and tortuous/delictual liability (typically in France). Must one apply only Regulation Rome I, pursuant to which applicable law determines whether the party harmed has rights both under contract norms and under tort/delictual dorms or, on the contrary, does the principle of non-cumulation of such rights prevail? Or must one apply both European instruments in parallel? Article 4(3) of Regulation Rome II seems to indicate that cumulation is possible when it provides that 'Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a[nother] country […] the law of that other country shall apply' and provides that such a connection 'might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.' The same appears to result also from Article 14 (1)(b) of Regulation Rome II, which provides for the situation in which damage occurs within an existing commercial relationship between the parties.

V. Conclusions

The underlying principles of the Regulations and the manner in which they counterbalance each other reveals a general parallelism among Regulations Rome I, Rome II and Brussels I, with a few differences of detail. In a more ostensible manner, their similar or complementary structures and solutions offer proof of important synergies, notably in the comparison between Regulations Rome I and II, both of which often refer to the *lex contractus*, for reasons of predictability of the law for parties having the intention to contract. On the other hand, if one compares them with Regulation Brussels I, the different nature of the instruments of conflicts of jurisdiction and conflicts of law sometimes imposes divergent solutions. As a result, even if consistency in interpretation – expressly desired by the European legislator – is largely possible and produces important effects of synergy

[83] ECJ, 30.11.1976, C- 21/76, *Mines de Potasse d'Alsace, ECR* [1976] 1735.

that must, in principle, be approved, it cannot be absolute. Transposition of the jurisprudence relating to the Brussels Convention and Regulation Brussels I should therefore not be automatic, [84] but rather prudent, such that the 'whole does not become less than the sum of its parts.'

[84] See also PERTEGÁS M. (note 52), p. 175 *et seq.*; MAX PLANCK INSTITUTE FOR FOREIGN PRIVATE AND PRIVATE INTERNATIONAL LAW, 'Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization', in: *RabelsZ* 2004, p. 1 *et seq.*, at p. 88.

APPLICABLE LAW IN THE ABSENCE OF CHOICE TO CONTRACTS RELATING TO INTELLECTUAL OR INDUSTRIAL PROPERTY RIGHTS

Pedro A. DE MIGUEL ASENSIO*

I. Introduction

The typology of international contracts having intellectual or industrial property (IP) rights as their subject matter encompasses multiple categories of agreements that combine a great variety of clauses. This is only one factor influencing the choice of law issues concerning these contracts which have traditionally been very controversial in all jurisdictions. From a comparative perspective, national systems have envisaged very different solutions. Even among countries whose Private International Law ('PIL') systems are based on similar principles, significant divergences can be found to the extent that they have enacted specific conflict-of-law rules for these contracts.[1] In most systems the lack of specific provisions has been an additional source of uncertainty. This has also been the situation concerning the interpretation of the 1980 Rome Convention on the law applicable to contractual obligations. The difficulties in identifying the characteristic performance and the opposing views with respect to the relationship between paragraphs 2

* Professor at the Law Faculty of the Universidad Complutense, Madrid.

[1] For instance, under Article 122 of the 1987 Swiss Private International Law Act, the law applicable to contracts relating to industrial or intellectual property rights shall be the law of the habitual residence of the transferor or licensor. By contrast, under the 1978 Austrian Private International Act, those contracts were governed by the law of the protecting country or, in the case of contracts for more than one country, the law of the habitual residence of the transferee or licensee. See paragraph 43(1) that was replaced by the Rome Convention, FALLENBÖCK M., 'Zur kollisionsrechtlichen Anknüpfung von Immaterialgüterrechtsverträgen nach dem Europäischen Vertragsrechts- übereinkommen (EVÜ)', in: *ZfRV* 1999, at 98-102.

Yearbook of Private International Law, Volume 10 (2008), pp. 199-219

and 5 of Article 4 have led to a disparity of views on the law applicable to these contracts and have seriously undermined predictability.

The 2005 Proposal for a Regulation on the law applicable to contractual obligations (Rome I)[2] included in paragraph 1 of Article 4 a particular rule on the law applicable to 'a contract relating to intellectual or industrial property rights' aimed at enhancing certainty by means of a precise rule on the law applicable in the absence of a choice.[3] However, such a rule was suppressed during the decision-making process, and hence, it has not been included in the final text of Article 4 Regulation (EC) No 593/2008 (Rome I Regulation) which contains no particular reference to those contracts.

Choice of law agreements are very common in international practice since they are the best instrument to enhance certainty between the parties. A significant number of international contracts in this area, however, do not include an effective agreement on the issue.[4] This article deals only with the applicable law under the new European conflict rules for contracts when a choice of law has not been made by the parties. Hence, its subject matter is the interpretation of Article 4 of the 2008 Rome I Regulation in the field of contracts relating to intellectual or industrial property rights. Therefore, other issues that may be very significant in regulating these international contracts are left aside. Those issues include, in particular, the determination of the limits between the scope of the law of the contract and the scope of the law(s) of protection of the exclusive rights covered by the contract,[5] the applicability of the specific provisions on consumer contracts (Article 6 Rome I Regulation),[6] and the application or effects of overriding mandatory provisions (Article 9 Rome I Regulation).

---

[2] COM (2005) 650 final, 15.12.2005.

[3] For a critical appraisal of that rule, see EUROPEAN MAX-PLANCK GROUP FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (CLIP), 'Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) of December 15, 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of August 22, 2006', in: *IIC* 2006, at 471.

[4] About the reasons for this situation, see DESSEMONTET F., 'L'harmonisation du droit applicable aux contrats de licence', in: *Mélanges A.E. von Overbeck*, Fribourg 1990, at 725-739; ZENHÄUSERN U., *Der internationale Lizenzvertrag*, Fribourg 1991, at 90; HIESTAND M., *Die Anknüpfung internationaler Lizenzverträge*, Frankfurt 1993, at 151; and TORREMANS P., 'Choice-of-Law Problems in International Industrial Property Licences', in: *IIC*, 1994, at 390-391.

[5] DE MIGUEL ASENSIO P.A., *Contratos internacionales sobre propiedad industrial*, 2nd ed., Madrid 2000, at 163-185.

[6] DREXL J., 'Which Law Protects Consumers and Competition in Conflict with Intellectual Property Rights?', in: BASEDOW J. / DREXL J. / KUR A. / METZGER A., *Intellectual Property in the Conflict of Laws*, Tübingen 2005, at 79-106.

II. The New Structure of Article 4

The provisions on the law applicable in the absence of an express or implied choice by the parties are among those in which the transformation of the Rome Convention into a Regulation has resulted in the introduction of relevant amendments to the previous text.[7] The interpretation of the new text and the assessment to what extent it departs from the previous Article 4 deserve special attention given the pivotal role of those provisions in the conflict-of-laws system on international contracts.

A basic underlying principle of Article 4 both in the Rome Convention and the Regulation is the so-called proximity principle that is founded on the idea that the applicable law should be that of the country with which the contract is most closely connected. However, this basic principle may lead to uncertainty in the law-finding process since, in the absence of specific criteria regarding its application, courts have a significant degree of discretion to determine the applicable law. By contrast, clear and reliable indications for the parties and the judge concerning the law applicable in the absence of choice contribute to reduce litigation. The new Regulation stresses that it is possible to achieve its general objective of contributing to legal certainty in the European judicial area only with highly predictable conflict-of-law rules.[8] The changes introduced in Article 4 are to a great extent aimed at achieving a clearer and more precise balance between conflicts justice – or proximity – and legal certainty with a view to ensure a sufficient level of predictability.

It is noteworthy that the content of the first paragraph of Article 4 Rome Convention has as such disappeared in the Regulation. That paragraph proclaimed the basic principle that the contract shall be governed by the law of the country with which it is most closely connected. That idea is also essential in the new Article 4, as illustrated by the escape clause contained in paragraph 3 and the default rule of paragraph 4. However, Article 4 now begins with a new provision establishing the law applicable to certain categories of contracts by means of fixed and direct rules that only in exceptional circumstances may be disregarded. Additionally, the suppression of the express reference contained in Article 4(1) Rome Convention to the possibility that a severable part of the contract which has a closer connection with another country may be governed by the law of that other country seems related to the exceptional character of such mechanism and the additional risks it poses to legal certainty.

---

[7] GARCIMARTÍN ALFÉREZ F.J., 'El Reglamento «Roma I» sobre ley aplicable a las obligaciones contractuales: ¿Cuánto ha cambiado el Convenio de Roma de 1980?', in: *La Ley*, num. 6957, 2008, at IV; LEIBLE S. / LEHMANN M., 'Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht («Rom I»)', in: *RIW* 2008, p. 528 *et seq.*, at 534-536; and UBERTAZZI B., *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milan 2008, at 67 *et seq.*

[8] See paragraph 16 of the Preamble.

A crucial element to the functioning of Article 4 Rome Convention was the existence of three presumptions concerning the law most closely connected with certain categories of contracts. Under the general presumption of paragraph 2, it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or its central administration. Specific provisions were provided for in paragraphs 3 and 4 for two categories of contracts to which the characteristic performance rule did not apply. Concerning contracts whose subject matter is a right in, or a right to use, immovable property it is presumed under Article 4(3) that the contract is most closely connected with the country where the immovable property is situated. Paragraph 4 was devoted to contracts for the carriage of goods.

In practice, that system and its application by national courts raised significant difficulties that seriously undermined the predictability of the law applicable under Article 4 Rome Convention and the uniform interpretation of its provisions by the courts of the Member States. The determination of which performance is characteristic (or even if it is possible to establish a performance as characteristic) was frequently a source of controversy between parties (and academics) and led to different solutions in different Member States. Such disparities arose even with regard to certain types of contracts frequently used in international business, such as exclusive distribution agreements[9] and franchise contracts. Since the determination of the characteristic performance becomes more difficult the more complex the relevant contract is, the issue was controversial concerning many contracts relating to intellectual or industrial property rights.

In order to avoid or at least limit these difficulties and to reinforce legal certainty, the new Article 4 rests on a different approach concerning the role of the characteristic performance. The new Article 4 now only requires identification of the characteristic performance to determine the governing law in those cases where the contract cannot be categorised as being one of the specified types listed in the new paragraph 1 or where the elements of the contract fall within more than one of those types as provided for in the new paragraph 2. Hence, inasmuch as the contract may be characterised as falling within one of the categories of paragraph 1, the existence of conflicting views about which is the characteristic performance in those contracts loses its previous significance. In practice, the categories of contracts listed in the new paragraph 1 encompass a very significant percentage of international agreements since the list includes: sale of goods; contracts for the provision of services; contracts relating to a right *in rem* in immovable property or to a tenancy of immovable property; franchise contracts; distribution contracts; sale of goods by auction; and contracts concluded within regulated markets in financial instruments. Contrary to paragraphs 2 to 4 of Article 4 of the Rome Convention, Article 4(1) of the Regulation is not drafted as a series of presumptions but as rules that determine the law of the country applicable to each of those categories of con-

[9] MANKOWSKI P., 'Der Vorschlag für die Rom I-Verordnung', in: *IPRax* 2006, pp. 101-113, at 103-104.

tracts. The introduction of fixed rules establishing which is the governing law represents a significant evolution of Article 4 Rome Convention and, in practice, increases legal certainty especially regarding those categories of contracts in which the determination of the characteristic performance is controversial and that are now listed in Article 4(1) such as distribution and franchise contracts.

The wording and complex structure of Article 4 of the Rome Convention have made possible different interpretations regarding the interaction between the presumption based on the characteristic performance and the escape clause contained in paragraph 5.[10] According to this provision, the presumptions established in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. Diverging views in regards to the interplay between the presumptions and the escape clause result in different approaches when examining the balance between 'conflicts justice' (proximity) and legal certainty and result in different solutions when determining the governing law to similar situations under Article 4 of the Rome Convention. The case-law concerning the application of Article 4 of the Convention provides significant examples of the influence of such divergent views in the different Member States or even between the courts of the same State.[11]

If a broad and flexible view is taken regarding the ability to disregard the presumptions, this may in practice seriously undermine legal certainty in the determination of the law applicable to international contracts because it may lead to a case-by-case assessment of the particular contacts that a contract has with the different countries even in the situations covered by the presumptions. That approach broadens the degree of judicial discretion by weakening the significance of the presumptions. Hence, it is no surprise that certain courts have tended to favour that interpretation.[12] By contrast, other courts have favoured an interpretation of the escape clause that stresses its nature as an exception in those cases in

---

[10] See, e.g., MARTINY D., in: REITHMANN C. / MARTINY D., *Internationales Vertragsrecht*, 6th ed., Köln 2004, at 129-130.

[11] In the UK, most English decisions have opted for a weak presumption theory, disregarding the characteristic performance presumption of paragraph 2 when the characteristic performer's principal place of business is not the country of the place of performance of the characteristic obligation, see *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* ([2002] CLC 533), *Kernburn Waste Management Ltd v Bergmann* ([2002] CLC 644) and *Definitely Maybe Touring Ltd. v. Marek Lieberberg Konzertagentur GmbH* ([2001] 2 *Lloyd's Rep*. 455); by contrast, in Scotland the Court of Session has clearly adopted the strong presumption approach, see *Caledonian Subsea Ltd. v. Micoperi Srl* ([2001] SC 716 (OH); 2003 SC 70).

[12] As illustrated by English practice, see HILL J., 'Choice of Law in Contract under the Rome Convention: the Approach of the UK Courts', in: *ICLQ* 2004, p. 325 *et seq.*, at 339-343. See also, in Italy the judgment of the *Corte di Cassazione* of 10.03.2000 in *Krauss Maffei Verfahrenstechnik GmbH, Kraus Maffei AG v. Bristol Myers Squibb S.p.A.*, considering that a contract for the sale of technical equipment, which includes for the seller also an obligation to install and guarantee the functioning of the goods, is governed by the law of the country where those obligations are to be performed (place of the buyer).

which one of the presumptions applies.[13] Such a view favours legal certainty and seems to be coherent with the system established in Article 4 Rome Convention and the rationale of the presumptions[14] that were introduced in the Convention to substantially limit the flexibility of the general principle established by paragraph 1. Further, it gives specific form and objectivity to the concept of 'closest connection' which by some was considered as too vague. In this connection, it was acknowledged in the Report to the Convention that the presumption based on the characteristic performance was aimed at greatly simplifying the determination of the applicable law, and that in typical situations in which a characteristic performance may be established, seeking the place where the contract was concluded or the different places of performance and classifying them becomes superfluous.[15]

In order to enhance legal certainty, the wording of the new Article 4 reinforces the view that only a restrictive interpretation of the escape clause is compatible with the general objective of the Regulation. Indeed, the escape clause of Article 4(3) Rome I Regulation makes it clear that it is only to be applied in cases in which the contract is 'manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2.' Additionally, paragraphs 1 and 2 are not drafted as presumptions, although their rules may be disregarded when the conditions to apply the escape clause are met. Hence, it can be concluded that, as regards the role of the escape clause, the new Article 4 mainly reviews the wording of the Rome Convention in order to make clearer its nature as an exceptional device. The final result is in line with the approach that favoured a strong presumption approach and a restrictive interpretation of the escape clause of Article 4(5) of the Convention. Therefore, the Regulation grants a certain degree of discretion to the courts, which is in contrast to the initial 2005 Proposal made by the Commission that not only envisaged the conversion of the mere presumptions into fixed rules,

---

[13] Most prominent is the judgment of 25.09.92 by the Dutch *Hoge Raad* in *Société Nouvelle des Papéteries v. Machinenfabrik*; discussing that judgment and its implications, see RAMMELOO S., 'Die Auslegung von Art. 4 Abs. 2 und Abs. 5 EVÜ: Eine niederländische Perspektive', in: *IPRax* 1994, at 243; and STRUYCKEN T., 'Some Dutch Reflections on the Rome Convention, Art 4(5)', in: *LMCLQ* 1996, at 18. See also, e.g., in Germany, *Bundesgerichtshof*, judgment of 25.02.1999 (*NJW* 1999, at 2442-2443), holding that the presumption of the characteristic performance applies for international construction contracts and that a construction site cannot be regarded as a closer connection under Article 4(5); and in Spain, *Audiencia Provincial de Barcelona*, judgment of 21.03.2003 (*JUR* 2003, 199804), considering that the law applicable to a contract of sale under Article 4 is the law of the seat of the party who is to effect the characteristic performance (seller) irrespective of the place of delivery and installation of the machines that were the subject matter of the contact.

[14] See KREUZER K., 'Zur Funktion von kollisionsrechtlichen Berichtigungsnormen', in: *ZfRV* 1992, p. 168, at 175-176; and MARMISSE A., 'Autonomie de la volonté et principe de proximité dans Bruxelles I et dans Rome I', in: *Enforcement of International Contracts in the European Union*, Antwerpen 2004, pp. 255-268, at 266.

[15] As stated in the comments on Article 4 contained in GIULIANO M. / LAGARDE P., 'Report on the Convention on the law applicable to contractual obligations' (*OJ* C 282, 31.10.1980, at 1).

establishing hard-and-fast connecting factors, but also was intended to abolish the escape clause.[16]

III. Significance of the Categories of Contracts Covered by Article 4(1)

Under Article 4 Rome I Regulation the first step to determine the applicable law is to assess if the contract can be categorised as being one of the specified types listed in paragraph 1. If that is the case, the applicable law is determined in accordance with the fixed rules of paragraph 1, and the resulting law can only be disregarded under the exception clause of Article 4(3) of the Regulation.

The rules specified in Article 4(1) Rome I Regulation for the types of contracts listed in that provision establish fixed connecting factors that are considered the relevant elements to locate each group of contracts in the country where its centre of gravity is situated. Sometimes the criterion chosen is the habitual residence of one of the parties. Indeed, some rules make explicit the widely accepted result of applying to the relevant groups of contracts the characteristic performance concept. That is the case, in particular, with paragraph (a), which establishes that a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence, and paragraph (b), which states that a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. Also, paragraphs (e) and (f) refer to the habitual residence of one of the parties as the connecting factor: a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence (paragraph e); and a distribution contract shall be governed by the law of the country where the distributor has his habitual residence (paragraph f). However, these two provisions seem to have their own rationale. It results from the original Proposal by the Commission that those rules are not the product of a new consensus as to which is the characteristic performance of those types of contracts but rather reflects a choice by the drafters of the Regulation as to the appropriate

[16] LAGARDE P., 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuels (Rome I)', in: *Rev. crit. dr. int. pr.* 2006, at 331-338; MAX PLANCK INSTITUTE FOR FOREIGN PRIVATE AND PRIVATE INTERNATIONAL LAW, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', in: *RabelsZ* 2007, at 225-344; and FERRARI F., 'Objektive Anknüpfung', in: FERRARI F. / LEIBLE S., *Ein neues Internationales Vertragsrecht für Europa*, Jena 2007, pp. 57-87, at 72.

connecting factor after considering especially the fact that Community law seeks to protect the franchisee and the distributor as the weaker parties.[17]

The centre of gravity idea is clearly the rationale behind the connecting factors used in paragraphs (c), (d), (g) and (h) of Article 4(1) Rome I Regulation. Paragraphs (c) and (d) refer to contracts relating to a right *in rem* in immovable property or to a tenancy of immovable property, and state that they shall be governed by the law of the country where the property is situated; however, certain contracts relating to a tenancy of immovable property concluded for temporary private use shall be governed by the law of the country where the landlord has his habitual residence provided that the tenant has his habitual residence in the same country.[18]

One of the categories of contracts listed in Article 4(1) of the 2005 Proposal presented by the Commission referred to contracts relating to intellectual or industrial property rights. According to Article 4(1)(f) of the Proposal, those contracts should be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence. Such a provision was intended to establish a fixed criterion common to all contracts having as their main object the transfer or licence of intellectual or industrial property rights. The suppression during the legislative process of this provision was mainly due to the impossibility of finding a fixed rule capable of providing an adequate response to the diverse typology of IP contracts that have developed in business practice.[19] Indeed, the differences as regards the subject matter, the content, the scope of parties' obligations or the territorial reach of licenses and assignments, and the complex nature of many of the agreements that include in their object industrial or intellectual property rights, make it almost impossible to establish an appropriate solution for all of those contracts in a single rule. Additionally, the wording of the proposal was too broad because in many contracts the assignment or licence of industrial or intellectual property rights is only ancillary, especially in distribution, franchise, and joint-venture agreements. The lack of specific reference in the Regulation to these contracts may prove to be a source of uncertainty.[20]

Given the structure of Article 4 Rome I Regulation, the following steps should be followed in order to determine the law applicable in the absence of choice to contracts relating to intellectual or industrial property rights. First, it has to be ascertained whether the relevant contract can be categorised as falling within

[17] As it was expressly stated in the Explanatory Memorandum of the 2005 Commission's Proposal, COM (2005) 650 final, at p. 6. This represents the inclusion of new policy goals in Article 4, see, LEIBLE S. / LEHMANN M. (note 7), at 535.

[18] Under paragraph (g) the relevant connecting factor as regards contracts for the sale of goods by auction is the country where the auction takes place, if such a place can be determined. Finally, according to paragraph (h), the applicable law to contracts concluded within regulated markets in financial instruments shall be the law of the country that governs the relevant market.

[19] GARCIMARTÍN ALFÉREZ F.J. (note 7), at IV.1.

[20] AZZI T., 'Les contrats d'exploitation des droits de propriété littéraire et artistique en Droit international privé: état des questions', in: *RIDA* 2007, p. 3 *et seq*., at 41.

only one of the types of contracts set forth in Article 4(1). If the response is negative, it will be necessary to find out if it is possible to determine the habitual residence of the characteristic performer. Hence, the determination of the characteristic performance still plays a significant role in these contracts. Only if the law applicable cannot be determined on the basis of the characteristic performance criterion, then it shall be necessary to establish which country is most closely connected with the contract. Finally, the law applicable by virtue of these rules may be disregarded in exceptional cases by virtue of the escape clause of Article 4(3) of the Rome I Regulation.

As regards the first step, several categories of contracts listed in Article 4(1) may be relevant when determining the law applicable to contracts having as their subject matter intellectual or industrial property rights. In particular, franchise agreements are complex contracts that typically include in their object the licensing of certain exclusive rights (such as trademarks or copyrights) and also know-how. The inclusion of a special rule on franchise contracts in Article 4(1)(e) and the lack of a rule on IP contracts determines the applicability of the special provision to all franchise contracts, including master franchise agreements, irrespective of the presence of intellectual or industrial property rights in the object of the contract. Under the fixed rule of paragraph (e), the law applicable shall be that of the country where the franchisee has his habitual residence. As already noted, this fixed rule, which aimed also at enhancing the protection of franchisees who have been typically viewed as weaker parties, shall contribute to increase the predictability of the law applicable to franchise contracts, since under the system of the Rome Convention, the determination of the party required to effect the characteristic performance and the identification of a characteristic performance in these contracts were especially uncertain and controversial.[21]

Some other types of contracts listed in Article 4(1) may in practice include provisions relating to intellectual or industrial property rights. In particular, distribution contracts may include a grant to the distributor to use certain trademarks. As already stated with respect to franchising, inasmuch as an agreement falls within the category of a distribution contract in the terms of Article 4(1)(f) Rome I Regulation, the criteria that the contract shall be governed by the law of the country where the distributor has his habitual residence applies irrespective of the presence of IP rights in its subject matter.

The possible classification of contracts relating to intellectual or industrial property rights as contracts for the provision of services in order to be covered by Article 4(1)(b) Rome I Regulation may raise additional uncertainty. Under that rule, a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. The Rome I Regulation seems to be based on a broad understanding of service contracts since its Preamble states that franchise and distribution contracts are contracts for services even though they are the subject of specific rules.[22] Since there are no special rules

[21] See HIESTAND M., 'Die international-privatrechtliche Beurteilung von Franchiseverträgen ohne Rechtswahlklausel', in: *RIW* 1993, at 173-179.

[22] See paragraph 17 of the Preamble.

for contracts relating to intellectual or industrial property rights under Article 4.1 of the Regulation, paragraph (b) should be decisive to the extent that contracts relating to those rights are to be regarded as contracts for services in the context of that provision. With respect to the interpretation of the concept of provision of services in Article 4.1 Rome I Regulation, its Preamble also stresses that it should be interpreted in the same way as when applying Article 5 of Regulation 44/2001 insofar as provision of services is covered by that Regulation. Given these facts, a reference for a preliminary ruling from the *Oberster Gerichtshof* (Austria) lodged on 29 November 2007 and currently pending before the European Court of Justice (ECJ) may be of special interest in this connection.[23] The first question referred to the ECJ seeks to clarify whether a licence agreement – a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right – is a contract regarding 'the provision of services' within the meaning of Article 5(1)(b) of the Brussels I Regulation or not.

The view that licensing contracts in general are contracts for the provision of services could result in a concept of contract for services much broader than the one originally envisaged by the drafters of the Brussels I and Rome I Regulations, especially in those situations in which the licensor only grants the right to use the object of the licence and does not perform any additional activity, as stressed by AG Trstenjak in her Opinion in case C-533/07. However, it is important to note that the typology of contracts relating to intellectual or industrial property rights is very diverse and encompasses agreements that may be classified as contracts for the provision of services in the context both of Article 5(1)(b) Brussels I Regulation and Article 4(1)(b) Rome I Regulation. That should be the case for agreements where the permission for use granted to the licensee by the owner of the IP right is functionally subordinate to the main obligation of one of the parties to provide certain services to the other party. For instance, it may happen that a contract combines a patent licence with the obligation of the licensor to provide technical assistance and train the licensee's personnel in a much broader technological area so that in fact the obligations relating to the patent licence are economically and functionally less significant than the promise to provide services to the other party. Such characterization may also be appropriate for some categories of research and development agreements in which the researcher or developer is granted the right to use technology owned by the other party. Regardless of the presence of licensing or assigning obligations, to the extent that the research or development obligations of one of the parties are envisaged as the main object of the contract, it may be possible to characterize it as a contract for the provision of services falling within the scope of Article 4(1)(b) Rome I Regulation. Notwithstanding the relevant differences as to the structure and contents of the agreements, the same result may be appropriate with respect to certain software development agreements. To the extent that the relevant contract may be classified as a contract for the provision of

[23] Case C-533/07, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst* (*OJ* C 37/15 of 9.2.2008). Advocate General Trstenjak delivered her Opinion on 27 January 2009.

services under Article 4(1), the law applicable should be the law of the country where the service provider has his habitual residence.

It may also occur that contracts relating to intellectual or industrial property rights in certain categories of licences fall at the same time within both the category of contracts for the provision of services and other types of contracts specified in Article 4(1) of the Rome I Regulation. That may be the case of a so-called production and supply contract with respect to patented products. This kind of contract is characterized as a production license without a marketing and sales license within the framework of a supply contract. The licensee is obliged to produce certain products using the technology of the licensor and to supply the products to the licensor who in turn promises to buy all of the products made by the licensee who is not visible in the market as an independent supplier.[24] Given these features, although the agreement comprises a licence in the framework of Article 4(1) Rome I Regulation, it seems to fall in part within the contract for the sale of goods classification – as regards the obligation to supply the goods – and in part a contract for the provision of services – concerning the production of the goods by the licensee.[25]

According to Article 4(2) Rome I Regulation, where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. The Preamble of the Regulation states in paragraph 19 that in the case of a contract consisting of a bundle of rights and obligations falling within more than one of the types of contracts listed in paragraph 1, the characteristic performance of the contract should be determined according to its centre of gravity. In a contract such as the production and supply agreement mentioned above, the fact that both paragraph (a) – sale of goods – and paragraph (b) – provision of services – lead to the application of the law of the country of the habitual residence of the same party – the producer or supplier who is also the licensee – makes it possible to identify that party as the one who is to effect the characteristic performance in such a contract for the purposes of Article 4(2) Rome I Regulation.

[24] PAGENBERG J. / GEISSLER B., *Lizenzverträge, (License Agreements)*, 3rd ed., Köln 1991, at 306-329.

[25] In the context of Article 5(1) Brussels I Regulation, the qualification of contracts concerning the delivery of goods to be produced and delivered to the other party in accordance with its specifications as sale of goods or provision of services remains controversial, pending a preliminary ruling on that issue referred to the ECJ by the *Bundesgerichtshof* (Germany) on 09.07.08.

IV. Characteristic Performance

Article 4(2) Rome I Regulation does not provide any indications on how to establish what party is to effect the characteristic performance of a given contract. The comments on Article 4 in the Report on the 1980 Rome Convention stressed that recourse to the characteristic performance defines the connecting factor of the contract from the inside based on elements related to the essence of the obligation and on the function that the legal relationship involved fulfils in the economic and social life of any country. Concerning the determination of the characteristic performance, the Report stated that in bilateral contracts whereby the parties undertake mutual reciprocal performances, the counter-performance by one of the parties usually takes the form of money and this is not the characteristic performance. It is the performance for which the payment is due – such as the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, etc. – which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.

Aiming to simplify the determination of the governing law, Articles 4(2) of the Convention and the Regulation locate the characteristic performance in order to establish the relevant connecting factor at the habitual residence of the party liable for its performance at the time of the conclusion of the contract.[26] Hence, the determination of the applicable law under paragraph 2 is not dependent upon the place of performance that may be more difficult to establish.

Intellectual or industrial property rights may be involved in agreements in different forms. They may be the main or sole object of a simple or mixed licence or transfer agreement, but they may also be part of a package deal of other contracts, such as an engineering contract or a joint-venture agreement. As regards the basic types of contracts relating to intellectual or industrial property rights, the prevailing view is that it is possible to determine the performance of one of the parties as characteristic. Simple transfer or assignment of rights and simple licences are considered to be the basic types of contracts in this area. Transfer equals assignment of ownership, and licence equals granting the right to use. By contrast to licence agreements, the transferee wishes to acquire the IP right and not only to participate in its use. Therefore, transfer of IP rights resembles sale contracts and licence is similar to the concept of lease. The basic idea of licensing agreements is that the owner of an exclusive IP right or know-how permits the licensee to enjoy it in return for payment. Hence, the licensor confers the right to use a species of

[26] For the sake of legal certainty, Article 19 Rome I Regulation includes a definition of habitual residence, which in the case of companies and other bodies, shall be the place of central administration and which, in the case of a natural person acting in the course of his business activity, shall be his principal place of business. As an exception, according to Article 19(2), where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

technology, or the subject matter of another IP right, and the licensee seeks to participate in the legal or effective exclusivity of the licensor. As industrial and intellectual property rights consist of a bundle of rights, the bundle may be split into its component parts for the purpose of licensing. Contrary to simple transfer or simple licence, mixed agreements combine in their object more than one type of subject matter, such as patent, design, trademarks or copyright. Mixed licences whose subject matter includes patents and unpatented secret technology (know-how) are also very common.

The prevailing opinion is that the party who is to effect the characteristic performance in typical assignment or transfer of rights contracts is the assignor or transferor.[27] Characteristic is the performance of ceding the exclusive right to which the legal protection is bound. Also, it is widely accepted that the characteristic performance in basic licence contracts whose content consists of the permission granted by the owner of the IP right (or know-how) to enjoy it in return for payment is that of the licensor.[28] With regards to authors' rights this criterion has the advantage of referring to the law of the country in which the author has his residence and hence leads typically to the application of the law of the country of residence of the party who is considered the weaker party. Furthermore, it is noteworthy that the Report on the 1980 Rome Convention mentions as an example that in bilateral contracts in which the counter-performance by one of the parties takes the form of money, it is clear that 'the granting of the right to make use of an item of property' by the other party is the characteristic performance. This criterion decisively influenced Article 4(1)(f) of the 2005 Rome I Proposal, and its Explanatory Memorandum insisted on the idea that the determination of the characteristic performance was controversial for distribution and franchise contracts but not in the case of contracts relating to IP rights.[29]

---

[27] KREUZER K., 'Know-how-Verträge im deutschen Internationalen Privatrecht', in: *Festschrift für E. von Caemmerer*, Tübingen 1978, at 705 and 723; VIVANT M., 'Régime international', in: *J.-Cl. dr. comm*., 'Brevets', Fascicule 560, Paris 1992, p. 1 *et seq*., at 15; and ZENHÄUSERN U., *Der internationale Lizenzvertrag* (note 4), at 113.

[28] VIDA A., 'Les contrats de licence en droit international privé', in: *Rev. crit. dr. int. pr.* 1964, at 209 and 222-223; ULMER E., *Intellectual Property Rights and the Conflict of Laws*, Luxembourg 1978, at 93-95 and 102; LANDO O., 'Contracts', in: *Int.Enc.Comp.L*., vol. III chapter 24, 1976, at 142; VIVANT M. (note 27), at 15; DESSEMONTET F., 'Les contrats de licence en droit international privé', in *Mélanges G. Flattet*, Lausanne 1985, at 435 and 450-452; CABANELLAS G., 'Applicable Law under International Transfer of Technology Regulations', in: *IIC* 1984, at 39 and 54-57; SCHWANDER I., 'Die Behandlung der Innominatverträge im internationalen Privatrecht', in: *Innominatverträge, Festgabe W.R. Schluep*, Zurich 1988, at 501 and 509; LAGARDE P., 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980', in: *Rev. crit. dr. int. pr*. 1991, at 287 and 307; ZENHAÜSERN U. (note 4), at 110; HIESTAND M. (note 4), at 183-193; MARTINY D., 'Art. 28', in: *MünchKommBGB*, 4th ed., München 2006, at 1854 and UBERTAZZI B., 'La ley aplicable a los contratos de transferencia de tecnología', in: *ADI* 2006-2007, at 447 and 461. See also paragraph 315 ALI Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational IP Disputes.

[29] COM (2005) 650 final, at 6.

Such a view has been countered by arguing that in most licence agreements the licensee's obligations go far beyond the payment of money, and hence, the licensee is the characteristic performer.[30] Usually licensor and licensee enter into additional obligations including but not limited to issues such as registration of the license, technical assistance, warranties and guarantees, obligation to use, infringement reports and actions, quality control, changes and improvements, sub-licenses, supply of goods, marking, marketing, confidentiality. In this connection, the following view has gained acceptance: to the extent that the license is exclusive or the licensee assumes the obligation to exploit the subject matter of the contract (patent, trademark, know-how, copyright, etc.), the licensee is the party who effects the characteristic performance.[31] Due to the complex nature of licence agreements it has also been advocated that determining the characteristic performance requires a case by case analysis.[32]

In the framework of Article 4 Rome I Regulation, it is particularly noteworthy that the view that the transferor or licensor is the party who assumes the characteristic performance seems in line with the main features of the characteristic performance doctrine as stated by its creators.[33] In fact, those who favour the application of the law of the licensee or the place of exploitation have traditionally criticized the characteristic performance doctrine as leading to unfair results that strengthen the dominant position of the providers of technology in the context of contracts relating to industrial property rights.[34] Nonetheless, recourse to the characteristic performance has been the choice made by the EU legislator in Article 4(2) Rome I Regulation. Additionally, reference to the characteristic performance in Article 4 has to be interpreted in such a way as to ensure the basic aim of the Regulation that the conflict-of-law rules are highly predictable. In this regard, a systematic interpretation of that provision in accordance with the doctrine of the characteristic performance favours the view that the law of the habitual residence of the transferor or licensor shall normally be the decisive factor under Article 4(2).

The idea that if the licence is exclusive or the licensee is obliged to exploit the licensed rights, he should always be considered under Article 4(2) the party who effects the characteristic performance seems to raise significant difficulties. The criterion based on the exclusive character of the licence does not seem reliable and in certain cases it is not possible to decide that issue without consulting the law of the contract. Concerning the obligation to exploit, it is noteworthy that the exis-

---

[30] MODIANO G., *Le contrat de licence de brevet*, Geneva 1979, at 138-141: and SAJKO K., 'International-privatrechtliche Fragen internationaler Lizenzverträgen (Betrachtungen aus jugoslawischer Sicht)', in: *GRUR Int* 1986, at 239 and 241-242.

[31] ULMER E. (note 28), at 94.

[32] ROY A., *Lizenzverträge im Verkehr zwischen der Bundesrepublik Deutschland und der Republik Polen*, Frankfurt 1991, at 218.

[33] SCHNITZER A.F., *Handbuch des internationalen Privatrechts*, vol. II, 4th ed., Basel 1988, at 597.

[34] SOLTYSIŃSKI S., 'Choice of Law and Choice of Forum in Transnational Transfer of Technology Transactions', in: *Recueil des Cours* 1986, t. 196, at 239 and 315.

tence of such an obligation is basically linked to the way in which the price is determined. Such an obligation may or may not be included in the contract simply depending on the drafting of other clauses that may ensure the licensor a minimum payment regardless of the effective exploitation by the licensee. A significant disadvantage of making the law of the contract dependent on the obligation to exploit is that the governing law – the *lex contractus* but also in some situations the *lex loci protectionis* applicable to determine the transferability of the IP rights and the conditions under which a licence can be granted – may be decisive determining if such an obligation exists. Hence, that criterion may prove a source of uncertainty inasmuch as the law applicable to the contract depends on an issue that is to be decided under that law. To determine the law of the contract, it is necessary to establish if the contract includes an obligation to exploit; however, that is an issue to be determined under the law applicable to the contract. Thus, this criterion may lead to a vicious circle.[35] Indeed, the determination and extent of such obligation varies between legal systems and in most legal systems is a controversial issue not always easy to ascertain.[36] Additionally, such a view seems to contradict the basic idea – stated, for instance, in the report to the 1980 Rome Convention – that under the characteristic performance doctrine in a bilateral contract in which the main obligation of one party is to grant the right to make use of an item of property it is the grantor who effects the characteristic performance. It is clear that those contracts are typically concluded because the other party intends to use the item and that is also common in transfer and licences of IP rights. Furthermore, although the traditional patent licensing contract refers to the permission by the licensor to use or exploit the rights and the obligation not to assert infringement claims based on those rights against the licensee, the licensor usually has to afford the licensee every assistance in the exercise of the right to use he has provided. The licensor additionally usually has to provide guarantees as to the IP rights. That result also seems particularly clear in the case of agreements aimed at providing technical assistance to the licensee because they typically include obligations such as training of technicians and production counselling. Further, in regards to know-how licence agreements, the view of a mere waiver by the licensor of (unfair competition) claims is never appropriate due to the secret nature of the knowledge. Even if understood broadly as covering non-secret technology, these contracts focus on the transfer of technical knowledge and skills because the licensee is not able to use the technology without assistance.[37]

Notwithstanding the idea that the assignor or the licensor is in principle the party that effects the characteristic performance in a contract having as its main

[35] DE MIGUEL ASENSIO P.A. (note 5), at 291-292; AZZI T. (note 20), at 33.

[36] For the complex interpretation of that point under German substantive law, see PAHLOW L., *Lizenz und Lizenzvertrag im Recht des Geistigen Eigentums*, Tübingen 2006, at 330-334 and 419-423.

[37] PFAFF D., 'International Licensing Contracts, Transfer of Technology and Transnational Law', in: *The Transnational Law of International Commercial Transactions*, Deventer 1982, at 199 and 203.

subject matter the assignment or license of an intellectual or industrial property right, it is important to note that the typology of these contracts is very diverse. In practice, these contracts include categories of agreements in which the characteristic performance corresponds to the other party, contracts in which no characteristic performance can be determined, and contracts that are manifestly more closely connected with a country rather than that of the habitual residence of the transferor or licensor.

When making the determination of the characteristic performance, it may happen that the licensing or even the transfer of rights is functionally subordinate to activities or obligations that the other party has to effect under the terms of the contract. Under those circumstances, typically it will be possible to establish that the other party is the characteristic performer. That may be the case with development contracts[38] or production and supply contracts. As noted earlier in the framework of Article 4 those contracts may qualify as contracts for the provision of services or supply of goods and be covered by paragraph 1. For instance, that may also be the case with certain adaptation or translation agreements in which the author is the party who authorises the adaptation but the other party is who effects the characteristic performance. Additionally, in the case of publishing agreements under the relevant national provisions, they constitute a type of contract different from licensing contracts and have their own essential characteristic. The publishing house organizes the reproduction and distribution of the work. It is the publisher who usually is the only party acting in the course of his trade or profession and his performances are the most relevant when considering the function which the legal relationship involved fulfils in the economic and social life of any country. In typical situations, the performance of the publisher is the economic purpose of the contract. Therefore, it seems reasonable to conclude that under those circumstances the publisher is the party that effects the characteristic performance.[39]

Furthermore, given the complex nature of certain agreements the best way to avoid arbitrary or forced solutions is to accept the limitations of the characteristic performance doctrine.[40] Indeed, in very complex contracts whose structure and content has little in common with typical transfer or licence agreements, it seems appropriate to conclude that it is not possible to determine the party who is to effect the characteristic performance. That may be the case, for instance, in certain agreements which are common in the software industry, such as joint development agreements or developer-publisher licence agreements involving close cooperation between the developer and the publisher even before the development begins.

---

[38] KREUZER K. (note 27), at 727.

[39] HIESTAND M. (note 4), at 189-190; JOSSELIN-GALL M., *Les contrats d'exploitation du droit de propriété littéraire et artistique*, Paris 1995, nums. 310 *et seq*; OBERGFELL E.I., in: REITHMANN C. / MARTINY D. (note 10), at 1267 and 1294-1297.

[40] Stressing such limitations, see FAWCETT J. / TORREMANS P., *Intellectual Property and Private International Law*, Oxford 1998, at 551 *et seq.*

V. Recourse to the Escape Clause

Even if a contract falls within one of the categories listed in paragraph 1 or if it is possible to determine its characteristic performance, the law indicated in Article 4 paragraphs 1 and 2 shall not apply if the contract is manifestly more closely connected with another country. Although the functioning of the escape clause requires restraint to ensure reasonable certainty, such clause may be relevant in an important number of situations concerning contracts relating to intellectual or industrial property rights. In the context of Article 4 Rome I Regulation, the key issue to be addressed is if, in situations that fall within paragraph 1 or the characteristic performance can be determined, it is possible to establish that certain contracts relating to intellectual or industrial property rights are manifestly more closely connected with another country pursuant to the terms of paragraph 3.

In order to determine if such a manifestly closer connection exists, a relevant factor is the existence of a very close relationship of the contract in question with another contract or contracts, as stated in the Preamble to the Rome I Regulation (paragraph 20). This element may be relevant in situations where international transfer or licence of IP rights are a part of a broader and more complex project arranged through a number of contracts. Under those circumstances, it is possible that there are good practical reasons for deciding that the various contracts arising out of the project were governed by the law of the same country.[41] For instance, it may happen that a licence agreement appears as functionally subordinate or accessory to the main agreement that covers the central aspects of the cooperation project. Where a choice of law has not been made by the parties in the licence agreement, its relationship with the other contracts arising out of the project may be relevant in the context of Article 4(3). Such relationship may be the basis to disregard the law applicable to the licence contract resulting from Article 4(2) and to appreciate that a manifestly closer connection exists with the law applicable to the other contract(s) concerning the project, so that inasmuch as possible the same law applies to the whole deal.

When analyzing agreements whose main object is the transfer or licence of an intellectual or industrial property right, it is important to note that the specific nature of intellectual and industrial property rights may decisively affect the existence of special links between the contract and one country. The view that contracts whose object is industrial or intellectual property rights of one country are clearly most closely connected with that country (country of protection) has found

[41] KREUZER K. (note 27), at 719; VON DER SEIPEN C., *Akzessorische Anknüpfung und engste Verbindung im Kollisionsrecht der komplexen Vertragsverhältnisse*, Heidelberg 1987, at 272-273; JAYME E., 'Kollisionsrechtliche Techniken für Langzeitverträge mit Auslandsberührung', in: NICKLISCH F. (Hsgb.), *Der komplexe Langzeitvertrag (Strukturen und Internationale Schiedsgerichtsbarkeit)*, Heidelberg 1987, at 311 and 313; VISCHER F., 'Das Internationale Vertragsrecht nach dem neuen schweizerisches IPR-Gesetz', in: *Das neue Bundesgesetz über das Internationale Privatrecht in der praktischen Anwendung*, Zurich 1990, at 9 and 29; MARTINY D., in: REITHMANN C. / MARTINY D. (note 10), at 163-167.

significant acceptance.[42] These exclusive rights are limited to specific territories and to the extent that a contract only refers to rights of a single country, it is certain that most facts and activities relevant to the performance of the contract shall always take place in the country of protection. The scope and effects of those rights are limited to the territory of the state that grants them, and hence, they can only be exploited within the country of protection. In the case of rights subject to registration, as is common in the field of industrial property rights, the integration of the subject matter in the social and economic sphere of the country of registration is especially clear. Nonetheless, such integration and special relationship with the country of protection is also present in the case of intellectual or industrial property rights not subject to registration due to them also being territorial.

The implementation of the contract requires that both parties perform continuous obligations in that territory. Additionally, the law of protection, as a consequence of the mandatory conflict-of-law rules on intellectual or industrial property rights, shall govern certain issues relevant to the contract regardless of the law of the contract. Those issues usually cover,[43] in particular: the existence, validity, duration, scope and contents of the exclusive rights; whether and under what conditions a right may be transferred; the conditions under which licences can be granted, and; whether and under what conditions a transfer or licence is effective against third parties.[44] Given that a breach of contract may take the licensee's activity into the area of infringement, there is significant interplay between the law of the contract and the law applicable to non-contractual obligations. Furthermore, because the main obligations arising out of the contract have to be performed in the country of protection, overriding mandatory provisions of that country such as antitrust laws are normally applicable to the contract due to its close connection with that country. In the case of agreements on copyright, specific rules establishing limits on transferability and the extent and conditions of transfers and licences are an important part of national copyright legislation aimed at protecting the author as the weaker party in typical contractual situations. Such provisions usually fall under the scope of application of the *lex loci protectionis* as a result of the conflict-of-law rules on intellectual property rights and therefore apply regardless of the law applicable to the contract.[45] That approach ensures the protection of

---

[42] TROLLER A., *Immaterialgüterrecht*, Vol. II, 3rd ed, Basel 1985, at 863-864; BLAISE J.B. / STENGER J.P., 'Propriété industrielle', in: *J.-Cl. dr. int.*, Fascicule 563-A, Paris 1981, at 28; DE MIGUEL ASENSIO P.A. (note 5), at 267-276; MARTINY D., 'Art. 28', in: *MünchKommBGB*, 4th ed, 2006, at 1855; UBERTAZZI B. (note 28), at 462.

[43] SOLTYSIŃSKI S. (note 34), at 294-307; ZENHÄUSERN U. (note 4), at 88-89; HIESTAND M. (note 4), at 98-122; DE MIGUEL ASENSIO P.A. (note 5), at 168-185; and LÓPEZ-TARRUELLA MARTÍNEZ A., *Contratos internacionales de software*, Valencia 2006, at 269-297; AZZI T. (note 20), at 45-47.

[44] FAWCETT J. / TORREMANS P. (note 40), at 546.

[45] METZGER A., 'Transfer of Rights, License Agreements, and Conflict of Laws: Remarks on the Rome Convention of 1980 and the Current ALI Draft', in: BASEDOW J. / DREXL J. / KUR A. / METZGER A. (note 6), at 61-77 and 66-73; SCHACK H., 'Internationally

authors in international contracts. Given this situation, it can be concluded that the contract is to a great extent manifestly integrated in the sphere of the country of protection.

The idea that transfer and licence contracts whose subject matter is industrial or intellectual property rights of only one country are manifestly more closely connected with the country of protection may to a certain extent be founded on the same rationale as the special rule on contracts to a right *in rem* in immovable property or to a tenancy of immovable property.[46] Under Article 4(1)(c) Rome I Regulation, those contracts shall be governed by the law of the country where the property is situated. The rule is based on the idea that, given its subject matter, the centre of gravity of those contracts is located in that country. A clearly closest connection with the sole country of protection cannot be established under Article 4(3) in situations where the contract has special links with another country. For instance, this may be the case when licensor and licensee have their common habitual residence in a country other than the country of protection of the licensed rights.

The idea that under Article 4(3) the law applicable to contracts relating to intellectual or industrial property rights of only one country shall be the law of protection may raise certain problems. It has been stressed that such an approach leads to different solutions for one-country and multi-country licence agreements.[47] Nonetheless, such diverse treatment seems reasonable to the extent that only in the case of one-country IP contracts a manifest more closely connection with the sole country of protection can typically be established. Also, the special rule of Article 4(1)(c) applies to the extent that a contract relates to immovable property located only in one country, although multi-country agreements on immovable property are less frequent. It also results in a criterion that, in typical situations, is easy to determine and apply. In principle, the close connection with the country of protection is not functional with respect to contracts relating to supranational IP rights such as Community trademarks, although its rationale may be influential as regards the application of Article 4(3) and 4(4) to those contracts.

With a view to extend a similar approach to multi-state licence agreements, it has been argued that sometimes it is possible to identify one of the protecting countries as the primary country of protection and exploitation. If the essential acts of production, exploitation and marketing take place in one of the protecting countries, that almost always is also the place of the seat of the licensee.[48] However, in cases where a characteristic performance can be determined, recourse to the escape clause is to be limited to exceptional circumstances and hence should apply only to the extent that it is undisputed that the so-called primary country of protection is

---

Mandatory Rules in Copyright Licensing Agreements', *ibid*, at 107-117 and 116; AZZI T. (note 20), at 45.

[46] HIESTAND M. (note 4), at 281-289.

[47] ULMER E. (note 28), at 92-93.

[48] BEIER F.K., 'Conflict of Law Problems of Trademark License Agreements', in: *IIC* 1982, at 162 and 175-177; and TORREMANS P. (note 4), at 404-409.

clearly most closely connected with the contract than is the country of the habitual residence of the characteristic performer.

It has also been noted that application of the law of protection to one-country intellectual or industrial property contracts under Article 4(3) leads to the application of different connecting factors to one-country patent contracts and to know-how agreements. That may pose difficulties given that in practice mixed licences whose subject matter includes know-how and patents or other IP rights are very common.[49] However, differences as to their subject matter between patent agreements and know-how agreements may justify the diverse results in the application of Article 4 Rome I Regulation due to the fact that only one-country patent agreements can present the connection with the country of protection required under Article 4(3). Thus, mixed patent and know-how licences may combine obligations falling within categories of contracts (one-country patent licences and know-how licences) to which different connecting factors may apply under Article 4. Given the function of Article 4(3), only to the extent that exclusive industrial or intellectual property rights (and not know-how) are clearly the main object of the contract, a manifestly more closely connection with the law of the protecting country can be established in the case of mixed contracts that include know-how and industrial or intellectual property rights of a single country. Otherwise, the law of the habitual residence of the party who is to effect the characteristic performance should apply.

VI. Determination of the Country with the Closest Connection to the Contract

Article 4(4) Rome I Regulation establishes a flexible default rule based on the location of the centre of gravity or the most significant relationship of the contract in line with Article 4(5) Rome Convention. That provision provides the formula to determine the law of the contract in the absence of choice, where the applicable law cannot be determined under Article 4(1) of the Regulation, since the contract cannot be categorised as one of the specified types nor under paragraph 2 because it is not possible to determine the country of habitual residence of the party required to effect the characteristic performance. In these situations the governing law shall be the law of the country with which the contract is most closely connected.

Such situations may be frequent in the field of contracts relating to industrial or intellectual property rights to the extent that in some of these contracts the characteristic performance may be impossible to determine. That is the case of so-called reciprocal agreements or licence exchange contracts. These agreements are usually concluded between parties who mutually waive their industrial property

[49] ULMER E. (note 28), at 92-93; VON HOFFMANN B., 'Verträge über gewerbliche Schutzrechte im internationalen Privatrecht', in: *RabelsZ* 1976, at 208 and 214; and HIESTAND M. (note 4), at 304-311.

rights because they cannot perform their activities without infringing on each other's rights. Therefore, the two parties grant each other a licence; usually, these licences concern similar IP rights. It is thus impossible to single out the main performance of one of the parties as characteristic. Additionally, transfer and licences of industrial or intellectual property rights take place many times as part of the subject matter of a complex agreement that combines in a single contract a bundle of rights and obligations typical of different categories of contracts. For instance, this may be the case in certain cooperation contracts. As noted earlier, in complex contracts whose structure and content has little in common with typical transfer or licence agreements, it is usually not possible to determine the party who is to effect the characteristic performance.

The Rome I Regulation does not provide in principle any criteria to determine the country with which the contract is most closely connected under paragraph 4. Its Preamble also stresses in this connection the idea that account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts. In general terms, not only a single circumstance is decisive and a wide range of factors must be taken into consideration. With a view to determining certain factors that must be taken into account and weighing them, it is important to consider that the ideas on which the rules established in Article 4 paragraphs 1 and 2 are based should play a significant role because they are considered as the most relevant elements indicating the centre of gravity of the international contracts in the contracts they cover.[50]

Therefore, the most significant factors include the place of residence or business of the parties and their nationality, which may be decisive if both are residents of the same country or are of the same nationality. It may also be very important to consider the subject-matter of the contract and the place of performance if the contract is more integrated in the social and economic sphere of one country. These factors may be decisive if the contract only covers industrial or intellectual property rights of one country or if it possible to determine a so-called primary country of protection. Other relevant factors to be considered include the structure and content of the contract, the place where the negotiations have been held, and the place of contracting.

[50] DE MIGUEL ASENSIO P.A. (note 5), at 264-267; and MARTINY D. (note 10), at 149-159.

THE ROME I REGULATION AND DISTRIBUTION CONTRACTS

Marie-Elodie ANCEL[*]

I. Introductory Remarks

The Rome I Regulation is now officially published and will govern contracts concluded after 17 December 2009.[1] Two of the Regulation's main novelties concern distribution contracts. The first is Article 9's definition of 'overriding mandatory rules.' Due to Article 9's wording and, especially, the invocation of 'public interests,' one may wonder if protective regimes — such as the Belgian Act of 27 July 1961 on the unilateral termination of exclusive distributorship contracts — still qualify as 'overriding mandatory rules.'[2] Whereas Article 9 potentially encompasses any contract, the other novelty deals solely with distribution agreements: when no choice of law has been made by the parties, Article 4.1 dictates that 'a distribution contract shall be governed by the law of the country where the distributor has his habitual residence.' This paper is focused on that provision.

---

[*] Professor of Law at the University of Paris 12.

[1] See GARCIMARTÌN ALFÉREZ F.J., 'The Rome I Regulation: Much ado about nothing?', in: *The European Legal Forum*, 2-2008, I, p. 61 *et seq*.

[2] If they do and are *foreign* overriding mandatory rules, another question is whether they make 'the performance of the contract unlawful': see Art. 9 (3) of the Rome I Regulation.

Yearbook of Private International Law, Volume 10 (2008), pp. 221-231

> 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
>
> (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
>
> …
>
> (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
>
> (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
>
> …
>
> 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
>
> 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
>
> 4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

No one can deny that when parties have not chosen a law to govern their agreement, the determination of the law applicable to distribution agreements needs to be clarified. Indeed, the Rome Convention has started a European-scale battle regarding characteristic performance and, as a result, peacemaking is necessary (II). The new Regulation clearly applies the law of the distributor's habitual residence, a choice that needs to be explained and tested (III). Finally, it must be emphasized that, surprisingly enough, the Rome I Regulation impacts another controversial matter: jurisdiction over distribution agreements under Article 5.1 of the Brussels I Regulation (IV).

II. The Battle over Characteristic Performance under the Rome Convention

Article 4 of the Rome Convention is an intricate provision.[3] It begins with a reference to the general principle of closest connection (§1); it then presumes that the closest connection is with the law of the party who is to effect the characteristic performance of the contract (§2); and it ends with a method to rebut this presumption when it appears that the contract is more closely connected with a different country (§5). Many courts in Europe are puzzled by this tortuous reasoning, because they do not know whether to begin at §1 or at §2. The escape clause (§5) tempts the courts to either reintroduce previous national conflict rules or to practice a result-oriented method to determine the governing law. Distribution agreement cases illustrate another difficulty, namely how to identify the characteristic performance. Following the Report by Giuliano and Lagarde, the characteristic performance is defined as the 'centre of gravity' and the 'socio-economic function' of the contract.[4] Generally, but not always, the characteristic performance coincides with the performance for which the payment is due. Thus judges are asked to find the distribution agreement's centre of gravity of distribution and determine whose shoulders it weighs upon – that of the manufacturer or the distributor. This task has proved difficult. First, the respective obligations assumed by the parties are not always clearly defined. Second, some courts are influenced by jurisdictional parameters. And finally, diverging conceptions on the characteristic performance of distribution agreements exist in Europe.

A. A Whodunit Game

In a sizable number of cases, courts are confronted with absent, partial, or equivocal evidence of the precise purpose and extent of a contract. Indeed, on rare occasions the agreement is oral.[5] Using some French case law examples, one may find agreements that were drafted but never signed;[6] a situation where a commercial relationship continued after the termination of an agreement;[7] and situations where

[3] See, for instance, BONOMI A., 'Conversion of the Rome Convention on Contracts into an EC Instrument: Some Remarks on the Green Paper of the EC Commission', in: *Yearbook of Private International Law* 2003, pp. 53-98, p. 71 *et seq*.

[4] GIULIANO M., LAGARDE P., 'Explanatory report': *OJ C 282*, 31.10.1980, espec. p. 20.

[5] *Irish Supreme Court*, 21.12.2000, *Bio-Medical Research Ltd trading as Slenderdone v. Delatex S.A.*; *England and Wales Court of Appeal*, 2.3.2001, *Print Concept GmbH v. G.E.W. (EC) Ltd*, [2001] EWCA Civ. 352.

[6] *Cour de cassation*, 25.11.2003, *Ammann-Yanmar v. Zwaans BVA*, n°01-01.414, *Bull. civ.* I, n° 237; *Cour de cassation*, 23.1.2007, *Waeco International GmbH v. Waeco France et al.*, n°05-12.166, *Bull. civ.* I, n° 30.

[7] *Cour de cassation*, 5.3.2008, *Wolman v. Cecil*, n°06-21.949.

court had only invoices, general sales conditions,[8] or unspecified 'documents'[9] to work with. Moreover, a contract's name may be approximate[10] or completely unusual[11] with regard to its purpose.

Of course, in this context it is difficult to follow the Giuliano-Lagarde Report's guidance. It is also difficult to ascertain whether the obligations undertaken by the so-called 'distributor' go beyond what an ordinary buyer would bear. As Lord Justice Tuckey humorously noted in the *Print Concept* case: 'We were thus treated to the unusual spectacle in this court of counsel enthusiastically suggesting that each of their respective clients should be subject to comparatively onerous implied obligations over and above what their clients had expressly agreed.' In this case, the manufacturer agreed to certain commitments, namely following the specifications given by the final buyer and helping to install the equipment sold, that helped to tip the scales in favour of applying its law.

B. Influence of the Obligation at Issue

Most often the law governing the contract must be determined before jurisdiction can be decided. Many international distribution cases follow the same pattern: a manufacturer is dissatisfied with either the behaviour or results of its foreign distributor. Accordingly, it terminates the contract expressly or tacitly by providing its goods to another foreign firm. Then, the original distributor files a breach of contract action in its own court. Of course, the first thing the manufacturer does is challenge that court's jurisdiction. When the manufacturer is established in an EU Member State he argues that he should have been sued in his own country pursuant to the Brussels Convention or – since 2002 – the Brussels I Regulation (Art. 2). The question then becomes whether the seized court has jurisdiction under Article 5.1 of one of these two instruments.

Because the head of jurisdiction has historically been the place of performance of the obligation supporting the claim (ECJ, 6.10.1976, *De Bloos*), according the law designated by the conflict rules of the *forum* (ECJ, 6.10.1976, *Tessili*), the debate usually slips towards the governing law and the characteristic performance of the contract. In such circumstances, the French *Cour de cassation* has on two occasions confused the obligation supporting the claim of the distributor (which is of course an obligation bearing on the manufacturer) with the contract's characteristic performance. In the *Waeco* case, the Court held that a manu-

[8] *Cour de cassation,* 6.3.2007, *Nemrod Frankonia v. Blaser Jagdwaffen GmbH,* n°06-10.946, *Bull. civ.* I, n° 93; *Cour de cassation,* 19.3.2008, *Equipiel v. Novotechnik,* n°06-17.561; *Cour de cassation,* 16.4.2008, *Fascom v. Ionian Sa Papastratos Group et al.,* n°07-14.697.

[9] *Cour d'appel de Douai,* 20.6.2006, *Thai Kitchen et al. v. TWF,* n° RG: 05/07523.

[10] *Corte di cassazione (s.u.),* 11 juin 2001, *Otto Kogler v. Eurogames s.r.l.,* n°7890: 'contratto di rappresentanza esclusiva'.

[11] In the *Ammann-Yanmar* French case*: 'Importeurvertrag'.*

facturer's alleged failure to comply with its obligation to guarantee a distributor's exclusive distributorship in France was the contract's characteristic performance. In the *Thai Kitchen* case, the plaintiff claimed that his partner failed to honour certain orders and used a new distributor; the Court held that the characteristic performance was ('*de la sorte*') the provision of goods.[12]

In Italy, the bias has a different origin. In the *Otto Kogler* case, an Italian manufacturer filed suit in Italy because its Austrian distributor failed to pay for some orders. The *Corte di cassazione* held that the contract at issue fulfilled two functions: exchange and collaboration. The *Corte* went on to state that the characteristic performance should be identified through the peculiarities and circumstances of the contract at issue, as opposed to abstract contractual classifications. Holding that the contract's exchange function was essential and linked with the provision of goods, the *Corte di cassazione* concluded that the contract was governed by Italian law. In this case, the importance given to the provision of goods may be explained by the fact that the contract described at length all the obligations assumed by the Italian manufacturer, whereas it was apparently more ambiguous on the role of the Austrian distributor. The *Corte* also expressed the general view that the distribution activity would not have existed without the provision of goods. However, the subject-matter of the dispute – unpaid deliveries – also played a role (at least to confirm the decision). Nonetheless, in the more recent *Fallimento Manifatture Natlacen s.r.l.* case, the *Corte di cassazione* retained only the general view it expressed in *Otto Kogler*.[13] In this case, an Italian distributor sued a French manufacturer for violating the distributor's exclusivity rights and also for delay in making deliveries. The *Corte de Cassazione* cited the *Otto Kogler* case and once again applied the law of the manufacturer.

C. Diverging Conceptions

Apart from these contingencies, Europe courts appear to have diverging ideas on where the centre of gravity lies in exclusive distributorship agreements. In Italy, and now France,[14] and to a lesser extent England,[15] the manufacturer is the

[12] For a deeper analysis of French case-law in the field of distribution contracts, see ANCEL M.-E., 'Les contrats de distribution et la nouvelle donne du règlement Rome I', in: *Rev. crit. dr. int. priv.* 2008, p. 561 *et seq.*

[13] *Corte di cassazione (s.u.),* 4.5.2006, *Fallimento Natlacen s.r.l. v. Ets Hallette s.a.s. et al.*, n° 10223, *Riv. dir. int. priv. e proc.* 2007, p. 194. See also IORIO FIORELLI G., 'Contratti internazionali di distribuzione: problemi di legge applicabile e di giurisdizione', in: *Riv. dir. int. priv. proc.* 2007, p. 633 *et seq.*

[14] When the contract at issue was concluded before the entry into force of the Rome Convention, the *Cour de cassation* often admitted that *'l'obligation principale'* was performed by the distributor: see, for instance, *Cour de cassation*, 8.2.2000, *William Grant and Sons International Ltd et al. v. Société Marie Brizard et Roger International*, n° 96-20.568, *Bull. civ.* I, n° 39.

[15] See the *Print Concept* case.

characteristic performer because distribution is irrelevant without the provision of goods. In other countries, such as the Netherlands, Germany, Austria, and Spain,[16] manufacturing or providing goods is not the characteristic performance because it misses the point of a *distribution* agreement.[17]

III. Choice for the Law of the Distributor under the Rome I Regulation

The Rome I Regulation makes a stand for the law of the distributor. Legal certainty seems to lie at the root of this choice. However, simplicity is not guaranteed because the Regulation gives no substantial definition of distribution contracts.

A. The Rationale

By choosing the law of the distributor's habitual residence, the Rome I Regulation follows the European Commission's 2005 proposal.[18] However, while the Commission justified this connecting factor by protecting distributors as the weaker party, the Regulation recitals make no reference to such a weakness. Accordingly, the Commission's explanation is questionable.[19] For instance, it is a bit excessive to represent distributors as generally weaker parties. Moreover, had such a weakness existed, the means chosen to solve the problem were ill-suited for the task: the law of the distributor's habitual residence is not always the most protective of the distributor. The first thing the Commission should have done was to limit choice of law, a solution it did not envision. It is not surprising then that the Rome I Regulation does not endorse such a view.

[16] For the Netherlands: *Hoge Raad*, 24.4.1991, *Häcker v. Bosma*; 1.11.1991, *Isopad v. Huikeshoven*, *NILR* 1993, p. 239, comments by PELLIS L.Th.L.G. In Germany: see, for instance, *OLG* München, 26.9.1995, *IPRspr*. 1995, n° 32; *LG* Stuttgart, 30.4.1996, [1998] *ILPr* 100. In Austria: *OGH*, 20.01.1999, *ÖJZ* 1999.504. In Spain: *AP Barcelona*, 28.4.2000, *Anuario español de Derecho internacional privado* 2002, p. 679, with comments by DE MIGUEL ASENSIO P. A.

[17] For an example of a change in analysis, see the Swiss case-law prior to the Swiss Private International Law Act of 1987: *Tribunal fédéral*, 12.2.1952, *Chevalley*, ATF 78 II 74; *Asbrink Eiker AB*, 10.12.1974, ATF 100 II 450. Under the Act of 1987, see *Tribunal fédéral*, 9.3.1998, *A. AG v. B*, ATF 124 III 188, based on the closest connection with the country where the distributor operates but also with a reference to the *Asbrink EikerAB* case.

[18] COM (2005) 650 final, 2005/0261 (COD).

[19] See, for instance, LAGARDE P., 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)' in: *Rev. crit. dr. int. pr.* 2006, p. 331 *et seq*., spéc. p. 339.

The rationale behind employing the law of the distributor has more to do with predictability than protection. First, a predefined connecting factor is certainly helpful in reducing differences between courts in Europe. Second, there are several advantages in choosing the law of the distributor over that law of the manufacturer. The main advantage is that distribution agreements are generally more closely linked with the country where the distributor has its habitual residence and operates. Thus, the probability that Rome I's Article 4.3 escape clause could be successfully invoked is rather low. Moreover, a distributor may also be acting as the manufacturer's agent for certain kinds of products or tasks. Since in the absence of a choice of law agency is generally governed by the law of the agent,[20] having both the distribution and agency agreements governed by the same law is a good thing.

Finally, no-one can exclude that, fundamentally, a majority of the European legislators believe that the distributor effectuates the characteristic performance of a distribution contract.[21] However, with a predefined connecting factor this question has lost its importance. But new ones arise.

B. The Handling

1. The Definition of Distribution Contracts

Under the Rome Convention, characterisation of a contract is not a serious problem, because what matters is a determinate contract's centre of gravity. For instance, if one party agrees to lease a parking lot and his counterpart agrees to pay him 200€ per month in return, it is sufficient to say that the centre of gravity is on the shoulders of the former – hence he is the one who is to effect the contract's characteristic performance. Furthermore, it is sufficient to say that this contract belongs in the category of let and hire contracts (whose generic characteristic performance is performed by lessors), but such categorization is not necessary.

On the contrary, the Rome I Regulation has created specific conflicts rules, associating specific connecting factors with specific categories.

It is necessary to know what these categories cover and, especially, what a 'distribution contract' is within the meaning of Article 4.1.f. It is beyond doubt that the contractual categories listed in Article 4.1 are to be construed in an autonomous way but the EU legal system is not so advanced and complete that it can provide ready-made answers. Of course, Recital 17 of the Rome I Regulation defines dis-

[20] Ex Article 4.1.b of the Rome I Regulation or Article 6 of the 1978 Hague Convention on the law applicable to agency.

[21] The Draft Common Frame of Reference seems to support this viewpoint, placing distributorship among 'contracts under which a party engaged in business independently is to use skills and efforts to bring another party's products on to the market' (VON BAR C. et al., 'Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group)', in: *Draft Common Frame of Reference, Interim Outline Edition*, München 2008, Book IV, Part E, Art. 1:101.1).

tribution contracts as 'contracts for services,' but that definition does not really help in understanding their substance and limits. Should it be interpreted in a broad or in a narrow sense? Can the definition be built on legal criteria, or is a mere economic characterization relevant?

For instance, a manufacturer, as in the *Print Concept* case, contracts to deliver equipment according to specifications from its end customers. These customers are found by the manufacturer's partner, who operates in a foreign market and supervises the installation on end customers' premises. Is the contract between this manufacturer and his partner a 'distribution contract'? If it is, it will be governed by the law of the 'distributor'. But one may contend that such a contract is not a 'sale of goods,' a 'provision of services,' or a 'distribution contract.' Consequently, identifying the contract's characteristic performance – as required by Article 4.2 of the Rome I Regulation – may lead to the law of the manufacturer, just like it did in the *Print Concept* case.[22]

And what if partners use an outline agreement to define how prices are fixed and how orders are passed yet they establish no minimum quantity requirements or domestic market penetration standards for the importer – is this a 'distribution contract' or just a series of sales that are governed, individually (Art. 4.1.a) or globally (Art. 4.2), by the law of the exporter?

However, the simplest and most important question for the ECJ to answer may be the following: Are 'sales' between the parties part of the 'distribution contract' or do they stand alone for purposes of conflicts rules? If they do stand alone, they are governed by their own law, that is to say the law of the seller (manufacturer), unless the escape clause can be invoked. This latter possibility should be seriously considered because Recital 20 of the Regulation permits one to take account of whether the contract in question (that is, for us, sales) has a very close relationship with another contract (that is, for us, the 'distribution contract' *stricto sensu* or the framework agreement). Unfortunately for uniformity and predictability, such a reunification is not always possible.

2. The Relationship with International Conventions

According to Article 25 of the Rome I Regulation,

> 1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
>
> 2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or

[22] Except for the situation where, the characteristic performance being impossible to determine, the closest connection test comes into play thanks to Article 4.4 of the Regulation.

> more of them in so far as such conventions concern matters governed by this Regulation.

Two international Conventions are relevant to distribution agreements. The first is the Hague Convention on the law applicable to international sales of goods (1955). This Convention binds a few Member States (Finland, France, Italy and Sweden) as well as Niger, Norway, Switzerland, and Denmark (which is considered a third country in this context ex Article 1.4 of the Regulation). Thus, judges in these Member States still have recourse to this Convention. In France, for instance, it is generally contended that the Convention applies to determine the law governing sales taking place between manufacturers and distributors.[23] In the absence of a choice of law, this Convention frequently leads to the law of the seller, which would then be the manufacturer. It is important to note that the Hague Convention has no escape clause such as Article 4.3 of the Rome I Regulation. As a consequence, these sales should definitely be governed by the law of the manufacturer.

A close look at Article 25 of the Rome I Regulation shows that conflict-of-law rules laid down by international conventions fully prevail, with their own categories and their own connecting factors. As a result, when a Finnish, French, Italian, or Swedish court is seized, the law of the seller will govern regardless of the ECJ's position vis-à-vis sales under a distribution agreement. The law of the distributor will apply only to the other aspects of the legal relationship.

The second Convention is the 1980 Vienna Convention on contracts for the international sale of goods (CISG). Although the CISG Convention does not threaten uniformity as the Hague Convention does, the Rome I Regulation raises some questions about its scope of application. *Ratione materiae,* the set of uniform rules comprised in the CISG, is generally considered to apply to sales between manufacturers and distributors.[24] This Convention binds roughly 70 States, but not Malta, Portugal, or the United Kingdom. *Ratione loci,* the Convention applies to contracts between parties whose places of business are in different States and either both of those States are contracting States (Art. 1.1.a) or the rules of private international law lead to the law of a contracting State (Art. 1.1.b). Whereas the second possibility merely leaves the application of the Convention to the private international regime of the forum, the first one is a rule stating under which conditions the CISG is 'directly' applicable. One may wonder if this rule, which is not a classical bilateral conflict-of-law rule, is preserved by Article 25 of the Rome I Regulation.[25] Of course, this question may be largely theoretical, because

---

[23] Although case law is not so categorical: Cour de cassation, 22.7.1986, *Rev. crit. dr. int. pr.* 1988, p. 56, with a comment by BATIFFOL H. This case may be construed as limiting the scope of application of the Hague Convention to independent and occasional sales of goods.

[24] See BRIDGE M., 'Uniform and harmonized sales law: choice of law issues', n°16-95, in: FAWCETT J.J., HARRIS J.M., BRIDGE M., *International Sales of Goods in the Conflict of Laws*, Oxford 2005.

[25] Especially because Article 25 of the Rome I Regulation is drafted more narrowly than Article 21 of the Rome Convention: 'This Convention shall not prejudice the

when parties have their places of business in two contracting States, the Rome I Regulation most often leads to the law of one of those two States, thus making the CISG applicable. In any case, some authors contend that Article 25 'encompasses uniform material-law conventions that define their sphere of application by means of unilateral rules,' such as the CISG. Nevertheless, if doubts should ever arise, it might still be argued – with a bit of astuteness – that applied directly to the circumstances mentioned at Article 1.1.a, the CISG makes the conflict of laws disappear and leaves no more room for the Rome I Regulation. In any case, it would be a pity to jeopardize Article 1.1.a of the CISG.

IV. Rebound on the Brussels I Regulation

Regarding jurisdiction, the Brussels I Regulation has started another European-scale battle with respect to distribution contracts: Does the head of jurisdiction established by Article 5.1.b for provision of services apply to distribution contracts? Some courts, in Greece and Spain for instance,[26] answer this question in the affirmative, while the French *Cour de cassation* seems absolutely convinced that an exclusive distribution contract is not a provision of services (nor a sale of goods) and, as such, is subject to Article 5.1.a. This keeps the judge-made *Tessili-De Bloos* doctrine alive. Naturally, this kind of divergence should be solved by the ECJ or, why not, in a revised version of the Brussels I Regulation. However, Recital 17 of the Rome I Regulation appears to give more than a hint.

To start, the Recital states that:

> 'As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation'.

Since, within the meaning of the Rome I Regulation, a 'distribution contract' (Art. 4.1.f) is not a 'contract for the sale of goods' (Art. 4.1.a) any more than a 'contract for the provision of services' (Art. 4.1.b), it would be logical to conclude that, under the Brussels I Regulation, distribution agreements are dealt with by the rule of Article 5.1.a.

---

application of international conventions to which a Contracting State is, or becomes, a party.'

[26] Protodikeio Thessaloniki, 11862/2004, quoted by VASSILIKAKIS E., in: *IPRax* 2005, p. 279 *et seq*., espec. p. 280 and by MANKOWSKI P., 'Article 5', footnote 342 in: MAGNUS U., MANKOWSKI P. (eds.), *Brussels I Regulation*, München 2007; AAP Zaragoza, 15.12.2006, *Casa Ártiach v. Camp Sap*, <www.accursio.com>.

Nonetheless, Recital 17 immediately adds that:

> 'Although franchise and distribution contracts are contracts for services, they are the subject of specific rules'.

Therefore, as far as the governing law is at stake, distribution contracts are distinguished from contracts for the provision of services. But, when it comes to jurisdiction, distribution contracts are seen as 'contracts for services,' which, in order to make sense, should mean 'contracts for the provision of services' within the meaning of Article 5.1.b of the Brussels I Regulation.

Consequently, a plaintiff should file suit in a Member State court where the services 'under the contract were or should have been provided.' Most often, this location should correspond to the place where distribution occurs.[27]

V. Conclusion

While drafting Recital 17 and Article 4.1.b of the Rome I Regulation, the EU legislators were clearly inspired by good intentions. They wanted to provide distribution contracts with a clearer head of jurisdiction and a clearer conflict-of-law rule. However, the difficulty now lies in determining what the legislators actually meant by 'distribution contracts.'

[27] MANKOWSKI P., 'Article 5', n°113, in: MAGNUS U., MANKOWSKI P. (note 26). When a distributor operates in several jurisdictions, see MANKOWSKI P., 'Article 5', n°120-121, in: MAGNUS U., MANKOWSKI P. (note 26).

FRANCHISE CONTRACTS AND THE ROME I REGULATION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS

Laura GARCÍA GUTIÉRREZ*

I. The Structure of Franchise Contracts as a Premise for Understanding the Rules on Applicable Law

As is generally known, the Rome I Regulation on the law applicable to contractual obligations[1] (hereinafter RIR) shall apply from 17 December 2009.[2] RIR makes significant changes in the area of franchise contracts. The main objective of this study is to analyse these changes and their adequacy to the business practice of expanding marketing networks through franchises.

The structure of franchise contracts is somewhat complex. Therefore, it is advisable to first recall of what a standard franchise contract consists, so as to be able to correctly understand the scope of the rules under analysis, and to compare the new 'situation' brought about by the RIR with that existing previously within the framework of the Rome Convention of 1980.

* Profesora Contratada Doctora, Department of Private International Law, Universidad Autónoma de Madrid.

[1] See OJ L 177, 4.7.2008, p. 6.

[2] See Article 29 RIR.

Yearbook of Private International Law, Volume 10 (2008), pp. 233-244

In franchise contracts, a long-standing business with a certain degree of success and prestige in the market,[3] the franchisor, assigns to the other party, the franchisee, the bundle of intangible assets composing its own system for marketing products and/or services, basically comprising its know-how regarding the creation and development of the business, as well as its trademarks and other distinguishing marks. Certain tangible assets essential to the franchised activity, such as machinery, means of transport and corporate furniture, are also usually transferred to the franchisee, as well as, in distribution franchises, the products to be sold under the corporate image of the franchisor. Consequently, there is, in franchise contracts, a transfer of a complete marketing method, usually called a *franchise package*, for the franchisee's use. In exchange, the franchisor is paid an array of royalties, which tend to include an entry fee (also called an admission ticket or front money) as well as ongoing periodic royalty payments. In this manner, the franchisee undertakes to faithfully reproduce the franchised business, following the instructions, and under the supervision of the franchisor, that shall provide the franchisee with ongoing technical and commercial assistance. Therefore, a franchise contract is sometimes referred to as a sort of 'company reproduction' contract.

II. The Situation prior to the Rome I Regulation: Problems Determining the Law Applicable in the Absence of Choice

Bearing in mind the aforementioned brief description of the characteristics of franchise contracts, it is understandable how complicated it was to determine the applicable law, in the absence of choice, within the framework of the Rome Convention 1980. Particularly, it was rather difficult in these contracts to specify the 'characteristic performance' (Article 4.2 Rome Convention 1980), under the closest connection rule of Article 4.1 of the Rome Convention 1980. As highlighted by a significant number of experts,[4] this problem was not confined to franchise contracts, but rather was common to all contracts lacking the exchange-of-goods/services-for-money structure.

[3] In fact, many franchisors and advisors recommend starting with a local market share of at least 70% before internationalising a franchise (see ABELL M., *The International Franchise Option*, Waterloo 1990).

[4] See, for example, CARRASCOSA GONZÁLEZ J., 'La lucha por la prestación característica (I): los contratos internacionales de distribución', in: *Cuestiones actuales del Derecho mercantil internacional*, Madrid 2005, p. 355; KAUFMANN-KOHLER G., 'La prestation caractéristique en droit international privé des contrats et l'influence de la Suisse', in: *ASDI* 1989, pp. 195 *et seq.*, esp. p. 217; KAYE P., *The New Private International Law of Contracts of the European Community*, Aldershot 1993, pp. 191-192 and 453.

In fact, expert opinions and case law were quite divided on this problem.[5] A first group was of the opinion that the party required to effect the characteristic performance was the franchisor,[6] therefore, pursuant to Article 4.2 of the Rome Convention 1980, in the absence of choice, the contract was to be governed by the law of the franchisor's habitual residence. Among the arguments used to defend this opinion was the fact that the multiple obligations undertaken by the franchisor, the contract's true centre of gravity, were of a higher complexity, especially taking into account that the franchisee basically reproduces that which is assigned to him as part of the franchise package. Moreover, this solution allowed all contracts entered into by the same franchisor to be governed by the same law and provided a solution to international franchise contracts similar to that to be expressly found in Switzerland's Federal Code on Private International Law (CPIL) for contracts concerning intellectual property rights.[7] A second group of experts considered the franchisee to be the party required to carry out the characteristic performance of the contract.[8] Their principal argument was that the franchise should be treated in a manner similar to distribution contracts, for which several Court decisions had deemed the obligations of the distributor to be the

[5] In this regard, see MARTINY D., 'Comment to Article 28 EGBGB', in: *Münchener Kommentar zum BGB*, volume 10, 4th ed., Munich 2006, n. 230, p. 1789.

[6] See BRÄUTIGAM P., 'Franchiseverträge im deutschen internationalen Privatrecht', in: *WiB* 1997, p. 899; HIESTAND K., 'Die internationalrechtliche Beurteilung von Franchiseverträgen ohne Rechtswahlklausel', in: *RIW* 1993, pp. 173-178; VISCHER F./HUBER L./OSER D., *Internationales Vertragsrecht*, 2nd ed., Bern 2000, pp. 307 and 308; VISCHER F., 'Haftung des Kreditkartenunternehmens gegenüber dem Vertragsunternehmen: Überlegungen zu einigen materiell- und kollisionsrechtlichen Aspekten des Kreditkartenfranchising', in: *Festgabe zum 60. Geburtstag von Walter R. Schluep*, Zurich 1988, pp. 513-530; VON BAR CH., *Internationales Privatrecht*, vol. II, Munich 1991, n. 499, p. 369.

[7] See Article 122 CPIL. As already known, this Code had a decisive influence on the drafting of the Rome Convention 1980. US case law of the past several years tends too to see the centre of gravity of a franchise contract in the assignment of the trademark license (see, for example, *Siegel* v. *Chicken-Delight Inc.*, decision handed down by the Court of Appeals for the Ninth Circuit on 23/03/1971; *Susser v. Carvel Corp*, decision of the *US Supreme Court* handed down on 3/5/1966; or *Principe v. Mc. Donald's Corporation*, decision handed down by the Court of Appeals for the Fourth Circuit on 26/9/1980).

[8] See ABELL M., *European Franchising – Law and Practice in the European Community*, Waterloo 1991, p. 194; SCHLEMMER H., 'Kollisions- und sachrechtliche Fragen bei Franchising', in: *IPrax* 1988, p. 252; BAUDENBACHER C., 'Die Behandlung des Franchisevertrages im Schweizer Recht', in: KRAMER E. A., *Neue Vertragsformen der Wirtschaft: Leasing, Factoring, Franchising*, St. Gallen 1985, pp. 205-230; EBENROTH T., 'Kollisionsrechtliche Anknüpfung der Vertragsverhältnisse von Handelsvertretern, Komissionsagenten, Vetragshändlern und Handelsmaklern', in: *RIW* 1984, pp. 165 *et seq.*; SCHWANDER I., 'Die Behandlung der Innominatverträge im internationalen Privatrecht', in: *Festgabe W.R. Schluep*, Zurich 1988, pp. 501-510; WILDHABER C., *Franchising im internationalen Privatrecht*, St. Gallen 1991, p. 259 (the latter in favour of treatment analogous to that given to employment contracts).

characteristic performance.[9] The third group believed that, given the impossibility to determine the characteristic performance of the franchise contract, the law most closely connected with the contract should be applied on a case-by-case basis. Consequently, their view was that this problem should be resolved by a sort of compromise.[10]

III. The New Panorama Presented by the Rome I Regulation: Increased Legal Certainty, But Are the Rules Adequate?

The RIR mentions franchise contracts, which were never expressly referred to in the Rome Convention, on two occasions: once in Recital (17) and again in Article 4.1.e. In Recital (17), EC Law classifies both franchise and distribution contracts as 'contracts for services', although they are subject to specific rules on applicable law. This classification of franchise contracts is highly debatable, and would affect not only provisions on applicable law, but also those on international jurisdiction. This was the EC legislature's intention, since the aim of Recital (17) is precisely to make it clear that the concepts of 'provision of services' and 'sales of goods' should be interpreted in the same way within the scope of the RIR and of Art. 5.1 of the Brussels I Regulation.[11] Moreover, in relation to franchise contracts, the effect of this Recital is even greater in the field of international jurisdiction than in that of applicable law. The classification of these contracts as 'contracts for services' would imply that EC Law is in favour of the application of the presumption made in Article 5.1.b[12] about lawsuits relating to this

[9] For example, MERONI R. in ABELL, M. (note 3), p. 295, the opinion offered being that since Switzerland's Supreme Court had ruled that in distribution contracts the characteristic performance was carried out by the distributor, in franchise contracts it would be the franchisee.

[10] See PLASSMEIER G., *Kollisionsrechtliche Probleme internationaler Franchise-systeme*, Osnabrück 1999, p. 118. According to this author, in practice, in the majority of cases, determining the closest connection on a case by case basis without considering the characteristic performance of the contract would lead to the application of the law of the country where the franchisee has its habitual residence (p. 119); see also REIF M., *Internationale Franchiseverträge. Eine Studie zum internationalen Privatrecht mit Hinweisen zur gerichtlichen und aussergerichtlichen Streitbeilegung sowie zur Vertragsgestaltung*, Regensburg 2002, pp. 30-34.

[11] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* L12, 16.1.2001, p. 1.

[12] Recently the French *Cour de Cassation* ruled against the classification of an exclusive agency contract as a contract for the sale of goods or for services for the purposes of Art 5.1.b of the Brussels I Regulation, in the case *Waeco International GmbH vs. Cardon et al*., decision 23.1.2007 (see *ILPr* 2007, p. 521). Also against the application of the presumptions of Article 5.1.b of the Brussels I Regulation to distribution contracts, see IORIO FIORELLI G., 'Contratti internazionali di distribuzione: problema di legge applicabile e di giurisdizione', in: *Riv. dir. int. priv. proc.* 2007, p. 650; DURÁN AYAGO A., 'Contratos

type of contract. Consequently, it would no longer be possible to argue in favour of the application of the basic rule of Article 5.1.a. As is well-known, notwithstanding the presumptions in Article 5.1.b, as ruled by the European Court of Justice (hereinafter, ECJ) in *De Bloos*,[13] in deciding whether a case is under international jurisdiction, the relevant obligation is 'that on which the suit is based', and the 'place of performance of said obligation' shall determine the special jurisdiction. This implies that if the places of performance of the different obligations arising from the franchise contract were to be different, multiple courts would have jurisdiction over these contracts. The inclusion of franchise contracts in the presumptions of Article 5.1.b of the Brussels I Regulation implies that EC legislature would be in favour of concentrating all lawsuits relating to franchise contracts in the place of the 'provision of services', as a special jurisdiction stated in Article 5.1 of the Brussels I Regulation.

In principle, the consequences of this classification would be appropriate, to the extent that the number of courts having jurisdiction over the same contract would be reduced, hence lowering both the risk of irreconcilability of decisions and legal costs. However, it would lead to the same problems as those discussed earlier relating to the determination of the place of characteristic performance in franchise contracts within the framework of the Rome Convention 1980. Specifically, where would the service be provided in a franchise contract? For this purpose, the strict classification of a franchise as a service contract seems appropriate. However, it is doubtful whether a franchise contract is really comparable to a contract for services.[14] This becomes evident when one tries to identify the service provider and the service receiver.

As has already been observed, within the scope of international jurisdiction and probably inadvertently, EC Law has left this question open to discussion. However, in the field of applicable law, the EC legislature seems to have been more aware of this problem, and despite their classification as 'contracts for services', franchise and distribution contracts are not, as specified in the same Recital (17), subject to the general rule on the determination of applicable law in the absence of choice for service contracts, stated in Article 4.1.b.[15] However, as shall be noted here below, it is also very likely that the reason why these contracts are subject to specific rules under Article 4.1 is that, rather than seeking the characteristic performance of the contract, greater importance was placed on other elements when determining the applicable law rules.

---

internacionales de distribución', in: CALVO CARAVACA A. L./CARRASCOSA GONZÁLEZ J., *Curso de contratación internacional*, 2nd ed., Madrid 2006, p. 434.

[13] ECJ case 14/76.

[14] In fact, until now, authors usually based their arguments on the impossibility of comparing franchise contracts to contracts for the sale of goods and services for the purpose of Article 5.1.b. See, for example, KENFACK H., *Droit du commerce international*, 2nd ed., Paris 2006, p. 150.

[15] This reads: *'To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence'*.

The second significant innovation brought about by the RIR in relation to franchise contracts is the provision of Article 4.1.e. This Article states a specific rule for determining which law is applicable to franchise contracts in the absence of choice. According to this Article, if the law to be applied has not been expressly or tacitly agreed upon, franchise contracts shall be governed by the law of the country where the franchisee has its habitual residence. However, this is without prejudice to the provision of Article 4.3, *'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated…the law of that other country shall apply'*.

Referring strictly to the field of the law applicable to contracts, two observations should be made in relation to the two new references to franchise contracts in the RIR, i.e. Recital (17), and Article 4.1.e. Firstly, franchise and distribution contracts are treated separately, which seems appropriate because of the particular structure of franchise contracts referred to at the beginning of this study. However, the inexistence of specific rules relating to other cooperation agreements, such as mandate or agency contracts, is striking. Secondly, both provisions are clearly meant to meet the objective set in Recital (16), i.e. to provide member States with *'highly foreseeable'* conflict-of-law rules. As pointed out earlier, this is an aim that the Rome Convention 1980 failed to attain in relation to franchise contracts.

A. The New Rule in Article 4.1.e and its Purpose

With respect to the new rule set forth in Art. 4.1.e, and in reference to the controversy over characteristic performance arising within the framework of the Rome Convention 1980 in the case of franchise contracts, my personal opinion is that the characteristic performance is effected by the franchisor, if only because this party is responsible for the most complex obligations. In other words, within the framework of the legislation applicable prior to the RIR, I would have opted for the alternative solution, or, in view of the broad controversy pertaining thereto, for an intermediate, compromise, solution, based strictly on the contract's 'closest connections'. However, I do not consider that EC Law, by opting for the application of the franchisee's law, is siding with those who defend the opinion that the characteristic performance of the franchise contract is that effected by the franchisee. In my opinion, EC Law has likely opted for this connection for two reasons: firstly, in order to pursue a policy of protecting the weaker party;[16] and secondly, for the purpose of taking into account the legal order of the State where the franchise is operated as the 'market affected by the contract'.

The principle of protecting the weaker party is expressly stated in Recital (23) of the RIR, in which EC Law generally advocates the need to lay down conflict-of-law rules that are more favourable to the weaker party than the general rules. I do not consider it to be a coincidence that EC Law is not expressly limiting this need to protect to consumer contracts, employment contracts, or certain insurance contracts, in this Recital. This omission shows that the protection policy is extensible to other contracts, such as franchises, where a certain asymmetry of information may exist between the

[16] Likewise, see IORIO FIORELLI G. (note 12), p. 645.

parties. It is true, in my opinion, that the level of protection required in the case of consumer contracts is higher because the asymmetry found with respect to these contracts is also higher. However, it is also true that it would have been more appropriate to include in this Recital a list of the principal contracts involving weak parties, so that there would be no doubt whatsoever that this principle is the basis for the specific rule relating to franchise contracts.

Certain authors shed doubt on the existence of a weaker party in franchise contracts;[17] however, this is a minority opinion. Although the parties to the franchise contract are independent companies, which invest and risk their own equity in the contract, and the franchisee is not in a weaker position compared to the situation of any other business of a similar size which carries out a business activity independently, it is widely agreed that within the internal relations of the franchise contract, significant inequalities exist in the information held by the parties.[18] Moreover, on many occasions, standard-form contracts are entered into, to which the franchisees are obliged to agree with scarcely any negotiating margin.[19] This point of view has doubtless been echoed in this Regulation. Examples of legal instruments in which this need for protection is stated include, inter alia, the UNIDROIT *Model Franchise Disclosure Law* (2002), the various Codes of Ethics drafted by different franchise associations,[20] and domestic laws regulating certain substantive terms of the franchise contract, imposing registration and/or disclosure requirements upon the franchisor in the phase previous to the conclusion of the contract.[21] Among the latter, most noteworthy are the laws of the United States, where this type of contract first arose[22]. Consequently, it pioneered such regulations, which are clearly protective in nature, as shown by the *Federal Trade Commission (FTC) Franchise Rule* of 1979[23] or the different regulations on an infra-

[17] In Spain, see for example PAZ-ARES C., 'La terminación *ad nutum* de los contratos de distribución', in: *RDM* 1997, p. 41.

[18] See CASSANO G. (dir), *I contratti di distribuzione*, Milan 2006, p. 70.

[19] DOMÍNGUEZ GARCÍA M. A., 'El contrato de franquicia', in: BERCOVITZ A: *Contratos Mercantiles*, vol. I, Madrid 2007, p. 589; STEIN-WIGGER M., *Die Beendigung des Franchisevertrags. Eine rechtsvergleichende Studie unter besonderer Berücksichtigung des schweizerischen, deutschen und amerikanischen Rechts*, Basel 1999, p. 35; WILDHABER C. (note 8), p. 202.

[20] See, for example, the *European Code of Ethics for Franchising adopted by the European Franchise Federation* (EFF), and on a national level, inter alia, the Codes of Ethics of the *British Franchise Association* (BFA), of the *American International Franchise Association* (IFA), or of the *Hong Kong Franchise Association* (HKFA).

[21] As pointed out by FRIGNANI and PRATT in 'Emerging Trends and Difficult Issues in International Franchising', in: <http://www.franchise.org/uploadedFiles/Files/emerging_trends.pdf> (query made on 17.11.2008), Civil Law States have not extensively regulated this contract and the specific regulations tend to refer to franchise disclosure.

[22] Franchises began to be used in the US at the end of the XIX century by companies such as *Singer Machine Company* (1851-1863) and *General Motors* (1898).

[23] 16 CFR Part 436.

national level.[24] Also noteworthy in this regard are the laws of the Canadian provinces of Alberta,[25] Ontario,[26] Prince Edward Island[27] and New Brunswick,[28] the Italian law of 2004,[29] the Chinese Law of 2004,[30] the Belgian law of 2005,[31] the Spanish regulations included in the Law regulating retail trade (*Ley de Ordenación del Comercio Minorista*)[32] (hereinafter LOCM), the French law of 1989,[33] or the Brazilian law of 1996.[34]

Secondly, I believe that the rule in Article 4.1.e of the RIR intends to attach some importance to the market affected by the contract. It is for this reason that it opts for the law of the habitual residence of the franchisee. Indeed, it is most usual for the franchisee's place of central administration to be located in the same country as that where it carries out the franchised activity, given that the franchisor usually chooses local franchisees that are familiar with the domestic market. However, and perhaps for this reason, the rule may not be adequate in cases, in practice very exceptional, in which the State of the habitual residence of the franchisee and the State in which the franchise is operated are not the same.

B. Problems Related to Some Imperative Rules of the State Where the Franchised Activity Is Carried Out

Nevertheless, and although in some cases it may be argued that EC Law has not taken, nor has any reason to take, into account the law of the State in which the franchise is operated, I believe that regulations of an imperative nature within the State in which the franchise is operated should in no way be disregarded. However, the RIR does not offer the appropriate means to take these laws into consideration, especially in those cases in which the State in which the franchise is operated and that in which the habitual

[24] For example the *California Franchise Relations Act* and the *New York State Franchise Act.*

[25] *Alberta Franchise Act* (R.S.A. 2000, Chap. F-23) and *Franchises Act Exemption Regulation* 312/2000.

[26] *Franchise Disclosure Act* (S.O. 2000, Chap. 3), also called the *Arthur Wishart Act*.

[27] This law entered into force on 1/1/2008.

[28] *Franchise Law* of 27/6/2007.

[29] *Legge 6 maggio 2004, n. 129 'Norme per la disciplina dell´affiliazione commerciale'*.

[30] Measures for the regulation of commercial franchise, enacted by the Ministry of Commerce of the People's Republic of China on 31/12/2004.

[31] *Loi relative à l´information précontractuelle dans le cadre d´accords de partenariat commercial* de 19.12.2005 (*Belgisch Staatsblad* 18/1/2006, p. 2732).

[32] Spanish Law 7/1996, of 15 January, *BOE no.* 15, of 17/1/1996.

[33] *Doubin* Law 89-1008, of 31/12/1989, *relative au développement des entreprises commerciales et artisanales et à l'amélioration de leur environnement économique, juridique et social* and Decree no. 91-337 of 4/4/1991.

[34] Franchise Law No. 8955, of 14.5.1996.

residence of the franchisee is located are not the same, or where the law chosen to be applicable to the contract is not the law of the State where the franchised activity is carried out. The fact that domestic legislatures have barely regulated franchise contracts and that such contracts are traditionally atypical or innominate should not be overlooked. Moreover, where such contracts have been regulated (and this is a growing trend), the purpose of such regulation has been, above all, to promote the above-mentioned policy of protecting the franchisee. For example, in the case of Spain, the Spanish legislature clearly follows this line in Article 62 of the LOCM and its implementing legislation,[35] setting forth two provisions. The first requires the registration of franchisors, thereby mimicking the legislation of different North American States such as California and New York.[36] This provision was provided because pressure was placed on the government by franchise associations.[37] Under this Spanish law, this registration obligation also applies to foreign franchisors operating in Spain. The second provision requires pre-contractual information to be provided to the franchisees.

These are rules of a mixed private and public nature, and failure to comply with them results in administrative fines (although the amount of such fines is low)[38] as well as certain consequences on a commercial law level (more or less serious depending on the opinion of experts and courts).[39] The RIR would ignore such rules in the event that they do not form part of the law chosen by the parties, or in the absence of a choice, when the country in which the franchise operates is not the same State as the habitual residence of the franchisee, under Article 19 of the RIR. In principle, the only means provided to apply imperative rules, i.e. Articles 9, 3.3 and 3.4 of the RIR, would not

[35] Royal Decree 2485/1998, of 13 November, relating to the regulation of the franchise system and the registration of franchisors (*BOE* no. 283, of 26/11/1998), amended by Royal Decree 419/2006, of 7 April 2006 (*BOE* no. 1000, of 27/4/2006).

[36] See RUIZ PERIS J. I., 'Comments on Article 62 of the LOCM', in: AA. VV: *Comentarios a la Ley de Ordenación del Comercio Minorista*, Madrid 1997, p. 501.

[37] See Opinion of the Consejo de Estado 2705/1998 on the draft of the Royal Decree implementing Article 62 of the LOCM.

[38] In Spain, the infringement of the registration obligation is considered a serious offence (Article 65.1.r LOCM), i.e. it may result in a fine of 500,001 up to 2,500,000 pesetas (3,005.07 to 15,025.30 €), whereas the non-fulfilment of the pre-contractual reporting requirements would be a mild offence (Article 64.h of the LOCM) and would involve a fine of up to 500,000 pesetas (3,005.06 €).

[39] For example, according to the majority opinion in Spain, the failure of franchisors to register would not give rise to private law consequences, meaning that a contract could not be declared null and void (see decision of the AP of Zaragoza 19/9/2003). Registration would be merely for purposes of declaration and control by the Administration. On the contrary, the failure to fulfil pre-contractual reporting requirements might affect the validity of the contract (see MAYORGA TOLEDANO M. C., *El contrato mercantil de franquicia*, 2nd ed., Granada, 2007, p. 69; RUIZ PERIS J. I. (note 36), p. 509; see also decisions of the French *Cour de cassation* (Chambre commerciale) of 11/2/2003, 6/5/2003 and 2/2/2004). Against the rendering of a contract null and void as a result of this infringement, see decisions of the AP Barcelona 23/12/2003 and 21/9/2004 or decision of the AP Asturias 23/1/2003.

encompass this type of situation. Firstly, it does not appear that they are *strictu sensu* of an essential nature *for safeguarding public interests*, thus enabling them to be considered as *'overriding mandatory rules'* under Article 9 of the RIR. Moreover, this rule solely provides for the application of *overriding mandatory rules of the forum* and of the *country where the obligations have to be performed in so far as they render the performance of the contract unlawful.* It is evident that by changing Article 7 of the Rome Convention 1980, EC Law intended to greatly restrict the imperative regulations to which the new Article 9 is applicable.[40] Unfortunately, in this manner and in the event that the European Court of Justice does not loosen this strict literal wording, it is possible that internationally imperative regulations, the application of which makes a great deal of sense, will be excluded. Additionally, Articles 3.3 and 3.4 of the RIR are solely concerned with safeguarding legal provisions of a country or Community Law *'which cannot be derogated from by agreement'*, when the contract is completely connected to said country or to the EU, except for the choice of law.

Concurrent with these provisions on mandatory rules, and especially the provision of Article 9, rules such as those included in EC competition law on vertical agreements and concerted practices (Regulation EC No 2790/1999) may be taken into consideration. However, this is not the case of the provisions of Article 62 of the LOCM and its implementing legislation, even though it appears sensible for them to be applied if they are in force in the State in which the franchised activity is carried out. Since their purpose is mainly to protect the franchisee, it would technically be a good option to place a limit on the possibility of choosing the applicable law,[41] as in the case of consumer[42] and individual employment contracts.[43] Another alternative would be to provide for their application by means of a certain type of extension rule. But it would appear that the connection to the affected market or the location in which the franchised activity is carried out is definitely more appropriate than the habitual residence of the franchisee. It appears to be clear that the RIR has not provided for situations such as those taken into account by the European Court of Justice for agency contracts in the *Ingmar* case,[44] in which the Court favoured the application of several protective regulations provided by British law implementing Directive 86/653. In this case, the United Kingdom was the place in which the contract was performed by the agent, and the applicable law was that of the State of California (habitual residence of the principle), as a consequence of an agreement between the parties.

[40] See, in favour of not restricting the choice of the parties by means of mandatory rules under Article 9 *'more than absolutely necessary'*, *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations*, COM (2005) 650 final, p. 60.

[41] In favour, see: WILDHABER C. (note 8), p. 215.

[42] See Article 6.2, *in fine*, RIR.

[43] See Article 8.1 RIR.

[44] Case C-381/98.

C. Why Only Regulating Direct Franchises?

Furthermore, in my opinion it should be emphasized that the new rule stated in Article 4.1.e of the RIR will only be used marginally. It is important to take into account that in cases where businesses opt for this type of commercial expansion, there will most frequently be an express or tacit choice of applicable law. Franchisors commonly require the inclusion of a clause whereby the law chosen is that of their habitual residence. This clause is usually included as one of the clauses on general conditions.[45] In fact, in view of the wording of Article 4.1.e, the RIR promotes this practice.

It is also striking that EC Law has shown concern specifically for regulating only the most unusual situation in the practice of internationalising a franchise network: direct franchises. Bearing in mind that there are multiple options available to a business for expanding its marketing network abroad, there are certain very important options, which, in principle, are not covered by the RIR. A business may, for example, choose to create a network of own subsidiaries and/or branches. This type of expansion requires heavy investment by the business, but there are powerful companies, such as the Spanish company Zara, which prefer this method.

Expansion, without a network of subsidiaries and/or branches, is also possible through intermediaries such as agents or distributors. This is a method characterized by less collaboration between businesses than in the case of a franchise, and less control exercised by the principle or grantor than that exercised by a franchisor. In this case, at least for distribution contracts, the RIR has set forth a specific rule.

Lastly, it is possible to expand a marketing network abroad through a franchise, which gives rise to significant advantages for the franchisor, that is not required to make as significant investments as in other cases, since it will be backed by a self-financing network. Besides, it can expand rather quickly by making its trademarks and products internationally reknowned. It will also have constant feedback regarding market needs through its franchisees, since they are normally local businesses, that will be well aware of the tastes and choices of local consumers.[46]

Franchises may basically internationalize in three ways,[47] for the third of which the RIR has only expressly shown concern. Firstly, businesses usually choose to eliminate the risk of internationality and, consequently, the issue of applicable law by creating a subsidiary in the State in which they wish to expand their network. The subsidiary is to be responsible for entering into contracts with local franchisees, meaning that the franchise contracts will be purely domestic. This is the manner in

---

[45] In this regard, see ABELL M. (note 3), p. 183.

[46] On the advantages of the internationalization of franchises, see, for example, *Manual práctico de contratación internacional* (various contributors), Madrid 2007, p. 130; BESCÓS TORRES M., *La franquicia internacional: la opción empresarial de los años noventa*, Madrid 1989, pp. 159 and ss.

[47] See ABELL M. (note 3), p. 21; KENFACK H. (note 14), p. 150; ORTUÑO BAEZA M. T., 'Contratos ligados a la propiedad industrial. Licencia de marca. Franquicia', in: CALVO CARAVACA A.L. / FERNÁNDEZ DE LA GÁNDARA L. (coord.), *Contratos internacionales*, Madrid 1997; PLASSMEIER G. (note 10), pp. 71 and 72.

which companies such as McDonald's operate in Spain. Contracts are entered into with the Spanish subsidiary, and even the suppliers are local.

Secondly, the main method of expanding a franchise business is to use a master franchise,[48] in which the master franchisee is responsible for entering into franchise contracts with subfranchisees. These are indirect franchises, to the extent that the master franchisor does not directly enter into a contract with the end franchisees. A good sign that this practice is very common is the publishing by UNIDROIT of a *Guide to International Master Franchise Arrangements* (1998). Despite their success, it should be pointed out that the main disadvantage of this method of commercial expansion is that there is less control by the franchisor.[49] The RIR has not expressly provided a rule for this type of international contract, in which the relation between the master franchisor and master franchisee is generally international in nature. In this case, the resulting subfranchise contracts are purely domestic.[50] There is still a question as to whether it is possible to make an analogous interpretation of Article 4.1.e, in the event that the law applicable to the master franchise is not chosen, and whether or not this would involve the application of the law of the habitual residence of the master franchisee.[51] This solution is doubtful, since the master franchise lacks one of the grounds previously referred to for the application of the rule set forth in Article 4.1.e of the RIR: the asymmetry of information between the parties leading to the protection of the franchisee as the weaker party to the contract. The other option might be to resort to the general rule stated for contracts for services in Article 4.1.b, in which case there would be a doubt as to who the service provider would be. It would perhaps be preferable to apply the rule of closest connections under Article 4.4 of the RIR. The resulting debate has many points in common with the above-mentioned discussion on franchise contracts, which arose within the framework of the Rome Convention 1980.

The last option for internationalizing a franchise network, i.e. the direct franchise, is the method least used in practice, since it only operates well where States are geographically close and culturally similar.[52] However, as I have already pointed out, this is the option addressed by the RIR in Article 4.1.e.

---

[48] See *UNIDROIT Model Franchise Disclosure Law* (Explanatory Report).

[49] See ABELL M. (note 3), p. 24. Therefore, it is likely that franchisors such as the American Subway, which formerly used a master franchise, will now opt to use the direct franchise method.

[50] See BALDI R. *Il contratto di agenzia, la concessione di vendita, il franchising,* 5th ed., Milano 1992, p. 137.

[51] In favour of the characteristic performance of the master franchise contract being the master franchisee's, see PLASSMEIER G. (note 10), p. 125.

[52] See UNIDROIT *Guide to International Master Franchise Arrangements*, (2005 translation to Spanish), p. 13; FLOHR E., *Masterfranchise-Vertrag*, Munich 2004, pp. 6 and 7.

NEW ISSUES IN THE ROME I REGULATION: THE SPECIAL PROVISIONS ON FINANCIAL MARKET CONTRACTS

Francisco J. GARCÍMARTIN ALFÉREZ*

* Professor of International Law, University Rey Juan Carlos, Madrid. The present paper has already been published in E. CASHIN-RITAINE / A. BONOMI, *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations extracontractuelles, Publications of the Swiss Institute of Comparative Law*, Zurich (Schulthess) 2008. Both the author and the editors of the *Yearbook* wish to express their gratitude to Schulthess for allowing republication.

Yearbook of Private International Law, Volume 10 (2008), pp. 245-259

I. Introduction

The Rome I Regulation has converted the 1980 Rome Convention into a Community instrument. The new text basically retains the same structure and the same solutions as the Convention.[1] One important innovation, however, is the special set of provisions dealing with financial contracts. These provisions are contained in Article 4 (1) point (h) and in Article 6 (4) points (d) and (e). This paper attempts to offer a general description of those rules, highlighting the main policy decisions that informed their adoption.

II. Special Provision on Contracts Concluded in Financial Markets

In the Rome I Regulation, if the parties have not chosen the law applicable to their contract, the determination of this is based on a catalogue of rules and an escape clause (Article 4). Among these rules, there is a provision on contracts concluded in financial markets, typically (but not only) stock exchanges. The text of this new rule is the following: *'a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments, as defined by Article 4(1) point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law'* (Article 4 (1) point (h)). This rule is applicable by default, *i.e.* to the extent that the law governing the contract has not been chosen by the parties, and – like the other rules contained in Article 4 (1) – is accompanied by an escape clause, *i.e.* where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that country shall apply (Article 4 (3)).

A. Genesis and Rationale of the Rule

The genesis of this provision can be summarized as follows. With regard to the law applicable by default, the Commission's Proposal laid down a catalogue of rules, without an escape clause. However, it did not contain any special rule for financial

[1] See, GARCIMARTÍN F., 'The Rome I Regulation: Much ado about nothing', in: *E.L.F.* 2008, p. 61 *et seq.*, at 61. This has also been underlined by most commentators, see *i.a.*: LEIBLE S./LEHMANN M., 'Die Verordnung über das auf vertragliche Schuldverhältinesse anzuwendende Recht (Rom I)', in: *RIW* 2008, p. 528 *et seq.*,at 529; MANKOWSKI P., 'Die Rom I Verordnung – Änderungen im europäischen IPR für Schuldverträge', in: *IHR* 2008, p. 133 *et seq.*, at 133.

markets.[2] The origin of the new rule was a proposal submitted by the Spanish delegation adding another paragraph to the catalogue of Article 4 (1), according to which '*contracts concluded at exchanges, fairs, auctions or any other organised market subject to common minimum organisational or operating rules shall be governed by the law of the country in which the market in question is located*'. This proposal was partially included in the draft elaborated by the Finnish and (the incoming) German Presidencies in December 2006,[3] but breaking it down into two different rules: one for auctions and another for financial markets. It was argued that the nature of those two situations was so different that to include them in a single provision would lead to misinterpretation. In particular, the rule dealing with financial markets established that '*a contract concluded at a financial market …shall be governed by the law applicable to the financial market*'.

Two main arguments were invoked to support this special rule.

(a) On the one hand, financial markets are usually organized markets, with a set of common rules applicable both (i) to all participants in that market and (ii) to all transactions entered into 'within' the corresponding market. Accordingly, it seems reasonable that all contracts concluded in those markets shall be governed by a single law, *i.e.* the law under which the market is organized. In fact, the application of a single law, *irrespective of the nature, nationality or habitual residence of the parties*, is an essential feature of organized financial markets. Financial markets are mainly anonymous markets: in most transactions, buyers and sellers do not know each other. For this reason, applying the law of the habitual residence of the seller is not appropriate.

(b) On the other hand, this solution ensures that the same legal order determines the public-law aspects (*organizational law*) and the private-law aspects (*transactional law*) of the market as institution.[4] This is also a sensible argument as those two aspects are closely interconnected and the application of the same legal order prevents problems of characterization and adaptation from arising.

It could be argued that this special rule was not strictly necessary since the same result could be achieved under Article 3 (1). If the parties enter into a contract within a financial market, it can be deemed that they are making a tacit choice in favour of the law of that market. Furthermore, many markets include, among the

---

[2] See COM (2005) 650 final. This proposal was preceded by a Green Paper of 14 January 2004 (COM (2002) 654 final). This paper and the replies are accessible at <www.europa.eu.int>. Some jurisdictions have laid down a special rule for contracts in financial markets (see paragraph 43 of the Liechtenstein IPRG: '*Börsengeschäfte und ähnliche Verträge. Börsengeschäfte und Verträge, die auf Märkten und Messen geschlossen werden, sind nach dem Recht des Staates zu beurteilen, in dem sich die Börse oder der Markt befindet bzw. die Messe stattfindet*'); see KRONKE H., 'Capital Markets and Conflict of Laws', in: *Recueil des Cours*, 2000, t. 286, p. 245 *et seq.*, at 304 with further references.

[3] See Doc. 16353/06, Justciv 276 CODEC 1485. These documents are accessible at <www.register.consilium.europa.eu>.

[4] On these concepts, see SCHNYDER A., in: KRONKE H./MELIS W./ SCHNYDER A.K. (Hrsg.), *Handbuch Internationales Wirtschaftsrecht*, Köln 2005, p. 1405 *et seq.*, at 1430-1436.

organizational provisions or among the conditions of access, a rule laying down the principle that the transactions concluded within the market are governed by the law of the jurisdiction of the market. However, this is not always the case. Hence, it seemed preferable to maintain a special rule to avoid any uncertainty. A basic principle of financial law is that legal risks must be reduced to zero. Financial markets must run like clockwork and, therefore, legal uncertainties or ambiguities should be completely eliminated. Article 4 (1) point (h) of Rome I has to be read under this criterion. It establishes beyond any doubt that transactions concluded in a financial market are subject to the law of the market.

B. Problems Associated with the Drafting of the Rule

Although the reasons underpinning a special rule for financial markets were persuasive, the drafting of this rule entailed two problems. One related to the definition of financial markets and the other to the identification of the applicable law, *i.e.* the law that governs the market.

1. Concept of 'Financial Markets'

In the original proposal, the term employed was '…contracts concluded at a financial market'. The term 'financial market' was taken from the Insolvency Regulation (Article 9),[5] but it was deemed to be too ambiguous. The expression financial markets is not a technical term employed in other Community instruments different from the Insolvency Regulation, and even this instrument does not contain any definition of that expression. This may provoke uncertainty about the scope of application of the special rule. In order to overcome these problems, the term 'financial markets' was substituted by a description of its main characteristics. The final draft is borrowed from the Directive 2004/39/EC (*MiFID Directive*). This instrument differentiates between 'regulated markets', 'multilateral trading facilities (MTF)' and 'systematic internalisers' (see Article 4(1) points (7), (14) and (15) MiFID). The definition of Article 4 (1) point (h) of the Rome I Regulation tries to include the first two categories.[6] Unlike the MiFID Directive which only covers European markets, the Regulation has a universal scope of application. Therefore, Article 4 (1) point (h) of the Regulation also applies to financial markets of third countries that meet that definition; *i.e.* that are *functionally equivalent* to the multilateral trading facilities and regulated markets foreseen in the MiFID. This is the reason why a cross-reference to Article 4 (1) points (14) and (15) of the MiFID is avoided, and instead Article 4 (1) Rome I includes its own definition but that

[5] Article 9 of the Insolvency Regulation foresees an exception to the *lex fori concursus*, according to which '…the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a *financial market* shall be governed solely by the law of the Member State applicable to that system or market'.

[6] LEIBLE S./LEHMANN M. (note 1), at 535.

replicates the text of the former (see Recital 18 Rome I employing the term '*…such as…*' to express this idea).[7]

2. Identification of the Applicable Law

The other problem raised by this special rule was related to the identification of the applicable law.[8] The *connecting factor* chosen by the rule refers to the fact that the contract is '*…concluded within…*' a particular financial market and points, as the applicable law, to *the law that governs this market*. The function of Article 4 (1) point (h) is to make clear that the legal order applicable to the market also governs the private law aspects of the contracts entered into in that market. But the law applicable to a market is not determined by Rome I. In order to identify the legal order that governs a market, a practical criterion is to look at the rules of access to the trading facility or at the jurisdiction that authorises or recognises a financial market as a *national market.* Hence, for example, all contracts concluded in the stock exchanges recognized by the Spanish authorities as 'Spanish regulated markets' are governed by Spanish law (see Article 36 (1) of the MiFID for European regulated markets; the list is published on the web site of the EU Commission). At first sight, as has been said, this may make the rule seem redundant (and even unnecessary taking into account Article 3 of the Regulation). However, though organized markets are governed by a single law, the references are usually made to public law or to regulatory rules (competent supervisory authority, conditions of access to the market, rules of conduct in the market, and so on; see, for example, Article 36 (4) of the MiFID). Article 4 (1) point (h) of Rome I clarifies that the same legal order shall also apply to the private law aspects of the transactions concluded in that market. Even when the market is the result of the integration of different national markets, the individual transactions are usually subject to a particular legal order. The same can be applied, *mutatis mutandi*, with regard to Multilateral Trading Facilities.

3. Concept of Contracts

The concept of *contract* in Article 4 (1) point (h) is broad enough to encompass not only buying and selling of securities, but also any other transactions (pledges of

[7] Note that the cross-reference to the MiFID in the definition of 'financial instruments' does not contravene this idea. The MiFID defines 'financial instrument' in a descriptive form (shares, bonds, options, futures, swaps…) and not by reference to the Community or to Community law.

[8] On this issue, with further references, KRONKE H. (note 4), at 300-301; MANKOWSKI P., in: REITHMANN C./MARTINY D. (Hrsg.), *Internationales Wirtschaftsrecht*, 6th ed., at 985-986; ID. (note 1), at 138-139; WAGNER R., 'Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung)', in: *IPRax* 2008, p. 377 *et seq.*, at 385.

securities, lending and so on) entered into in those 'platforms', regardless of whether there is a central counterparty or not. This last element is explicitly made clear by Recital 18 *in fine*. The provision also applies regardless of the way the transactions are structured, either by the participants in the markets acting in their own names, but on behalf of their clients, or as agents or in representation of their clients. On the contrary, the transactions for provision of services between financial entities and their clients are not included in this category (see *infra*).

4. Other Issues: Securities Settlement Systems

Contracts concluded in Securities Settlement Systems (SSS) are not included in the wording of Article 4 (1) point (h) of the Regulation. They are subject to the general rule (*i.e.*, Article. 3 and 4 (2) Rome I). In this case, a specific presumption was not considered necessary mainly due to the fact that the proper functioning of those systems, even from a conflict-of-laws standpoint, is ensured by the Directive 1998/26/EC. According to Article 2 (a) of this Directive, a 'system', to be considered as such for the purpose of that instrument, has to be governed by the law of a Member State chosen by the participants. This choice of law is a requisite to qualify as a SSS for the purpose of that instrument and it ensures the application of a single law to all participants and their transactions in the system. The prevalence of this Directive is confirmed by Recital 31 Rome I (where it is stated '*Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2 (a) of Directive 1998/26/CE')*. In relation to SSS of third countries, a uniform regime will very likely be ensured under Article 3 of the Regulation.

III. Article 6: Carve-outs

A. General Scheme of Article 6

Regarding the provision on consumer contracts, the Regulation retains: (a) its universal scope of application, *i.e.* the rule offers a conflict-of-laws protection to both EU and non-EU consumers, irrespective of their place of habitual residence; (b) and the 'principle of most favourable law', *i.e.* a choice of law in a consumer contract is valid but it cannot deprive the consumer of the protection afforded to it by the law applicable by default. In this sense, the final result departs significantly from the Commission's Proposal which limited the application of the provision to EU resident consumers and laid down the application of the law of the place of the consumer's habitual residence, there being no possibility to choose a different law, not even in favour of the consumer.[9] In turn, as regards the Rome Convention, the

[9] See Commission's Proposal, Article 5.

Regulation (i) extends the material scope of application of the rule, (ii) and clarifies the definition of 'passive consumer'. These new elements are taken from Article 15 of the Brussels I Regulation.

B. Article 6 (4) (d)

Paragraph 4 of Article 6 contains a list of exclusions from the scope of application of this provision. There are two categories dealing with financial markets. According to paragraph 4 point (d), the rule on consumer contracts does not apply to: '…*Rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of financial services'*. According to paragraph (e), the rule on consumer contracts does not apply either to: '*a contract concluded within the type of system falling within the scope of Article 4 (1) (h)'*. To understand adequately the scope of these exclusions it is necessary to read them with the relevant Recitals, *i.e.* Recitals 27, 28, 29 and 30.

The exclusions foreseen in letters (d) and (e) of Article 6 (4) constitute a reaction to the extension of its scope of application. As has been said, Article 5 of the Rome Convention only applied to contracts for the sale of goods or provision of services. The term 'goods' did not include transferable securities.[10] Accordingly, Article 5 of the Convention did not apply to the contracts for the sale of shares and other financial instruments. Under the new wording of Article 6, this provision applies to any contract between a professional and a consumer, regardless of the object of the transaction or the condition of the consumer (*i.e.*, buyer or seller). It would include, therefore, contracts whose object is the transfer of financial instruments. This extension called for the addition of new exclusions that were considered necessary to ensure the correct functioning of financial markets. In general terms, the application of Article 6 to some financial instruments or transactions, such as a public offer, could imply the interference of different laws depending on the habitual residence of the consumer (as investor), and this could impede the uniformity of the legal regime applicable to those instruments or transactions, which is a key element for ensuring their economic function.

As will be seen, the consequences when a contract falls outside the scope of Article 6 is that the general rules apply, *i.e.* Article 3, freedom of choice, and Article 4, including the special rule for stock exchanges that we have analyzed above.

[10] See Giuliano-Lagarde Report, Commentary to Article 5, though in other language versions of the text, it was not so clear, see Max-Planck-Institut, '*Comments on the European Commission's Green Paper on the conversion of the Rome Convention 1980 on the Law Applicable to Contractual Obligations into a Community instrument and its modernization'*, in: *RabelsZ* 2004, p. 1 *et seq.*, at 49; MANKOWSKI P. (note 8), at 984 with further references.

In order to understand the reach of this exclusion, it could be useful to break it down into the three different elements it contains: (i) financial instruments; (ii) public issuances or offers and public takeover bids; (iii) the subscription and redemption of units in collective investment. Finally, we will make a reference to the exclusion related to financial markets.

1. Financial Instruments

Article 6 does not apply to the rights and obligations which constitute a financial instrument. The concept of financial instruments is defined by a cross-reference to the MiFID Directive (Directive 2004/39/CE). As Recital 30 clarifies, financial instruments are those instruments referred to in Article 4 of the MiFID Directive. The list is contained in Section C of this Directive and it includes, *i.a.* transferable securities, units in collective investment undertakings, options, futures, swaps, and so on.

From a legal standpoint, a financial instrument can be characterized as a bundle of contractual rights and obligations. Furthermore, they constitute a fungible and standardized product and, therefore, must be governed by one single law; financial markets could not work if the law applicable to the financial instruments varied depending on the habitual residence of the holder (as could be the case if he or she were not a professional). The *ratio* of the exclusion is precisely to prevent this risk. As Recital 28 points out, it is important to ensure that the rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to the applicability of different laws to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. It may be argued that this exclusion would be partially unnecessary in many cases taking into account Article 1 (2) points (d) (negotiable instruments), (f) (company law) or (g) (trusts). But, in addition to the fact that this is not always true, we have already explained that legal risks are very costly in the financial world, and it was considered preferable not to leave any loophole whatsoever.

2. Public Offers

Article 6 does not apply either to the '*…rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public takeover bids of transferable securities…*' This exclusion covers public offers in primary and secondary markets, i.e. public offers for sale or subscription of securities and public takeover bids. The rationale behind this rule is also explained in Recital 28 of the Regulation. If Article 6 were applicable, the issuer or the offeror may find themselves subject to the application of multiple mandatory rules depending on the habitual residence of the investor. This may not only increase the cost of cross-border retail offers, but may even result in unsolvable contradictions if the appli-

cable laws have different regimes as regards, for example, the allocation of securities in the case of over-subscription.

The scope of this exclusion must be defined with the help of Recital 29. It encompasses the contractual terms related to the purchase of the securities, such as the methods and time limits for the delivery of the securities and the payment, the allocation of securities, the rights in the event of over-subscription, withdrawal rights and, in general, all the relevant contractual aspects of an offer binding the issuer or the offeror to the investor.[11] The term 'transferable securities' is defined by reference to Article 4 (1) point (18) of the MiFID Directive (see Recital 30 Rome I); it typically includes shares, depositary receipts and bonds.

This exclusion ensures that the choice-of-law clauses regarding the law applicable to the contracts between the issuer/offeror and the investors are valid and effective. The law designated by these clauses is, therefore, applicable without any interference of the law of the country where the investors have their habitual residence.[12] In financial practice, these clauses are usually included among the terms and conditions of the offer (see, for example, Article 6 (3) point (n) of the Takeover Directive).[13] The regime applicable to them is determined by Article 3 of the Regulation. With regard to the validity of the consent, Article 10 must also be taken into account. According to this provision, the existence and validity of the consent of the investors shall be governed by the law designated in the clause. Nevertheless, the investor may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if certain conditions are met (Article 10 (2) Rome I).

It may be worth clarifying that, together with public takeover bids, this exclusion covers the sale of securities in the context of a public offer regardless of the nature of the offeror. It includes three possible situations: (a) the direct selling by the issuer of new shares; (b) mixed offers, i.e. where there are other persons offering securities in association with the issuer (*ad ex.*, selling shareholders in the context of a private to public operation); (c) and cascade offers, i.e. where the public offer is carried out by means of a 'Firm-commitment underwriting' also known as 'bought deals', i.e. the underwriters purchase the entire issue of securities from the issuer and sell on the securities to the investors. In all these cases, the terms and conditions – in the abovementioned sense – are excluded from the scope

[11] Annex III, point 5 of the Regulation 809/2004 provides a useful indication to determine the issues covered by the expression 'terms and conditions of the offer'.

[12] We should not rule out the possible interference of the overriding mandatory norms of other jurisdictions, different from the one chosen by the issuer/offeror, under the conditions set forth in Article 9. This requires a case-by-case analysis. However, note that Article 9 has a very limited scope of application, it only refers to those rules that are 'crucial' for safeguarding the public interests of a country; see GARCIMARTÍN F. (note 1), at 76-77.

[13] According to this provision, the offer document must include '*…the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid…*'. See, also, MATTIL P./MÖSLEIN F., 'Die Sprache des Emissionsprospekts', in: *WM* 2007, p. 819 *et seq*., at 824-825.

of application of Article 6 Rome I (see Recital 29 which is intended to make this clear).

The Regulation does not contain a definition of public offers or public take-over bids. An explicit reference to the Prospectus Directive (Directive 2003/71/EC) and to the Takeover Directive (Directive 2004/25/EC) was avoided due to their restricted scope of application (for example, they are geographically limited to the EU market and materially limited to certain offers);[14] however, some concepts of these two instruments may constitute a useful reference for interpreting this provision of the Regulation.

3. Collective Investments

Article 6 does not apply either to '*…the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provisions of financial services*'. It is true that the concept of financial instruments encompasses units in collective investments vehicles (see Section C of Annex I of the MiFID Directive). But, as in the former case, there are also a set of contractual rights and obligations associated with the investment in collective investment undertakings that are not necessarily covered by that term since they are not intrinsic attributes of the instrument as such. In order to eliminate this loophole, point (d) of Article 6 (4) includes a reference to the 'subscription and redemption' of those units. According to this reference, all subscribers are governed by the same rules as regards issues such as the right to redeem at any time or the right to receive certain information. In general terms, all issues pertaining to the function, the structure, the management, operation and administration of the fund should be subject to a single law, regardless of the habitual residence of the subscribers. The exclusion covers units in collective investment whether or not they are covered by the Directive 85/611/EEC (see Recital 26).

As the provision itself clarifies, Article 6 Rome I does apply to financial services (i.e., commercialization, transmission of orders, investment advice or custody of financial instruments). That is, the provision of services contract entered into between an investor and his broker or bank is not excluded from Article 6. Therefore, the parties can choose the law applicable to their contract, but such a choice may not have the result of depriving the investor of the protection afforded to him by the provisions of the country where he has his habitual residence, if the conditions of paragraph (1) are met.[15] The direct selling of securities – outside the

[14] For example, the Takeover Bid Directive does not apply to offers prior to the delisting of the company and the Prospectus Directive excludes, *inter alia*, offers of securities addressed to fewer than 100 natural or legal persons per Member State (Article 3 (2) (b)). These two cases are excluded from the Directive, but should be covered by Article 6 (4) (d). This explains why a cross-reference was not introduced.

[15] However, paragraph 4 point (a) of Article 6 excludes those contracts where the services are to be supplied exclusively in a country other than that in which the consumer has his habitual residence. On the scope of this exclusion in the context of financial services,

scope of a public offer – from the intermediary to his customer is also covered by Article 6. Recital 26 Rome I elaborates this idea, and states that the exclusion foreseen in paragraph 4 point (d) of Article 6 does not cover investment services and activities and ancillary services provided by a professional to an investor, as referred to in Sections A and B of Annex I the MiFID Directive or contract for the sale of units in collective investment undertakings. In the latter case, it means that if the units are sold by a third party, the contract will be subject to Article 6 Rome I, while if the units are 'sold' directly by the management company, the contract will be excluded.

In the cases of public offers, this means that where the offeror is also providing a commercial service (e.g. the underwriters in a cascade offer), the contractual aspects of the sale of securities referred to in Articles 9, 10, 11 and 12 Rome I are excluded from Article 6; whereas the activities associated with the provision of service are, in principle, covered.

4. Contracts in Financial Markets

As has been explained, the correct functioning of organized financial markets requires that all transactions entered into within the market be governed by the same law. The same rationale explains the last exclusion of Article 6 Rome I: *contracts concluded within the type of system falling within the scope of Article 4 (1) (h).* Those markets cannot work if the applicable law could be limited by the mandatory rules of the jurisdiction where the investor has his habitual residence, when the seller is a professional, as may well be the case (see Recital 28 *in fine* Rome I). Article 4 (1) point (h) applies regardless of the capacity under which the intermediary is acting (as an agent of the investor or under his own name but on behalf of his client) and regardless of whether the market is organized on a multilateral basis or around a central counterparty.

No exception is included with regard to Securities Settlement Systems. An explicit provision for these systems was not considered necessary for the reason explained above.

---

see MANKOWSKI P. (note 8), at 978 with further references. In that case, the law governing the contract will be determined by Articles 3 and 4. A choice of law shall therefore be valid and effective *vis-à-vis* the investor. Note, however, that within its scope of application, Article 12 (2) of the Directive 2002/65/EC on financial services ensures the application of the Community standard. Pursuant to this provision, Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States. On the relationship of this clause with Rome I, see GARCIMARTÍN F. (note 1), at 66.

IV. Other Issues: Rome I and Other Community Instruments

A. Rome I and Professionals under the MiFID

Article 6 only applies to consumers, *i.e.* persons who conclude a contract which can be regarded as being outside his trade or profession.[16] The concept is defined by an abstract category. This reduces the uncertainty associated with the application of the rule. Accordingly, it is not relevant whether the particular investor is a wealthy person or has in-depth knowledge of financial markets. The relevant element is that the person is not professionally acting in that sector.

Although the issue was raised during the negotiations, the text does not contain any rule for those individuals who opt for professional status under the MiFID. Annex II of this instrument allows clients of investment firms, who would otherwise be classified as retail clients, to be considered professionals if they meet certain conditions. These conditions somehow guarantee that the client is financially sophisticated and experienced and, therefore, can be deprived of certain mandatory protection imposed by the Directive. However, considering the practical difficulties in including an exception in that sense (for instance, what would happen if the investor were qualified as a professional only in relation to certain instruments, but not to others?), it was deemed preferable not to make an automatic exclusion of all 'MiFID professionals' for the purposes of Article 6 Rome I.

B. Rome I and the 'State of Origin Principle'

Article 6 is based on a 'logic of Country of Destination'. If the conditions established by Article 6 (1) are met, the contract is subject to the mandatory rules of the country where the consumer has his habitual residence. In the case of provision of financial services, this includes aspects such as the information that must be furnished to the investor (as consumer), the contractual obligations of conduct of the professional or the contractual sanctions deriving from the non-compliance of those obligations. This poses particular problems in relation to those instruments aimed at ensuring the proper functioning of the internal market, specially when they are based on the principle of mutual recognition or the state of origin control. Rome I does not tackle this problem. It only declares the priority of those instruments that, in particular matters, lay down conflict-of-laws rules relating to contracts (Article 23 (2)). Recital 40, in turn, makes a reference to the internal market clause, but in very broad terms: Directive 2002/65/EC on financial services expressly recognizes that it does not prejudice the application of Rome I (see Reci-

[16] On the concept of 'consumers' in the context of financial markets, see MANKOWSKI P. (note 8), at 977 with further references.

tal 8)[17]. *At first sight*, this means that the national law designated by Article 6 of Rome I applies even to issues harmonized by the Directive. The same, *mutatis mutandi*, holds in the context of the MiFID.[18]

V. Assignment of Credits

Finally it is worth making a short reference to Article 13 due to its relevance for financial markets.[19] This provision deals with the assignment of claims and contractual subrogation. The assignment of credits is a common tool for obtaining finance nowadays. Actually, these types of transactions constitute the core element of any operation of securitization, whereby the originator transfers its pool of claims and ancillary rights to a vehicle, which it turn issues securities representing interests in the pool.

With regard to the issue of the substitution of creditors, the Rome Convention contained two rules: one dealing with 'voluntary assignment' (Article 12) and the other dealing with 'subrogation' (Article 13). According to the Explanatory Report, the former included any assignment of a right based on a contract, while the latter included any assignment of a right 'by operation of law'.[20] The Regulation intends to make this difference clearer and to avoid any problems of characterization. For this purpose, the new text lays down one provision expressly dealing with both 'voluntary assignment and contractual subrogation' and a different provision dealing only with 'legal subrogation'.

A. Article 13 Paragraph 1

The provision dealing with voluntary assignment and contractual subrogation (Article 13) retains the structure of the Convention. The first paragraph deals with the relationship between the assignor and the assignee. This relationship shall be

[17] The reference in the Recital is to the Rome Convention but it shall be understood as a reference to Rome I once this instrument is applicable (see Article 24 (2) Rome I).

[18] See, however, MÜLBERT P.O., 'The Eclipse of Contract Law in the Investment Firm-Client-relationship: The Impact of the MiFID on the Law of Contract from a German Perspective', in: FERRARINI G./WYMEERSCH E. (eds.), *Investor Protection in Europe*, Oxford 2006, p. 299 *et seq., at* 317-319 (arguing that Article 31 (1) of the MiFID may impose some limits on the application of the mandatory rules of the Member State of habitual residence of the investor).

[19] See on the concerns raised by this provision, EFMLG, *Legal obstacles to cross-border securitisations in the EU*, 2007, at 55-58. On the problems raised by this provision during the negotiations, see PERKINS J:, 'A Question of Priorities: Choice of Law and Proprietary Aspects of the Assignments of Debts', in: *L. & F. M. Rev.* 2008, at 238 *et seq.*

[20] Giuliano-Lagarde Report (note 10), commentary to Article 13.

governed by the law applicable to their contract under the Regulation. Hence, for instance, if the contract of assignment contains a choice-of-law clause, the law designated by the parties will apply to their mutual rights and obligations. The rule is the same as in the Convention (Article 12 (1)).

However, there are two important differences in relation to its scope of application.

(a) *Firstly*, the new text does not refer to the '*mutual obligations*' of the assignor and the assignee, but to the '*relationship*' between them. This new term intends to be wider than the former and to cover all the aspects of the relationship between the parties (assignor and assignee). This is explained by Recital 38. Pursuant to this recital, the term 'relationship' includes the '*…property aspects of an assignment as between the assignor and the assignee in legal orders where such aspects are treated separately from the aspects under the law of obligations*'. The rationale of this Recital is to solve a characterization problem. Some legal orders make a difference between (i) the property effects of an assignment only between the assignor and the assignee, (ii) and the property effects *vis-à-vis* third parties (creditors of the assignor, insolvency trustees, and so on). In addition, in those legal systems, the 'property effects of an assignment between the parties' are treated separately from the law of contractual obligations. The new wording of Article 13 paragraph 1 – and the accompanying Recital – intends to clarify that in those legal systems (*i.e.* when one of those legal systems is the State forum), the law applicable to the assignment contract also applies to the property effects as between parties (*i.e.* if and under what conditions the ownership over claim is transferred as between parties). The same Recital adds that the provision does not cover '*any relationship between the assignor and the assignee that might exist*', only '*those aspects directly relevant to the voluntary assignment/contractual subrogation in question*'. This seems obvious.

However, the claim that there is a discernible difference at the conflict-of-laws level between (i) property aspects as between parties and (ii) property aspects *vis-à-vis* third parties is, to say the least, dubious. Furthermore, this difference may make sense if Article 13 also dealt with the 'property effects' *vis-à-vis* third parties, as was the case at a number of stages of the negotiations, but it does not have any sense in relation to the final text, which does not contain any rule dealing with this issue.

(b) *Secondly*, the new provision expressly clarifies its application to assignments by way of collateral. According to paragraph 3, the concept of assignment includes not only outright transfers of claims, but also '*transfers of claims by way of security as well as pledges or other security rights over claims'*. This explanation is also helpful to prevent the problem of characterization from arising. Nevertheless, since property effects *vis-à-vis* third parties are excluded from the scope of application of Article 13, this clarification only relates to the contractual obligations (i) between the parties (pledgor and pledgee, for example) (ii) and *vis-à-vis* the debtor whose claim has been pledged (*debitor debitoris).*

B. Article 13 Paragraph 2

Paragraph 2 of Article 13 deals with the effectiveness of the assignment in relation to the debtor of the claim. The text is basically the same as in the Convention. The principle underpinning this provision is that the assignment cannot prejudice the legal position of the debtor. Accordingly, the law applicable to the assigned or subrogated claim governs its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged. This solution applies irrespective of the nature of the assigned claim, *i.e.* whether it is contractual or not.[21]

C. Effectiveness against Third Parties

Unfortunately, the Regulation has not resolved the main problem raised in this context, namely the determination of the law applicable to the effectiveness *vis-à-vis* third parties of the assignment. As is well known, the silence of the Rome Convention on this issue gave rise to different interpretations between national courts and legal scholars.[22] This legal uncertainty remains under the Regulation. During the negotiations of this instrument, it turned out to be impossible to reach a compromise between the '*law-of-the-assignor approach*', *i.e.* those who advocated the application of the law of habitual residence of the assignor (as it was established in the Commission's proposal, following the UNCITRAL Convention approach),[23] and 'the law-of-the-claim approach', *i.e.* those who advocated the application of the law governing the assigned credit (which would imply extending paragraph 2 of Article 13 also to the effectiveness of the assignment against third parties and the priority problems). The loophole has been compensated for by the Review Clause, which foresees that the Commission submits a report on this question and, if appropriate, that this report be accompanied by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced (Article 27 (2) Rome I).

---

[21] Note that Article 15 (e) of the Rome II Regulation only refers to the transferability of the right to claim damages, and not to the other issues enumerated in Article 13 (2) of the Rome I Regulation. On this issue, see Max-Planck Institute (note 10), at 88.

[22] See, summarizing the problem and the different solutions, GARCIMARTÍN F. and HEREDIA I., 'La cesión de créditos: reflexiones sobre los problemas de ley aplicable', in: *Anuario de Derecho Civil* 2003, at 969 *et seq.* In the context of the revision of the Convention, see, *inter alia*, FLESSNER A./VERHAGEN H., *Assignment in European Private International Law*, München 2006; GARDELLA A., 'Prevedibilità contro Flessibilità? La legge applicabile all'opponibilità della cessione del credito ai terzi nella proposta di Regolamento Roma I', in: *Banca, Bor., Tit. di Credito* 2006, at 635 *et seq.*; KIENINGER E.-M./ SIGMAN H.C., 'The Rome-I Proposed Regulation and the Assignment of Receivables', in: *E.L.F.* 2006, at 1 *et seq.*

[23] See Article 13.3 of the Commission's Proposal introducing a new conflict rule based on the 2001 UNCITRAL Convention on the assignment of receivables in international trade.

INSURANCE CONTRACTS IN ROME I: ANOTHER RECENT FAILURE OF THE EUROPEAN LEGISLATURE

Helmut HEISS*

* Professor of Private, Comparative, and Private International Law, University of Zurich; Chairman of the Project Group 'Restatement of European Insurance Contract Law', <www.restatement.info>; The author owes thanks to Ms. Mandeep Lakhan, LL.B. (King's College/Passau), assistant to the Project 'Restatement of European Insurance Contract Law', for translating the article into English. The present paper has already been published in E. CASHIN-RITAINE / A. BONOMI, *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations extracontractuelles, Publications of the Swiss Institute of Comparative Law*, Zurich (Schulthess) 2008, p. 97 *et seq*. Both the author and the editors of the *Yearbook* wish to express their gratitude to Schulthess for allowing republication.

Yearbook of Private International Law, Volume 10 (2008), pp. 261-283

Printed in Germany

I. Rome I and Insurance Contracts

The 'Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations' (hereafter, Rome I)[1] alters the current private international law regime applicable to insurance contracts.[2] An important, initially pleasing consequence of this Regulation is that insurance contracts will be conclusively governed by Rome I with regard to the conflict of laws.[3] Hence, it heeds the calls for action[4] made repeatedly, especially in academic literature, and eliminates, at least *prima facie*, the currently prevalent fragmentation of sources of laws for the conflict of law concerning European insurance in directives[5] and in the Convention on the Law Applicable to Contractual Obligations.[6] However, the following critical appraisal of the revised version of the

[1] *OJ* 2008 No L 177/6.

[2] Rome I does not apply to Denmark; see, however, the Amended Proposal for a Directive of the EP and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), COM (2008) 119 final, which provides in article 176: 'Any Member State not subject to the application of Regulation [Rome I] shall apply the provisions of that Regulation in order to determine the law applicable to insurance contracts falling within the scope of Article 7 of that Regulation.'

[3] For the previous, very differing proposals, see HEISS H., 'Reform des internationalen Versicherungsvertragsrechts', in: *ZVersWiss* 2007, p. 503, at 511 *et seq*.

[4] *Cf.* e.g. ROTH W.-H., 'Internationales Versicherungsvertragsrecht in der Europäischen Union – Ein Vorschlag zu seiner Neuordnung', in: *FS LORENZ E.*, Karlsruhe 2004, p. 631, at 640 *et seq*.; the reaction in literature was accordingly one of disappointment to the Commission's proposal to Rome I (COM (2005) 650 final), which still wanted to exclude the conflict of law rules in directives; on this point, see HEISS H., 'Das Kollisionsrecht der Versicherungsverträge nach Rom I und II', in: *VersR* 2006, p. 185, at 185; STAUDINGER A., 'Internationales Versicherungsvertragsrecht', in: FERRARI F./LEIBLE S. (Hrsg.), *Ein neues Internationales Vertragsrecht für Europa – der Vorschlag für eine Rom I-Verordnung*, 2007, p. 225, at 233; WIESER F., 'Auf dem Weg zur Europapolizze?', in: *VR* 2006, p. 53, at 57 *et seq.*

[5] See in particular article 7, 8 of the Second Non-Life Insurance Directive; article 32 of the Life Assurance Directive.

[6] Rome Convention of 19.6.1980, *OJ* 1980 L 266/1; consolidated version pursuant to the Fourth Accession Convention in *OJ* 2005 C 334/3.

international insurance contract law in Rome I will clearly demonstrate that while the future law leads to a formal rectification of the legal situation, it does not entail any improvements with regard to the content.[7] The European legislature has, therefore, again failed in the field of conflict of laws relating to insurance.

II. A Critical Appraisal of Rome I in its Revised Version

A. The Substantive Scope of the Regulation

1. Inclusion of all Contracts of Insurance

Broad regulation of insurance contracts in Rome I, in terms of the substantive scope of application, has been established: Rome I substitutes both the Convention on the Law Applicable to Contractual Obligations[8] and conflict of laws concerning insurance in the directives.[9] The provisions in Rome I, moreover, encompass contracts of insurance, which have not, hitherto, been regulated by European Law. This concerns insurance contracts which are concluded – first – by insurers without a domicile or branch in a Member State and – second – for risks situated in Member States.[10] All contracts of insurance are, consequently, subject to the new international insurance law in Rome I.

While article 1(2)(j) of Rome I excludes insurance contracts arising out of operations the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work, this exclusion only applies if such operations are carried out by organisations other than life assurance companies within the meaning of article 2 of the Life Assurance Directive.

---

[7] The European legislature, thereby, almost completely ignored important recommendations made in the literature; e.g. the suggestions in ROTH W.-H. (note 4), at 631; as well as the detailed proposal in MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', in: *RabelsZ* 2007, at 225.

[8] See article 24(1) of Rome I.

[9] In this respect, see article 23 of Rome I.

[10] As to this tripartition of the sources of law from the German perspective: LORENZ E., 'Das auf grenzüberschreitende Lebensversicherungsverträge anwendbare Recht – eine Übersicht über die kollisionsrechtlichen Rechtsgrundlagen', in: *ZVersWiss* 1991, p. 121, at 124 *et seq.*

2. Regulation of Certain Aspects by Rome II

In this context, the fact must also be addressed that certain aspects of international insurance contracts are regulated by the Regulation of 11 July 2007 on the law applicable to non-contractual obligations (hereafter, Rome II),[11] as they have a particularly close relationship to the law of torts.

Thus, article 19 of Rome II governs the *cessio legis* of claims in tort of the insured against a liable third party to the insurer paying compensation. The question of whether and to what extent a *cessio legis* of claims in tort occurs is subject to the proper law of the insurance contract,[12] which itself is to be determined pursuant to Rome I.

Article 18 of Rome II submits the injured party's *right of direct action* against the liability insurer either to the proper law of the insurance contract (to be determined in accordance with Rome I), or the proper law of tort[13] (to be determined in accordance with Rome II). It should, however, be noted that the Hague Convention on the Law Applicable to Traffic Accidents, which provides a separate conflict of law rule for the injured party's right of direct action in its article 9, takes primacy over Rome II.[14]

Finally, claims arising from *culpa in contrahendo* are excluded from the scope of Rome I[15] and governed by the special rules in article 12 of Rome II. This exclusion of *culpa in contrahendo* from Rome I and its regulation in Rome II are also of relevance to insurance contracts since the insurer's liabilities, which arise on account of breaches of information, disclosure and advisory duties, or as a result of discontinuance of contract negotiations in bad faith or delaying the conclusion of the contract in bad faith, are included in it.[16] However, article 12 of Rome II subjects these types of liabilities arising from *culpa in contrahendo* to the proper law of the contract or, in case a contract should not have been concluded, to the hypothetical proper law of the contract. As the actual or hypothetical proper law of the contract is, consequently, to be determined according to the rules of Rome I, synchronization between the proper law of the contract and the *culpa in contrahendo* is achieved in this respect.

---

[11] *OJ* 2007 L 199/40.

[12] On this point, see HEISS H./LOACKER L.D., 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II', in: *JBl* 2007, p. 613, at 638.

[13] On this point, see HEISS H./LOACKER L.D. (note 12), at 637 *et seq.*

[14] With regard to precedence, see article 28(1) of Rome II.

[15] See article 1(2)(j) of Rome I.

[16] For details about the characteristics of liability arising from *culpa in contrahendo*: HEISS H./LOACKER L.D. (note 12), at 639 *et seq.*

B. Significant Conflict of Law Rules for Insurance Contracts

1. Legal Fragmentation and Contradictory Legal Policies in Rome I

Through the inclusion of article 7, Rome I contains a special provision governing the applicable law for insurance contracts. This is applied to all insurance contracts covering *large risks*.[17] However, article 7 of Rome I only governs insurance of *mass risks* if the risks are located in the territory of one or more of the Member States bound by this Regulation.[18] For risks situated outside of Member States, the respective insurance contract is subject to the rules on applicable law in articles 3 and 4, and, if appropriate, also article 6 of Rome I. Should a contract cover a mass risk which is located both in and outside of Member States, recital 33 of Rome I will treat the insurance contract as two independent contracts, and thus divide the contract even though it had been concluded as a whole. Consequently, only part of the contract, the part which refers to the risks situated in the Member States, will be subjected to article 7 of Rome I; the rest of the contract, however, will be submitted to articles 3, 4 and, if applicable, article 6 of Rome I. Finally, article 7 of Rome I does not regulate reinsurance contracts,[19] to which articles 3 and 4 of Rome I apply.

As plainly shown by the analysis, the new codification of international insurance contract law only superficially eliminates the fragmentation of the law of conflicts currently in force. With regard to content, however, Rome I continues, to a considerable extent, to conceal within itself the existing legal fragmentation.[20] Unfortunately, the contradictory legal policies for the applicable conflict of laws relating to insurance are, thereby, maintained. Thus, article 7 of Rome I, which is, in content, orientated towards the current regime of international insurance contract law by the directives, provides for greater protection of the policyholder than articles 3, 4 and, where applicable, article 6 of Rome I, which – for all of the detailed changes – continues to follow the model of the Convention on the Law Applicable to Contractual Obligations. An objective reason cannot account for this differentiation.[21]

The differences in content can also not be justified using the argument that the internal insurance market, which is marked by the freedom to provide services and deregulation, would require special conflict of law rules.[22] Should an argument, nonetheless, be based on this premise, further reasons would have to be found for

---

[17] The first alternative in the first sentence of article 7(1) of Rome I.

[18] The second alternative in the first sentence of article 7(1) of Rome I.

[19] The second sentence of article 7(1) of Rome I.

[20] The legal fragmentation in existence today will only be abated insofar as the revised version covers all insurance contracts and article 7 of Rome I is applied to all large risks.

[21] *Cf.* ROTH W.-H. (note 4), at 641.

[22] The consideration may have historically had a role to play; *cf.* ROTH W.-H. (note 4), at 638.

why risks, which are located within the internal market yet outside of the Member States of Rome I,[23] *i.e.* in the EEA Member States of Iceland, Liechtenstein and Norway, are excluded from the scope of article 7 of Rome I and will, therefore in future, be dealt with by Member State courts according to the rules on applicable law in articles 3, 4 and 6 of Rome I, which were not intended for the internal insurance market. The lack of substantive justification for the differentiated legislation also makes it controversial on the basis of European law with a view to the named EEA States. As the concept of the location of the risk is, in most cases, directed to the policyholder's habitual residence,[24] the more unfavourable rules of conflict in articles 3, 4 and 6 of Rome I are normally applied to Icelanders, Liechtensteiners and Norwegians. Policyholders from Member States, on the other hand, may regularly enjoy the more favourable rules of conflict of article 7(3) of Rome I. Consequently, the laws of conflict indirectly discriminate on the basis of citizenship and therefore violate the prohibition in article 4 of the EEA Agreement. This discrimination of Icelanders, Liechtensteiners and Norwegians rooted in the conflict of laws cannot be justified with the argument that these countries simply do not participate in the communitarization of the conflict of laws. The non-participation only justifies differences between the international insurance contract law of these States and that of the Member States (gradual integration). It does not, however, justify a less favourable treatment of Icelanders, Liechtensteiners and Norwegians in the law of the Member States on the basis of conflict of laws. The European legislature is rather – as every national legislature – bound to the prohibition of discrimination in article 12 of the EC Treaty and article 4 of the EEA Agreement when codifying the conflict of laws. It must, thus, treat Icelanders, Liechtensteiners and Norwegians as equals to citizens of Member States on a conflict of law basis. In my opinion, Member State courts are therefore obligated, on account of the precedence of the prohibition of discrimination, to also apply article 7(3) of Rome I to insurance contracts which cover mass risks situated in Iceland, Liechtenstein and Norway. From a practical perspective, it may be of some consolation that the (revised) Lugano Convention[25] already confers jurisdiction to the courts at the place of domicile of policyholders in Iceland and Norway respectively. If they take advantage of this, and it is assumed that this is usually the case, they benefit from the applicable rules of conflict regarding directives, which are more favourable to them. Therefore, the discriminating treatment ensuing from Rome I does not affect them in practice. The Liechtensteiners alone are not guaranteed this jurisdiction at the place of domicile on the basis of European law, as the Principality has not acceded to the Lugano Convention. From the perspective of the Brussels I Regulation (hereinafter referred to as 'Brussels I') and the jurisdiction agreement, Liechtenstein policyholders are domiciled in a third-

[23] This includes Denmark, see the second sentence of article 1(4) of Rome I.

[24] Details on this *infra* II.B.3.

[25] Lugano Convention of 16th September 1988, *OJ* 1988 L 319/9; see henceforth the new Lugano Convention of 10th October 2007.

country, with respect to whom the international jurisdiction in insurance matters may be freely determined by a jurisdiction clause in the contract.[26]

2. 'Large Risk'

Following this analysis, the concept of 'large risk' is of significant importance for the ascertainment of the applicable rule of conflict of laws. Article 7(2) of Rome I does not, however, define this concept independently, but rather makes a reference to the definition in article 5(d) of the First Non-Life Insurance Directive. While the concept may be defined in this manner, the reference can certainly not be described as practical for the application of law; it can also not completely assure the synchronisation of the free choice of the parties in accordance with Brussels I and Rome I. Brussels I also refers to the directives for the definition of large risks,[27] yet it additionally contains a separate list of so-called special risks, which partially extends the free choice of the parties.[28] Rome I would have been a welcome occasion to reformulate and standardise the regulation, especially also with a view to Brussels I.

3. 'Location of the Risk'

The same applies with respect to the concept of 'location of the risk'. It is also defined in article 7(6) of Rome I by way of reference to the provisions in the directives. Those who apply the law must, therefore, draw on the definition of article 2(d) of the Second Non-Life Insurance Directive and, for life assurance, the definition of the 'Member State of the commitment' in article 1(1)(g) of the Life Assurance Directive. This reference is not practical for the application of law either.

C. Insurance Contracts Covering Large Risks

Article 7(2) of Rome I governs *large risk* insurance.[29] The uniform treatment on a conflict of laws basis of *all* large risks is, by all means, to be welcomed. In terms of the content, article 7(2) of Rome I grants parties free choice of law. Consequently, the restrictions in articles 3(3) and (4) of Rome I are directly relevant. The objec-

[26] See article 13(4) of Brussels I; in relation to Denmark see article 2(1) of JA Denmark; in relation to Iceland and Norway (and Switzerland), see article 12a(4) of the LugC (Art. 13 (4) of the newLugC).

[27] Point 5 of article 13 in conjunction with point 5 of article 14 of Brussels I.

[28] Point 5 of article 13 in conjunction with points 1 – 4 of article 14 of Brussels I; on this point, see HUB T., *Internationale Zuständigkeit in Versicherungssachen nach der VO 44/01/EG (EuGVVO)*, Berlin 2005, at 175.

[29] For this concept, see *supra* II.B.2.

tive connection occurs, as a matter of principle, at the habitual residence of the insurer, but permits avoidance in individual cases in which a much closer connection exists.[30] In this way, an identical result is attained to that of articles 3 and 4 of Rome I.

This result deserves some criticism: a rigid connecting factor might have offered more legal certainty, which is particularly important for insurance contracts that are products shaped to a considerable extent by the law applicable. It may also be queried, whether it would not have been worth aspiring towards a uniform, objective connection in synchronisation with mass risk insurance. A synchronisation would have been established at the same time with Brussels I, which regulates the jurisdiction for both mass and large risk insurance, in the same way.[31] As in Brussels I, a uniform, objective connection would not, in any case, have done any harm, since the freedom of choice of law is available to the parties for large risk insurance.

Should a uniform, objective connection not be desired, as is evidently the case for the European legislature, then a contrary question arises of why article 7(2) of Rome I specially governs large risks at all.[32] The connection, which is foreseen there, wholly corresponds to the content of articles 3 and 4 of Rome I, in such a way that large risk insurance could have simply been subjected to this special provision governing the applicable law. The inclusion of large risk insurances into article 7 of Rome I only safeguards that article 7(4) of Rome I, regulating compulsory insurance which could also be the case in large risk insurances, will apply. For that purpose, however, article 7(2) of Rome I is not needed, it can be achieved in more simple ways.

D. Insurance Contracts Covering Mass Risks Situated in Member States

1. A Policy Limiting the Choice of Law

Notwithstanding the principle of freedom of choice of law in article 3 of Rome I, the first subparagraph of article 7(3) of Rome I only guarantees limited options for insurance contracts covering mass risks located in Member States, which are substantively orientated towards the existing conflict rules as found in the directives.[33] Accordingly, parties may not select just any law, but rather only certain, exhaustively listed laws.

[30] See the second subparagraph of article 7(2) of Rome I.

[31] The jurisdiction in insurance matters also conforms to articles 8 – 14 of Brussels I for large risks; however, in the case of large risks parties may freely agree on jurisdiction in accordance with article 13 (5) in conjunction with article 14 of Brussels I.

[32] *Cf.* also the proposal from ROTH W.-H. (note 4), at 651.

[33] See articles 7(1)(b), (c) and (e) of the Second Non-Life Insurance Directive as well as article 32(2) of the Life Assurance Directive.

Priority here is given to the choice of law of the Member State, in which the risk is located at the time of conclusion of the contract.[34] This option is to a large extent meaningless because the location of the risk determines the applicable law even in the absence of a choice.[35] The option can only be of significance if *lit.* (a) establishes a freedom of choice in favour of the law of any one of the States in which an insured risk is situated in cases of multiple location of the risk.[36] I have argued elsewhere[37] that this was not the case mainly for two reasons: First of all, article 7(5) of Rome I would call for a *dépeçage* in cases where the risk is situated in more than one Member State. Secondly, a broad interpretation of *lit.* (a) would leave no room for *lit.* (e) giving a choice in case of multiple location of the insured risks if the policyholder pursues a commercial or industrial activity. However, both arguments can be circumvented if the following approach was taken: Article 7(5) of Rome I directly refers only to the third subparagraph of article 7(3) regulating the objective connection. Therefore, article 7(5) of Rome I can be ignored for the purposes of a choice of law by the parties in accordance with article 7(3) subparagraph 1. *Lit.* (e) deals with specific insurance contracts covering 'two or more risks', whereas lit. (a) mentions only 'the' risk. Arguably, *lit.* (a) only deals with insurance contracts covering a single risk situated in more than one Member States. If one reads *lit.* (a) this way, the choice granted in *lit.* (a) interferes neither with article 7(5) nor with article 7(3) subparagraph 1 *lit.* (e).

The second option in favour of the law of the country, in which the policyholder is habitually resident,[38] ought to be welcomed on grounds of legal policy. If a law, which applies at the habitual residence of the policyholder, is chosen, then considerations of policyholder protection do not conflict with the legitimacy of such a choice. However, *lit.* (b) is also of limited importance as the directives on insurance law[39] define where the risk is situated for most branches of insurance using the habitual residence of the policyholder. In this way, *lit.* (b) again does not, as a rule, assure an option to choose since the applicable law of the country where the policyholder has his habitual residence has already been assigned by the objective connection. *Lit.* (b) only becomes an option for insurance of property, registered vehicles and short-term holiday risks because, in these cases, the location of the risk is not defined by the habitual residence of the policyholder. Even in these instances, *lit.* (b) leads to a choice only where the policyholder does not have his

[34] Article 7(3)(a) of Rome I.

[35] Third subparagraph of article 7(3) of Rome I.

[36] Such a freedom of choice could overcome the division of the contract according to article 7(5) of Rome I.

[37] HEISS H, 'Versicherungsverträge in 'Rom I': Neuerliches Versagen des europäischen Gesetzgebers', in: BAETGE D./VON HEIN J./VON HINDEN M. (Hrsg.), *Die richtige Ordnung – FS für Jan Kropholler zum 70. Geburtstag*, Tübingen 2008, p. 459, at 465 *et seq.*

[38] Article 7(3)(b) of Rome I.

[39] Article 2(d) of the Second Non-Life Insurance Directive or article 1(1)(g) of the Life Assurance Directive respectively; *cf.* article 7(6) of Rome I.

habitual residence in the Member State in which the insured property is located, the vehicle is registered, or the contractual statement for a short-term holiday risk insurance is submitted (cases of divergence). As is evident, the scope of application of lit. (b) has, in practice, been drawn very narrowly.

A genuine option for freedom of choice is offered in lit. (c), which allows a policyholder of life assurance to choose the law of the Member State in which citizenship is held. The European legislature clearly assumes that policyholders whose nationality differs from their habitual residence do not require protection with regard to conflict of laws against the application of the *lex patriae*. Furthermore, the European legislature obviously does not want to hinder 'Euromobile' citizens[40] from arranging their retirement provisions in accordance with the law of their country of origin, and thus their nationality. There are, in fact, very plausible cases, in which Euromobile citizens have such an interest in choosing the law. Inasmuch, the freedom of movement[41] in the internal market advocates the *lex patriae* of the policyholder. However, viewed strictly, it also opposes this, and in my opinion it does so more vigorously: the inference of a bond between individual EU/EEA citizens and their country of origin cannot reliably be drawn from the nationality of an EU/EEA foreigner, specifically because of the freedom of movement in the EU and, in addition, in the EEA. As non-discriminatory treatment by the country of residence is guaranteed to EU/EEA foreigners by the freedom of movement,[42] they are often not particularly enticed to relinquish the nationality of their country of origin for that of the country of residence on settling there. Hence, the nationality of many EU/EEA foreigners or dual citizens living in Member States now only constitutes a formal bond to their country of origin. They require the same protection regarding conflict of laws for policyholders as natives. *Lit.* (c), therefore, partially fulfils an existing desire for a choice of law for the Euromobile citizen, but also undermines, to a certain extent, the protection of the policyholder intended by article 7(3) of Rome I.

Lit. (d) augments the range of choice of law options to the law of the Member State in which the insured events exclusively occur. Consequently, the option exists only for insurance contracts guaranteeing coverage abroad for one single Member State. This option may be justified on legal policy grounds; however it is of limited practical significance. In particular, the restriction of the option to the law of Member States may, at the least, be called into question.

Finally, *lit.* (e) establishes an option especially for policyholders, who pursue a commercial or industrial activity or a liberal profession. In cases where two or more risks are insured and situated in multiple locations, the parties should

---

[40] For an illustration of the 'Euromobile' citizen, see BASEDOW J., 'Das österreichische Bundesgesetz über internationales Versicherungsvertragsrecht', in: REICHERT-FACILIDES F. (Hrsg.), *Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum*,Tübingen 1994, p. 89, at 99 et seq.

[41] Article 18 of the EC Treaty (General Freedom of Movement) and article 39 of the EC Treaty (Freedom of Movement for Workers).

[42] *Cf.* in particular article 39(2) of the EC Treaty; see also the general prohibition on discrimination in article 12 of the EC Treaty.

be able to subject the contract uniformly to the law of one of those Member States, in which part of the risks are located. This is prudent as the ever dubious division of contract can thereby be avoided.[43] Additionally, the European legislature once again – even in *lit.* (e) – entitles this group of policyholders to an option in favour of the law of their habitual residence. This option has, however, already been made available in *lit.* (b) for all of the insurance contracts included in article 7(3) of Rome I.

2. The Absence of the Freedom to Choose the Law for the Active Policyholder

From a legal policy perspective, the catalogue of choice of law options has been drawn too narrowly. This is apparent from a comparison with article 6 of Rome I (consumer contracts). The limitations to the choice of law, which offer consumer protection, in article 6(2) of Rome I are not applicable, and the parties can, therefore, freely select the law applicable to a consumer contract in accordance with article 3 if the undertaking has in no way been engaged in business in the consumer's country within the meaning of article 6(1) of Rome I. In other words: the active consumer does not enjoy consumer protection in the law of conflicts and is exposed to a freedom of choice. There is much to be said for also permitting such a choice of law for insurance contracts in the first subparagraph of article 7(3) of Rome I.[44] It should be possible for the policyholder to request foreign insurance products[45] merely by virtue of the freedom to provide services, which the customer also enjoys in its passive form. This, however, presupposes at the very least a choice of law option in favour of the law of the country in which the insurance cover is being requested. This possibility plays a specific role, in particular for those policyholders, whose habitual residence is situated in a country, which does not have a fully developed private insurance system. It is, thus, very conceivable that the insurers established in the countries moving towards a market economy do not offer certain, highly specialised insurance products. In such cases, the policyholders will actively request insurance cover abroad. Yet, such a request will only be successful if a choice of law is available in favour of the law at the insurer's domicile. Protective considerations do not contradict such a choice of law: policyholders, who approach a foreign provider of their own accord during the search for insurance cover, require just as little protection as an active consumer.[46] The

[43] See article 7(5) of Rome I.

[44] Similarly, ROTH W.-H. (note 4), at 653 *et seq.*, who proposes making the choice of law available to policyholders by means of individual agreement.

[45] *Cf.* also the approach in article 28 of the Third Non-Life Insurance Directive (*OJ* 1992 L 228/1); on its importance for conflict of laws only, see ROTH W.-H., 'Dienstleistungsfreiheit und Allgemeininteresse im europäischen internationalen Versicherungsvertragsrecht', in: REICHERT-FACILIDES F. (Hrsg.) (note 40), p. 1, at 26 *et seq.*

[46] Thus, see also ROTH W.-H. (note 45), in: REICHERT-FACILIDES F. (Hrsg.) (note 40), p. 1, at 26 *et seq.*

policyholder's access to foreign insurance markets should, consequently, not be denied in cases of active request.[47]

Moreover, a freedom of choice for the active policyholder would, in my opinion, broadly, and possibly even completely,[48] spare the seemingly casuistic list[49] of the individual choice of law options in the first subparagraph of article 7(3), which is not convincing *per se*.

This primarily applies to cases which fall under article 7(3)(e) of Rome I, in which an insurance policy only covers insured events that occur in a particular country. If, for example, a policyholder, whose habitual residence is in Germany, covers an English third party risk using a German insurer, this cover will only be provided in accordance with German insurance law. Should the policyholder wish to use the English insurance market, this would be possible as the choice of law is available to customers who actively seek products abroad. This situation only remains unresolved if the English insurer wants to market third party policies, developed in accordance with English law, on the German market. It is precisely in this situation, however, that the protective considerations in article 7(3) of Rome I become effective, so that the choice of law option should not even be made available.

The same applies for the option in favour of the *lex patriae* of the policyholder in life assurance. If a French person with habitual residence in Germany could, for example, take out life assurance as an active consumer with a French insurer and in accordance with French law, this option would presumably be exercised by Euromobile citizens, who still have intensive contact with their country of origin. Article 7(3)(c) of Rome I would then be redundant. Should Euromobile citizens, in contrast, take out life assurance with an insurer in their country of residence, in the chosen example therefore with a German insurer, article 7(3)(c) of Rome I would also not be required since the German insurer would never get involved with a choice of French law. The situation in which French insurers want to market their life assurance policies at French nationals living abroad remains unresolved. In these cases, nationality alone is, in my opinion, not sufficient evidence of such close ties of policyholders to their or their parents' country of origin, such that a retraction of policyholder protection would be justified.[50] The criterion of active request is significantly more selective here, so that it is also fair to the interests of Euromobile citizens.

The option favouring the law of the location of the risk pursuant to article 7(3)(a) of Rome I has already been demonstrated to be superfluous. Hence, only the option in favour of the habitual residence in accordance with article 7(3)(b) is of any importance. It pertains to the few cases of a divergence between the location

[47] For details about the subject, see ROTH W.-H. (note 4), p. 631, at 638 *et seq.* with further references.

[48] With regard to this point, *cf.* also HEISS H. (note 3), p. 503, at 528 *et seq.*

[49] Another critic of the list of the individual choice of law option: STAUDINGER A. (note 4), p. 225, at 240.

[50] For criticism of the criterion of nationality, see *supra* II.D.1.

of the risk and the habitual residence of the policyholder. This option could, however, also be rendered obsolete by referring to the policyholder's habitual residence, rather than to the location of the risk, as the objective connection for all contracts of insurance. The policyholder would then no longer require an option for this legal system. The option favouring the law applicable where the risk is situated would then admittedly gain significance; however, this would be granted to the policyholder through active enquiry, which would very likely be undertaken for foreign property, vehicles registered abroad, and contractual statements for holiday risk insurance submitted abroad. The policyholder would thereby, in cases of multiple locations, be able to opt for the law of a country in which the property is located for the entire contract. In short: if the objective connection were to be directed to the policyholder's habitual residence, the freedom of choice of the active policyholder would also render the choice of law options in articles 7(3)(a), (b) and (e) of Rome I superfluous. The entire list could then be replaced by the active policyholder's freedom to choose the law and the provision in article 7 of Rome I could be considerably unburdened.

3. The Lack of Options in Favour of General Principles or an Optional Instrument

The options in article 7 of Rome I relate to the law of a 'Member State' or 'country'. It should, therefore, be clear that a choice based on conflict of laws of general principles of insurance contract law, as they exist, for example, in the form of the *Principles of European Insurance Contract Law* (PEICL)[51], is not available. The reference in recital 15 of Rome I, whereby Rome I does not preclude the contractual inclusion of a non-State body of law, will not have any impact on this as it only refers to a substantive incorporation which will be limited by the mandatory rules of the law applicable. Yet, at least recital 16 emphasises the possibility of the European legislature creating an *optional instrument* in the future. This recital leads to the prospect that, in the field of insurance, the PEICL may be enacted as an optional instrument. They have, at any rate, been drafted as a model for such an instrument.[52]

4. Policy Option held by Member States

Following the current law in the directives,[53] the second subparagraph of article 7(3) of Rome I grants the country, in which policyholder has his habitual resi-

[51] The English text, translations and further information is available at www.restatement.info.

[52] See article 1:102 PEICL.

[53] See articles 7(1)(a) and (d) of the Second Non-Life Insurance Directive, as well as the second sentence of article 32(1) of the Life Assurance Directive.

dence,[54] and additionally (divergence cases!) the Member State where the risk is situated,[55] the authority to extend the choice of law options. For policyholders, who pursue a commercial or industrial activity or a liberal profession, this authority pertains to each, individual Member State, in which even only a part of the insured risk is situated.[56] These choice-of-law options must be read *in favorem libertatis*. The parties to the contract can exploit the maximum freedom of choice provided by the law of one of these countries. The room for manoeuvre for the indicated countries ranges up to granting free choice of law.

This provision is untenable on a legal policy basis. First, it thwarts to a very large extent the true intention of the regulation, which is to establish a uniform, international contract law. Moreover, it leaves the protection of policyholders in article 7(3) of Rome I at the mercy of the discretion of several Member State legislatures. Even if just one of them favours a free choice of law, it will be granted. Lastly, the provision is inconvenient: if a German judge had to decide, for instance, on an insurance contract, which covered risks situated abroad, he would have to determine whether a free choice of law is admissible in accordance with foreign conflict-of law-rules.

5. Limitations on Choice in the Conflict of Laws Regarding Consumers

The choice of law options in articles 7(3)(a) to (e) of Rome I are also available to consumers and are not limited by article 6(2) of Rome I. Although this follows from the principle of speciality, it is formally highlighted by article 6(1) of Rome I once more for the purpose of clarification. The special conflict of law rules in the directive governing unfair terms and in the directive governing distance marketing of financial services also do not intervene. The application of article 6(2) of the Unfair Terms Directive and article 12(2) of the Distance Marketing of Financial Services Directive to article 7(3) of Rome I is expressly excluded by article 23 of Rome I.

This result is at least questionable with regard to a free choice of law authorised by a Member State in accordance with the second subparagraph of article 7(3) of Rome I. Did the European legislature want to exempt from article 6(1) of Rome I the insurance contracts formally covered by article 7 of Rome I even when the Member States grant a free choice of law? A perspective, which is rooted in the wording of the provisions in such a manner, hazards that a Member State can place the consumer in a worse position within the scope of the special protective rules in article 7 of Rome I than within the scope of the general rules on

[54] See the reference to point (b) of the first subparagraph in the second subparagraph of article 7(3) of Rome I.

[55] See the reference to point (a) of the first subparagraph in the second subparagraph of article 7(3) of Rome I.

[56] See the reference to point (e) of the first subparagraph in the second subparagraph of article 7(3) of Rome I.

applicable law. Such contradictory legal policies cannot be desired by the European legislature. The primacy of article 7 of Rome I over article 6 of Rome I might, therefore, only concern the content of the provision, in particular the guaranteed minimum freedom of choice of law and the objective connection to where the risk is situated, not however the expansion of choice of law by Member States. It must, thus, be considered whether a free choice of law, which derogates from the choice of law options in the first subparagraph of article 7(3) of Rome I and is justified in the law of Member States, ought to be subjected to an examination pursuant to article 6(2) of Rome I for consumer insurance.

Similar arguments could also be raised for conflict of law rules in the law relating to consumer protection and applicable to insurance contracts.[57] However, this issue is not as urgent since, in this case, article 3(4) of Rome I reserves the protection of mandatory Community law, at least for purely internal market situations.

6. The Constraint on the Choice of Law Pursuant to Articles 3 (3) and (4) of Rome I

Article 3(3) of Rome I safeguards the applicability of mandatory national laws against exclusion through the choice of another country's law, if the circumstances of the case – apart from the choice of law and, if applicable, a clause conferring jurisdiction – are connected to only one single country. Furthermore, article 3(4) of Rome I protects the applicability of mandatory Community law from exclusion by the choice of a third country's law, if the facts of the case present relevant connections to only EU Member States.[58] The provisions both deploy their protective effects in a system of free choice of law pursuant to article 3(1) of Rome I. In the case of article 7(3) of Rome I, however, they initially prove themselves to be inconsequential as the choice of law option, which the first subparagraph of article 7(3) of Rome I establishes, always presupposes a relevant relationship to the law chosen. Even in the alternative of *lit.* (b), where the law selected does not have to be one of a Member State, the habitual residence of the policyholder must be situated in the country, whose law is chosen. Doubts may only be cast in respect of the choice in favour of the *lex patriae* pursuant to article 7(3)(c) of Rome I. For an application of the current article 3(3) of the Rome Convention, which very much resembles article 3(3) of Rome I, a foreign nationality is not acknowledged as a relevant foreign element by much of the academic opinion.[59] Such a reading of

[57] See article 6(2) of the Unfair Terms Directive as well as article 12(2) of the Distance Marketing of Financial Services Directive.

[58] Such a proposal has already been formulated by BASEDOW J., 'Materielle Rechtsangleichung und Kollisionsrecht', in: SCHNYDER A.K./HEISS H./RUDISCH B. (Hrsg.), *Internationales Verbraucherschutzrecht,* Tübingen 1995, p. 11, at 34; for a critical view see LOOSCHELDERS D. (note 4), p. 441, at 450.

[59] For the discussion, see CZERNICH D./HEISS H., *EVÜ* Wien 1999, article 3 at the end of marginal note 4; KROPHOLLER J., *Internationales Privatrecht* Tübingen 2006, p. 466

article 3(3) of Rome I might, however, contradict the purpose of the option in article 7(3)(c) of Rome I. The provision itself establishes nationality, at least for its own purposes, as a relevant foreign element. These considerations certainly indicate the excessive tendency of article 7(3)(c) of Rome I, whose criterion of nationality cannot guarantee a genuine, close relationship to the chosen law.[60]

The limitations on the choice of law pursuant to articles 3(3) or (4) of Rome I can, therefore, not demonstrate any impact in this respect. They first gain importance within the scope of article 7(3) of Rome I when a Member State exercises its policy option pursuant to the second subparagraph and grants the parties the freedom of choice. In such situations, article 3(4) of Rome I is particularly relevant because European consumer law[61] cannot be circumvented by a choice of a third country's law for purely internal market situations.

7. Objective Connection

In the context of the objective connection, the third subparagraph of article 7(3) of Rome I focuses on where the risk is situated at the time of the conclusion of the contract. The, thus immutable, proper law is determined by using a rigid connection. In contrast to the current regime of international insurance contract law, a distinction between convergence cases (the location of risk and policyholder's habitual residence are situated in the same country) and divergence cases (the location of risk and policyholder's habitual residence are situated in different countries) can, thus, no longer be drawn.[62] In this way, the third subparagraph of article 7(3) of Rome I also overcomes the legal uncertainty, with which the objective connection had hitherto been afflicted.[63]

In most cases, the location of the risk is determined by the policyholder's habitual residence or establishment.[64] The definition of location of risk leads, however, to three specific connections: the insurance of property pursues the *lex rei sitae*;[65] the insurance of registered vehicles pursues the law under which the

---

with note 49; VON HOFFMANN B./THORN K., *Internationales Privatrecht*, München 2005, p. 434.

[60] Details on this point, see *supra*: II.D.1.

[61] The Unfair Terms Directive and the Directive on Distance Marketing of Financial Services are relevant in the insurance sector.

[62] *Cf.* the first sentence of article 7(1)(a) (convergence cases) and the second to fourth sentences of article (7)(1)(h) of the Second Non-Life Insurance Directive.

[63] With regard to the objective connection in divergence cases pursuant to article 11 EGVVG (Insurance Contracts (Introduction) Act), see DÖRNER H., *Internationales Versicherungsvertragsrecht*, Berlin 1997; article 11 EGVVG (Insurance Contracts (Introduction) Act) marginal note 13 *et seq.*; ROTH W.-H., *Versicherungsrechts-Handbuch*, München 2004, paragraph 4 marginal note 94 *et seq.*

[64] See article 1(1)(g) of the Life Assurance Directive and the fourth 'backup' alternative in article 2(d) of the Second Non-Life Insurance Directive.

[65] See the first alternative in article 2(d) of the Second Non-Life Insurance Directive.

vehicle is registered;[66] and the insurance of short-term holiday risks pursues the law of the place, at which the contractual statement was submitted by the policyholder.[67] Especially as the definition of where the risk is situated does not consistently adopt the policyholder's habitual residence, an insurance contract could be taken out to cover multiple risks situated in different Member States, which leads to an undesirable division of the contract.[68] A contract, concluded uniformly for multiple risks, would therefore be treated as several contracts for individual risks.

In view of this result, doubts, at the very least, arise as to whether it was really necessary to select the location of the risk and not generally the policyholder's habitual residence as the connecting factor on account of the three said types of insurance.[69] Consideration for the location of the property, the place of registration of vehicles and the place of the contractual statement by the policyholder for holiday risks could also have been adequately accommodated in the choice of law options. As demonstrated, a choice of law option for an active policyholder completely fulfils the practical requirements.

Another doubt follows: had the European legislature subjected all mass risk insurance to uniform rules on the law applicable (*i.e.* omitted improperly using the distinction between the insurance contracts according to the location of the risk in article 7(1) of Rome I), and thereby opted for the policyholder's habitual residence as a connecting factor, it would have not had to employ the concept of the location of the risk at all and therefore also not had to define it by way of reference to the law in the directives.[70] This would have much relieved the conflict of laws provision. At the same time, it would not have had to regulate the case of multiple locations and, hence, could have avoided the somewhat unfortunate division of the contract.[71] The European legislature has also let this opportunity slip through its fingers. The parties may, of course, resolve the problem by exercising the choice of law option in article 7(3)(b) of Rome I (choice of the law applicable at the policyholder's habitual residence).

---

[66] See the second alternative in article 2(d) of the Second Non-Life Insurance Directive.

[67] See the third alternative in article 2(d) of the Second Non-Life Insurance Directive.

[68] See article 7(5) of Rome I.

[69] For a connection to the policyholder's habitual residence see MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', in: *RabelsZ* 2007, p. 225, article 5a paragraph 1; probably also in a similar vein, see ROTH W.-H. (note 4), p. 631, at 650 *et seq*.

[70] Alongside articles 7(1) and (3) of Rome I, article 7(4) (compulsory insurance) also employs the concept of location of the risk. The concept may, however, be dispensed with in article 7(4) as well.

[71] Article 7(5) of Rome I.

8. The Absence of a Regulation for Group Insurance

Last but not least, article 7 of Rome I suffers, in my opinion, from its failure – just as the current law applicable in directives – to specifically govern group insurance contracts. This namely applies for those types of group insurance, for which the individual member of the group only holds the status of an insured person and not that of a policyholder. Particularly as both the legal connection (usually the habitual residence) and the limitation on the choice of law (mass risks) are orientated towards subjective criteria for the policyholder, but not the insured person, a vacuum in the protection emerges which must be filled. On literal application of article 7 of Rome I, the claims of an English person insured by a credit card insurance policy, which the person's German bank procured from a German insurer, are subject to German law. This is also the case even when the English credit card customer obtains the protection of the applicable law pursuant to article 6 of Rome I in relation to the German bank. Moreover: since banks are frequently large risk customers, German law, in accordance with the second subparagraph of article 7(2) of Rome I, would even be applicable when an English bank concludes the group insurance contract with a German insurer. In addition, the English bank and the German insurer are granted the free choice of law pursuant to the first subparagraph of article 7(2) of Rome I in such cases, a choice which is binding also on the insured.

From a practical perspective, a precarious situation emerges here because, in these cases, of group insurance the insured person is the one who 'takes out the insurance'. Joining the group, for instance by obtaining a credit card, is difficult to distinguish functionally[72] from the conclusion of a separate insurance contract. The group organiser is, on a practical examination, more likely to be given the role of a marketing organisation of the insurer than that of a policyholder. This phenomenon is also common at national law. Thus, the German *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority), or more precisely its predecessor, the former *Bundesaufsichtsamt für das Versicherungswesen* (Federal Insurance Supervisory Office), published the circular R3/90[73] on 31st July 1990 setting certain minimum requirements for contracts of group insurance, which drew the insured group member closer, at least in a legal sense, to the position of a policyholder. With regard to the law applicable, nothing else should be in force here. Brussels I has approved this approach: in article 9(1)(b), it bestows a jurisdiction at the place of the insured's habitual residence not only on the policyholder, but also on the insured person. This also applies in particular to the case of a group member insured within the scope of group insurance.

[72] In contrast to the legal construction of these group insurance contracts, whereby the bank or the credit card institution is the policyholder; *cf.* OLG (Higher Regional Court) Frankfurt/M. on 9th October 2002, in: *VersR* 2003, at 361; and also öOGH (Austrian Supreme Court) on 11th May 1994, in: *VersR* 1995, at 443.

[73] *VerBAV* 1990, at 339.

9. Compulsory Insurance

Article 7(4) of Rome I contains a provision on compulsory insurance in line with the current law in directives. Concerning the scope of application of this regulation, it must be highlighted that it is not only applicable to mass risk insurance in terms of article 7(3) of Rome I, but also to large risk insurance pursuant to article 7(2) of Rome I. This is definitely of importance since large risk insurance may also take the form of compulsory insurance.

With regard to content, article 7(4)(a) of Rome I states that the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. In case of derogations, the proper law of insurance obligation should prevail.[74] Evidently, the European legislature does not regard this provision as imperative *per se* and has also granted the Member States a policy option at this point:[75] they may prescribe that the proper law of insurance obligation governs the insurance contract in its entirety. The Member States may establish general conflict of law rules; they are not required to limit themselves to a mandatory connection to their own compulsory insurance. It has again been demonstrated here that legal unity in the conflict of laws relating to European insurance has nowhere near been achieved.

E. Insurance Contracts Covering Mass Risks Situated Outside of Member States

1. The Rules on Applicable Law and the Contradictory Legal Policies

Insurance contracts covering mass risk, which are situated outside of Member States,[76] are excluded from the special conflict of law rules in article 7 of Rome I and, hence, governed by the general rules on applicable law. As has already been highlighted, the differentiated treatment of insurance contracts cannot be justified objectively. A glance at the provisions in articles 3, 4 and 6 of Rome I shows that the European legislature has actually chosen two completely contradictory models to determine the connection. While article 7 of Rome I protects the policyholder up to the boundary of large risks (therefore including self-employed persons), only private consumers enjoy the protection of article 6 of Rome I. While the first sub-

[74] Article 7(4)(a) of Rome I refers to derogations of the law of the Member State where the risk is situated from the law which imposes the obligation to insure; the fact that the law of the country where the risk is situated only comes into application in the absence of a choice of law by the parties, has apparently been overlooked. Consequently, what must have been intended by article 7(4)(a) of Rome I are derogations of the law applicable from the law which imposes the obligation to insure.

[75] See article 7(4)(b) of Rome I.

[76] For the definition of this term, see article 1(4) of Rome I, which includes Denmark.

paragraph of article 7(3) of Rome I only permits a limited choice of law, which may be extended by the Member States, the choice of law pursuant to article 3 of Rome I is, in principle, free. Further, where the third subparagraph of article 7(3) of Rome I assigns the location of the risk as the objective connection, article 4 of Rome I favours the location or the contracting establishment of the insurer. The contradictory legal policies become evident at each level.

2. Limitations on Choice in Conflict of Laws Contained in Directives

In addition to the limitation on the choice of law in article 6 of Rome I, a constraint is also placed on the choice in the conflict of laws relating to consumer protection in the directives. If a French policyholder insures his holiday house, situated in Florida, with an English insurer, and if the parties agree – in derogation from the applicable English law pursuant to article 4 of Rome I – to the application of the law in Florida, the intervention of consumer protection must, first of all, be determined pursuant article 6 of Rome I. This also usually guarantees the application of mandatory European consumer law. Should, however, article 6 of Rome I not be applicable, e.g. because the Frenchman actively sought the English insurance cover, the special connections in article 6(2) of the Unfair Terms Directive and, as the case may be, article 12(2) of the Distance Marketing of Financial Services Directive would, nevertheless, have to be taken into consideration. The mandatory law in the directives, consequently, prevails over the choice for a third country's law.

3. The Constraint on the Choice of Law Pursuant to Articles 3 (3) and (4) of Rome I

Particularly as the choice of law pursues article 3 of Rome I, its limitations in paragraphs 3 and 4 are also put into perspective. The full impact of the constraint in paragraph 3 is unfurled here. The limitation in paragraph 4, however, presupposes that the circumstances of the case exclusively relate to the internal market. Yet, this is not the case when the mass risk is situated outside of a Member State. In this context, it should again be mentioned that the term 'Member State' also incorporates Denmark for the purposes this article.[77] Strictly speaking, had the European legislature wanted to secure the enforcement of mandatory internal market law in its entire geographical scope of application, it would have also had to count Iceland, Liechtenstein and Norway among the Member States for the purposes of article 3(4) of Rome I. On the other hand, if the approach represented here were pursued, according to which insurance contracts covering mass risks situated in Iceland, Liechtenstein or Norway should be judged according to the applicable law pursuant to article 7(3) of Rome I,[78] no further importance would be placed on

[77] See the second sentence of article 1(4) of Rome I.

[78] See *supra* II.B.1, *in fine*.

article 3(4) of Rome I for the insurance of mass risks, which are situated outside of Member States.

4. Compulsory Insurance

The general rules on applicable law do not acknowledge any special provisions for compulsory insurance. A result corresponding to article 7(4)(a) of Rome I can, however, also be reached using a special connection for overriding mandatory provisions pursuant to article 9 of Rome I since compulsory insurance regulations especially serve the public interest or interests of third party protection.[79]

F. Reinsurance

Rome I features hardly anything new for reinsurance. The second sentence of article 7(1) of Rome I excludes it from the scope of application of article 7 of Rome I, which is a persuasive solution in light of the special characteristics of reinsurance. Consequently, reinsurance is subjected to the free choice of law pursuant to article 3(1) of Rome I and its limitations in articles 3(3) and (4) of Rome I.

Rome I does not concern itself with the arguments about the theories for the objective connection for reinsurance contracts.[80] The restructuring of article 4 of Rome I and the express connection between contracts for the provision of services[81] and the habitual residence of the service provider is not able to radically invigorate the discussion because whether the first insurer or the reinsurer performs the determining services is also debatable in this discussion. Furthermore, article 4(3) of Rome I contains an escape clause, which to some extent is also drawn on as justification for a connection to the habitual residence of the first insurer.[82] Thus, the question remains exciting; for the most part, however, only theoretically exciting because the choice of law of the parties resolves the problem in practice.

III. Conclusion: Necessity and Proposal for Reform

On the whole, my opinion is predominantly negative: the recodification of the law applicable in European insurance law has failed, just as miserably as the current

[79] See ROTH W.-H. (note 63), paragraph 4 marginal note 94 *et seq.*

[80] See, for instance, ROTH W.-H., *Internationales Versicherungsvertragsrecht*, Tübingen 1985, at 580 *et seq.*; with regard to the debate about the objective connection for reinsurance, see MANKOWSKI P., 'Internationales Rückversicherungsvertragsrecht', in: *VersR* 2002, at 1177.

[81] See article 4(1)(b) of Rome I.

[82] For a detailed analysis, see ROTH W.-H. (note 80), at 580 *et seq.*

state of law. Consolation may, at best, be derived from the review clause in article 27(1)(a) of Rome I, according to which the Commission must present a report on the application of the regulation including possible proposals for change by 17 June 2013. The report must specifically deal with the significance of the conflict rules pertaining to insurance. It may be hoped that, with regard to insurance contracts, Rome I will be reformed very soon.

The current situation already calls for considering a revision today. If a reform took its cue from the present article 7 of Rome I, reinsurance and large risk insurance would have to be governed by articles 3 and 4 of Rome I. For (all!) insurance of mass risks, article 7 of Rome I would have to offer a protective connection at the habitual place of residence of the policyholder, which only omits active enquirers abroad. This protective connection would have to be modified for group insurance, compulsory insurance, and possibly also substitutive health insurance.

Such a new article 7 of Rome I could read:

Article 7. Insurance contracts.

(1) Insurance contracts, with exception to *re*insurance contracts and insurance contracts covering *special or large risks* within the meaning of article 13(5) in connection with article 14[83] of the Council Regulation (EC) No 44/2001 in the respective versions in force, are governed by the law of the country in which the policyholder has his *habitual residence*[84] at the time of concluding the contract.

(2) The parties can, however, choose the law to be applied if the contract is concluded with an *insurer*, who *neither itself nor through intermediaries* pursues his insurance activities in the country where the policyholder has his habitual residence and does not, by any means, *direct* such activities to that country or to several countries including that country.[85]

(3) As far as the claims of an *insured person* are concerned, the law applicable for group insurance must be determined pursuant to paragraphs 1 and 2, provided that the insured person is substituted for the policyholder and the group organiser is considered to be the insurer's *intermediary*.[86] If a group

[83] The reference to Brussels I assures a synchronization of party autonomy regarding conflict of laws and procedural law. On inclusion of this reference, articles 13(5) and 14 of Brussels I should be revised at the same time; an independent definition would have to replace the further reference to the definition in the directives.

[84] The concept of the 'situation of the risk' has been avoided in the entire proposal and therefore does not need to be defined; thus, the reference in the current article 7(6) to the definition in the directives would become obsolete.

[85] This choice of law option enables the policyholder to draw on the passive freedom to provide services and renders the choice of law options under article 7(3) redundant.

[86] Therefore the subjective criteria of individual insured persons must be drawn upon, in order to determine whether a large risk insurance contract exists: the choice of law pursuant to article 7(2) in the proposal put forward here would be established if the insured

insurance is taken out by an *employer* for the risks of his employees, the parties may choose the law of the country in which the employer has his *headquarters* or the *place of business*, in which or, failing that, from which the employee habitually carries out his work.

(4) *Compulsory insurance contracts* are subject to the law of the country which prescribes the legal obligation to insure.[87]

(5) *Health insurance contracts*, which entirely or partly substitute health insurance provided in the national insurance system of a country, are governed by the law of this country.[88]

person joined the group as an 'active policyholder'; the objective connection would direct itself towards the habitual residence of the insured person; in this respect *cf.* also the jurisdiction of the insured person according to article 9(1)(b) of Brussels I.

[87] For a similar proposition, see ROTH W.-H. (note 4), p. 631, at 656.

[88] The provision sustains the intention of article 54 of the Third Non-Life Insurance Directive; see also ROTH W.-H. (note 4), p. 631, at 656.

§OVERRIDING MANDATORY PROVISIONS IN THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTS

Andrea BONOMI*

I. Introductory Observations

The European Regulation Rome I on the law applicable to contractual obligations was recently adopted by the European Parliament and the Council of the European Union.[1]

This highly controversial instrument is intended to replace, in the near future, the Rome Convention of 19 June 1980, one of the founding documents of European Private International Law.[2]

This brief contribution contains some preliminary reflections on the new regime concerning overriding mandatory provisions.[3]

---

* Professor at the University of Lausanne. This article revisits an article published in the essays in honour of Fausto Pocar, Padua 2008. The author is very grateful to Karen Druckman for the thorough linguistic revision of his text.

[1] Regulation (EC) n. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'), in: *O.J. of the European Union*, L 177, of 4 July 2008, p. 6 *et seq*. For a short bibliography, see *supra* our general remarks on the Regulation, in this *Yearbook*, p. 165 (note 1).

[2] The Rome Convention on the law applicable to contractual obligations of 19 June 1980, *O.J.*, L 266 of 9 October 1980, p. 1 *et seq*. In a manner analogous to the Brussels Convention, this text was also followed by several accession conventions in order to extend its application to the new Member States; the consolidated version has been published in the *O.J.*, C 27 of 26 January 1998.

[3] For an in-depth analysis of *lois d'application immédiate* in the Rome Convention system, cf. BONOMI A., *Le norme imperative nel diritto internazionale privato*, Zurich 1998; IDEM, 'Mandatory Rules in Private International Law – The Quest for Uniformity of Decision in a Global Environment', in this *Yearbook* 1999, p. 215 *et seq.*

Yearbook of Private International Law, Volume 10 (2008), pp. 285-300

Printed in Germany

In the system for the determination of applicable law instituted by the Rome Convention, an important function was attributed to the overriding mandatory provisions, covered by Article 7, in order to guarantee an equilibrium between certain fundamental objectives of the Convention (*e.g.* uniformity of the conflict rules among the Contracting States, party autonomy) and the interests of the States. This centrality is confirmed by the regime established in the Regulation, even if it seems probable, for various reasons, that the role of this particular category of mandatory norms will, on the whole, be less important in the future.[4]

As compared to Article 7 of the Rome Convention, the new provision of Article 9 of the Regulation, *i.e.* the *sedes materiae* of *lois d'application immédiate*, presents various novelties, one of which is purely formal whereas the other two relate to the substance of the matter.

On a formal plane, the order of the two current paragraphs of Article 7 has been judiciously reversed. The provision of Article 7(2) of the Convention relating to overriding mandatory provisions of the *lex fori*, which has become Article 9(2) of the Regulation, now precedes the provision relating to overriding mandatory provisions of third countries that has been included, with certain important modifications (which will be discussed below) in the third paragraph of Article 9. This novelty, which is purely cosmetic and without practical effect, doubtless offers the advantage of simplifying the comprehension of this provision and of a notion, *i.e.* that of *lois de police* which is, by its nature, in particular for the uninitiated, fairly complex.

Much more significant are the modifications relating to the substance, *i.e.* the introduction of a definition of overriding mandatory provisions in Article 9(1) and the reformulation in a more restrictive manner of the conditions under Article 9(3) for the application (or the consideration) of the overriding mandatory provisions of a foreign State.

[4] On overriding mandatory rules in the Rome I Regulation see the contributions cited in the footnote 1 and the following: BOSCHIERO N., 'Norme inderogabili, "disposizioni imperative del diritto comunitario" e "leggi di polizia" nella proposta di regolamento "Roma I"', in: *Il nuovo diritto europeo dei contratti: dalla convenzione di Roma al regolamento 'Roma I'*, Quaderni della Fondazione Italiana per il Notariato, Milan 2007, p. 101 *et seq.*; THORN K., 'Eingriffsnormen', in: FERRARI F., LEIBLE S. (eds.), *Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom I-Verordnung*, Jena 2007, p. 129 *et seq.*; BIAGIONI G., 'L'ordine pubblico e le norme di applicazione necessaria nella proposta di regolamento 'Roma I'', in: FRANZINA P. (ed.), *La legge applicabile ai contratti nella proposta di regolamento 'Roma I'*, Padua 2006, p. 96 *et seq.*; FREITAG R., 'Einfach und international zwingende Normen', in: LEIBLE S. (ed.), *Das Grünbuch zum internationalen Vertragsrecht*, Munich 2004, p. 167 *et seq*; D'AVOUT L., 'Le sort des règles impératives dans le règlement Rome I', in: *Rec. Dalloz*, 2008, p. 2155 *et seq.*

II. The Definition of Overriding Mandatory Provisions

A definition of overriding mandatory provisions was introduced pursuant to the proposal by the European Commission[5] in Article 9(1) of the Regulation. In the words of the new text, they are mandatory provisions the respect of which is deemed by a country to be so crucial to the safeguard of its public interests, such as its organisation on a political, social or economic level, that it requires their application to any situation falling within their scope of application, regardless of the law applicable to the contract.

The introduction of a normative definition of this category of legal provisions no doubt constitutes an important innovation as well as an *unicum* with respect to legislation in effect; indeed, to the best of our knowledge, no other text – national or international – contains a definition of overriding mandatory provisions.

On the other hand, with respect to its content, the definition does not appear to be particularly innovative. Its direct antecedent is to be found in the well-known *Arblade* case of 1999.[6] It is useful to recall, however, that, in this case, the Court of Justice did not intend to formulate its own notion of overriding mandatory provisions (the question posed by the Belgian judges did not require the Court to do so) and restricted itself to confirming the principle – clear, in and of itself – that Community law takes precedence over internal law, including national norms that, in their own legal order, are deemed to have the status of overriding mandatory provisions.[7] The definition of *lois de police* adopted in the decision was thus that of

[5] See Art. 8(1) of the proposed Regulation.

[6] ECJ, 23 November 1999, C-369/96 e C-376/96, *Arblade*, ECR 1999, p. I-8453, para. 30, in which it is affirmed that the expression '*lois de police et de sûreté*' as used in Belgian law should be understood 'as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'. The decision has also been published in *Rev. crit. dr. int. pr*. 2000, p. 710, with a note by FALLON M.

[7] ECJ, 23 November 1999 (note 6), para. 31: 'the fact that national rules are categorised as public-order legislation [*lois de police*] does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of Community law would be undermined. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest'. This aspect of the *Arblade* case is rightly emphasised by MANKOWSKI P., 'Der Vorschlag für die Rom I-Verordnung', in: *IPRax* 2006, p. 109. It is precisely for this reason that, in another contribution, we have criticized from a methodological point of view the proposal of the Commission to deduce from the *Arblade* case a Community definition of overriding

the Belgian legal order that – as is well known – is based on that formulated in France by Phocion FRANCESCAKIS in his writings of the 1960's on *lois d'application immédiate*.[8]

Although the doctrinal and jurisprudential origin of the definition then appears unequivocal, the consequences of its introduction into the Regulation are less clear. In our opinion, this definition leads to certain effects that are certainly appreciable, whereas other possible implications appear at first glance to be more debateable.

a) An undoubtedly positive effect of the definition is to *clarify*, in particular for lawyers not specialised in private international law, the meaning and the breadth of the notion of overriding mandatory provisions.

On this subject, the Rome Convention maintains a certain ambiguity between the concept of *lois de police* and that of mandatory rules. Indeed, the expression 'mandatory rules' is used with different meanings in various articles of the text of the Convention. Whereas pursuant to Articles 3(3) (contract having no cross-border elements), 5(2) (contract concluded with a consumer) and 6(1) (employment contract), this term is used as a limit on the contractual designation of the law applicable and refers to all the norms from which no derogation can be made on the internal plane, the same term appears in Articles 7(2) and 9(6) as an element characterising a more limited category of legal provisions – specifically the overriding mandatory provisions – whose degree of 'mandatory-ness' is such that they are to be applied 'irrespective of the law governing the contract.' Such an approach in itself is correct given that the mandatory character is, according to the point of view we deem preferable, an element constituting the notion of *lois de police* (this is also reflected by the English expression 'overriding mandatory provisions')[9] but the formulation of these provisions certainly does not facilitate the comprehension of the system, in particular for legal practitioners not specialised in private international law. This ambiguity was particularly noticeable in certain linguistic versions of the Convention because the notions of mandatory norms and overriding mandatory provisions were sometimes referred to by the same legal term (*e.g.* in Italian by the expression *disposizioni imperative*, in English by *mandatory rules* and in German by *zwingende Vorschriften*). The difficulty became that

---

mandatory provisions: cf. BONOMI A., The Conversion of the Rome Convention of 19 June 1980 into an EC Instrument, Some Remarks on the Green Paper of the EC Commission', in this *Yearbook* 2003, p. 87.

[8] FRANCESCAKIS Ph., 'Quelques précisions sur les "lois d'application immediate" et leurs rapports avec les règles sur les conflits de lois', in: *Rev. crit. dr. int. pr.* 1966, p. 1 *et seq*.; IDEM, 'Lois d'application immédiate et règles de conflit', in: *Riv. dir. intern. priv. proc.* 1967, p. 691 *et seq*.; IDEM, 'Conflits de lois (principes généraux)', in: *Rép. Dalloz, Droit international*, t. 1, Paris 1968, p. 480. Cf. BONOMI A., *Le norme imperative* (note 3), p. 76 *et seq*., 169 *et seq*.

[9] BONOMI A., *Le norme imperative* (note 3), p. 139 *et seq*.

much more serious in the Contracting States that do not recognise the notion of *lois de police* in their internal law.[10]

The definition introduced in the Regulation contributes to the clarification that overriding mandatory provisions form a sub-set of the more general category of mandatory norms whose fundamental characteristic resides in the fact that they are intended to protect those legal values which cannot be waived in the legal order to which they belong.

b) The existence of a definition formulated in terms that are voluntarily restrictive should also have a *dissuasive effect* for the courts of the Member States. The reference to norms deemed to be 'crucial' for the safeguard of 'public interests' as well as maintaining the 'political, social and economic organisation' of the State should restrain the temptation of the national courts to attribute too easily the nature of overriding mandatory provisions to all mandatory norms and therefore prevent too many derogations of the conflict rules of the Regulation by means of the mechanism of Article 9.

The same concern is clearly demonstrated in paragraph 37 of the preamble to the Regulation which emphasises that recourse to overriding mandatory provisions as well as to public order should only be possible in the presence of 'exceptional circumstances' and that this notion should be distinguished from that of internal mandatory norms and 'construed more restrictively'. The normative definition will certainly result in the courts of Member States that might decide to apply Article 9 being required to provide appropriate reasoned justification of their decision to qualify a mandatory norm as a *loi d'application immédiate*.[11]

In these respects, the definition will certainly have positive effects. It is now appropriate to question whether, along with these laudable consequences, this definition will also have less fortunate implications.

c) It seems undeniable that the definition will have an *effect of uniformisation*. Indeed, the definition of Article 9(1) is a new European notion of overriding mandatory provisions, uniform and autonomous with respect to those which may exist in the Member States (although it is certainly intended to influence them). The introduction of this definition in the Regulation therefore has an impact that goes well beyond that of the *Arblade* case in which the Court of Justice, as we have noted, certainly did not intend to formulate a general definition of overriding mandatory provisions.

---

[10] The problem arose particularly in the Common Law countries, where the entry into force of the Rome Convention lead the doctrine to forge a new concept, that of 'overriding statutes', as opposed to 'simple' mandatory norms.

[11] Such a justification should specify that the mandatory norm pursues an objective essential to the forum State and that its application to the case at hand is necessary for the realisation of this result. On the possibility for a decision to apply an internal norm as an overriding mandatory provision to be based on a 'test of proportionality' see BONOMI A., *Le norme imperative* (note 3), p. 219 *et seq*.; idem, 'Mandatory Rules…' (note 3), p. 89 *et seq*.

The introduction of a Community notion necessarily implies that the Court of Justice is competent to interpret it;[12] the national judge wishing to have recourse to Article 9 and who has doubts about the breadth of application of this provision can therefore raise a preliminary question before the Court of Justice.[13]

This is an important new addition as, under the Rome Convention system, the decision whether to apply an internal norm as an overriding mandatory provision falls to the Contracting States. Of course the States do not have total freedom given that the application of internal norms may, in no event, infringe on European law. The principle of the subordination of national *lois d'application immédiate* to European law has been clearly established by the Court of Justice in the *Arblade* case[14] and confirmed, in substance by the *Mazzoleni* case.[15]

The concern expressed by certain French academicians in a now well-known open letter to the President of the French Republic[16] is therefore not unfounded but is not connected to the transformation of the Rome Convention into a Regulation given that the Contracting States, under the Convention and its Article 7, are already required to respect European principles. Indeed the legal basis for such a test of compliance is not to be found in the Convention (and will not be found in the Regulation in the future) but, rather, in the rules that establish the European freedoms and the general principle of the priority of European law over internal law. In this respect, the Regulation changes nothing and moreover, could not change anything, considering the constitutional value that the norms of the EC Treaty assume with respect to derivative acts of Community law.

Nonetheless, it cannot be denied that the definition of overriding mandatory provisions in the Regulation has the effect of introducing a new level of examination of compliance, that is distinct and prior to that of the compatibility of overriding mandatory norms with the principles of European law; such an examination will have as its purpose the conformity of the national *lois d'application immédiate* with the criteria established by Article 9(1) of the Regulation.[17]

---

[12] THORN K. (note 4), p. 136.

[13] Currently, the conditions necessary for a reference for a preliminary ruling to the Court of Justice are those that are established in Art. 68 of the EC Treaty.

[14] See *supra*, notes 6 and 7.

[15] ECJ, 15 March 2001, C-165/98, *Mazzoleni*, ECR 2001, p. I-2189, para. 22 *et seq.*; *Rev. crit. dr. int. pr.* 2001, p. 495, with note by PATAUT E.

[16] 'L'Union Européenne, la démocratie et l'Etat de droit: lettre ouverte au Président de la République', in: *JCP / La semaine juridique*, gen ed. n. 50 of 13 November 2006, *Actualités*, n. 586. The signatories of this letter criticised the proposal of Regulation Rome I for wanting to submit national *lois d'application immédiate* to the 'new requirement' that the application of such rules respect the provisions of the Community Treaty. In a response signed by another group of French academicians ('Observations sur la lettre ouverte au Président de la République', *ibid*., gen. ed. n. 1-2 of 10 January 2007, *Actualités*, p. 18), it is noted, in our opinion correctly, that the Regulation changed nothing in this regard.

[17] The different nature of this test with respect to that performed in the *Arblade* case is properly emphasised by par THORN K. (note 4), p. 136 *et seq.*

What will be the practical impact of this test? It should be noted that this will change nothing with respect to the cases where the application of the internal norm is in any event contrary to European law as was the case in *Arblade* and *Mazzoleni*. In these cases, it is probable that the Court of Justice will prefer to remain in the area of European freedoms with which it is familiar rather than venturing into the arduous question of clarifying the concrete scope of the definition of overriding mandatory provisions of Article 9(1) of the Regulation. There remains the case where the application of the national mandatory norm is not in conflict with the principles of European law (by reason of its content or because the case in question is '*extra-Communitarian*'). In such a case, the scope of the examination of conformity with Article 9(1) of the Regulation will depend concretely on the interpretation of the criteria used in this provision.

d) We thus arrive at the crucial question, *i.e.* that of the meaning that must be ascribed to the terms used in Article 9(1) and, in particular, to the reference to 'public interests' as well as the 'safeguard of the political, social and economic organisation' of the State in question. Will these expressions lead to a restrictive interpretation of the la notion of *lois d'application immédiate* which would exclude *a priori* specific categories of norms for which such a characterisation is recognised by the national legal orders of certain Member States? The question is raised in particular concerning those norms that protect the private interests of certain categories of individuals (the weaker parties, such as consumers, employees, tenants, commercial agents, franchisees, etc.) and which would therefore pursue only in an indirect matter interests of a public nature (the French doctrine refers in such cases to *lois de police* '*de protection*' as opposed to *lois de police* '*de direction*').

Although the definition introduced in Article 9(1) is of French and Belgian origin, it could be understood as the legislative consecration of a distinction already adopted by the doctrine and the jurisprudence of other countries (Germany in particular) between two categories of mandatory norms, the *Eingriffsnormen* and the *Parteischutzvorschriften*.[18] The first enter into the discipline of the contract in order to realise objectives of public interest (*e.g.* the norms of protection of competition and those governing imports and exports) whereas, for the norms of the second category, the mandatory nature serves to preserve or re-establish equilibrium between the parties to the contract (the expression *Ausgleich privater Interesse* is used in Germany; as an example, we can cite the norms of protection of consumers and employees). Pursuant to an opinion that is widely held in the German doctrine, only *Eingriffsnormen* should be qualified as overriding mandatory provisions as that term is understood in Article 7 of the Rome Convention.[19]

---

[18] Part of the doctrine prefers to define the norms of the second category as 'Sonderprivatrecht' ('special' private law): THORN K. (note 4), p. 132 *et seq*.

[19] MANKOWSKI P., 'Art. 34 EGBGB erfaßt § 138 BGB nicht!', in: *Recht int. Wirtschaft* 1996, p. 8 *et seq*. For additional references see BONOMI A., *Le norme imperative* (note 3), p. 172 *et seq*.

This restrictive reading has been received in the jurisprudence of the Federal Courts: as early as the first half of the 1990's, the *Bundesarbeitsgericht* (*i.e.*, the Federal Labour Court) excluded the possibility of having recourse to Article 34(2) EGBGB (which adopts the terms of Article 7(2) of the Rome Convention) in order to render applicable the norms of protection of employees.[20] More recently, and after having left the question open for quite some time,[21] the *Bundesgerichtshof* (*i.e.*, the Federal Supreme Court) , in a decision of 13 December 2005, arrived at the conclusion that the protective norms concerning certain categories of individuals, in particular the weaker party to a contract, do not fall under the notion of *lois d'application immédiate* even though they also tend to promote, indirectly, the interests of the collectivity (*Belange der Allgemeinheit reflexartig mitgeschützt warden*).[22]

Such an interpretation of Article 9(1) of the Regulation[23] would have an extremely innovative impact on the role reserved to overriding mandatory provisions in the European system, at least from the point of view of the Member States in which the same norms protective of the weaker party may, in certain cases, be assimilated to the category of overriding mandatory provisions.[24]

---

[20] *Bundesarbeitsgericht*, 29 October 1992, in: *IPRax* 1994, p. 123, pursuant to whose terms § 613a BGB, that protects the rights of employees in the event of a sale of a company, does not have an international mandatory character. See BONOMI A., *Le norme imperative* (note 3), p. 174, and the references therein.

[21] Cf. the judgments of 26 October 1993, in: *IPRax* 1994, p. 449, and of 19 March 1997, published in French in *Rev. crit. dr. int. pr.* 1998, p. 610, with note by LAGARDE P.

[22] *Bundesgerichtshof*, 13 December 2005 – XI ZR 82/05, in: *IPRax* 2006, p. 272; see the commentary of PFEIFFER Th., 'Verbraucherrechtliche Eingriffsnormen im Spannungsfeld von EG-Recht und nationaler Rechtssetzung', *ibid*., p. 238 *et seq.*

[23] One of the first commentators of the Regulation, GARCIMARTIN ALFÉREZ F. J. 'The Rome I Regulation: Much ado about nothing?', in: *The European Legal Forum* 2008(2), p. I-16, has already affirmed that 'Article 9 Rome I only encompasses "ordo-political rules" or *Eingriffsrechte*, *i.e.* it can only be invoked when "public interests" are at stake […] Rules such as those aimed at the protection of a party to the contract (consumers, agents, and so on) are not included in this concept'. Accord, D'AVOUT L. (note 4), p. 2167, who approves this restrictive solution.

[24] This opinion is widespread in the Italian doctrine: see POCAR F., 'La protection de la partie faible en droit international privé', in: *Recueil des cours*, t. 188, 1984, V, p. 392 *et seq.*; idem, 'La legge applicabile ai contratti con i consumatori', in: TREVES T. (ed.), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padua 1983, p. 314 *et seq.*; BONOMI A., *Le norme imperative* (note 3), p. 190; BOSCHIERO N. (note 4), p. 111, who cites other French and Belgian authors. See, also, the judgment of the French *Cour de cassation* of 23 May 2006, in: *Dalloz* 2006, No 40, p. 2798, with a note by AUDIT M. We remind the reader that the explanatory report of the Rome Convention drafted by GIULIANO and LAGARDE (p. 28), also mentions as an example of *lois d'application immédiate* the norms of consumer protection, as well as those relating to transport contracts, *i.e.* norms of private law aimed at protecting individual interests.

It is true that a significant portion of the questions relating to the protection of consumers and employees are resolved through the protective norms of Articles 6 and 8 of the Regulation, but one must not forget that the recourse to overriding mandatory provisions sometimes permits protections of individual interests in sectors of contract law that are not covered by special conflict rules of the Regulation. A recent example is provided by the decision of the French *Cour de cassation en banc* who recognised the nature of overriding mandatory provisions in the direct action of a sub-contractor against the employer, a particularity of French law provided for by a law of 1975.[25] Even though this rule certainly has an indirect effect on competition, it is intended to protect, in the first instance, the individual interests of a category (often weak) of entrepreneurs. Another example comes directly from European law as seen in the *Ingmar* case; the European Court of Justice has held that the English provisions of application of the Directive on commercial agents (whose immediate objective is the protection of the individual interest of agents) should apply despite the choice of a foreign law because they protect simultaneously the superior interests of European law as well as the freedom of establishment and free competition.[26]

Will the definition of Article 9(1) really have the effect of calling into question such solutions on the national and European levels? If this were to be the case, the fears expressed by the signatories to the open letter of the President of the French Republic[27] would, at least in part, be founded.

Such a solution does not seem to be inevitable. It is true that Article 9(1) refers in clear terms to the safeguard of *public* interests, but it is clear that the protective norms of specific individual categories can also have a fundamental importance for the political, social and economic organisation of a country.[28] The decisions of the French *Cour de Cassation* and of the European Court of Justice that we have just cited confirm this and even the German Federal Court recognises it implicitly by referring to an 'indirect' ('reflex') protection of collective interests. The exclusion *a priori* of all of these rules from the category of overriding mandatory provisions is, in our opinion, overly strict and unacceptable.[29]

Various elements lead, in any event, to consideration of this result as not having been desired by the authors of the Rome I Regulation and that the European

---

[25] Cass, ch. mixte, 30 November 2007, in: *JCP*, G 2008, II, 10000, note D'AVOUT L.; *Clunet* 2007, note GUÉRIN O.

[26] ECJ, 9 novembre 2000, C-381-98, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc*., ECR 2000, p. I-9305; *Rev. crit. dr. int. pr.* 2001, p. 107, note IDOT L.

[27] See *supra*, note 16.

[28] BONOMI A., *Le norme imperative* (note 3), p. 175. This is also implicitly recognised by one of the principal partisans of the interpretation of overriding mandatory provisions as *Eingriffsnormen*, MANKOWSKI P. (note 7), p. 109, who deplored the fact that, in the definition included in Art. 8(1) of the proposed Regulation '[d]ie Dichotomie Ausgleich zwischen Vertragsparteien / überindividuelle Interessen taucht als solche bedauerlicherweise nirgends auf.'

[29] Accord BOSCHIERO N. (note 4), p. 111 *et seq.*

Court of Justice, when it is called upon to clarify the meaning of Article 9(1), will not necessarily follow this restrictive interpretation.

A first clue can be deduced from the well-known tendency of the European legislator to attribute an internationally mandatory character to the norms that protect the weaker party contained in certain EC directives (in particular in the consumer protection sector)[30] and sometimes even in the internal law of the Member States (we refer here to certain protective norms of the State to which an employee is posted, to which the Directive 96/71/EC[31] attributes the nature of overriding mandatory provisions). This legislative tendency is confirmed by the jurisprudence of the European Court of Justice, notably in the previously cited *Ingmar* case and, in an even clearer way, in *Mostaza Claro*;[32] in these cases the Court implicitly recognised the nature of overriding mandatory provisions of certain protective norms under Community law. It is true that this orientation principally concerns the norms of European origin but it is difficult to maintain that a radically different interpretation must be adopted with respect to the mandatory norms of the Member States.

Another significant argument in the same vein could already be inferred from the *Arblade* case, which is the origin of the definition introduced in the Regulation. One must not lose sight of the fact that, in this case, the Court of Justice used the notion of overriding mandatory provisions by referring to national norms of employee protections. It would be surprising to say the least if, in the interpretation of the new Article 9 of the Regulation inspired by this case, these specific norms and, more generally, those that protect individual interests were to be declared incompatible with the notion of overriding mandatory provisions!

Finally, it should be noted that, if the distinction between *Eingriffsnormen* and *Parteischutzvorschriften* was adopted in the interpretation of the Regulation, its impact would be stronger than that which would result from the German case law and doctrine. In this national system, the distinction serves as a criterion for

---

[30] See Art. 6(2) of the Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts and Art. 7(2) of the Directive 1999/44/EC of 25 May 1999 on warranties in sale contracts.

[31] Directive 96/71/EC of 24 September 1996 concerning the posting of workers in the framework of the provision of services. This text imposes on the States (in Art. 3) the obligation to apply a nucleus of internal protective norms (*e.g.* those concerning minimum wage) even those for the benefits of employees temporarily posted on their territory, regardless of the law applicable to the employment contract, and this in order to avoid forms of *dumping* of salaries and other distortions of competition for the profit of companies established in the country offering the least protection. What are referred to here are internal norms that, pursuant to the wishes of the European legislator, must be applied as overriding mandatory provisions, see BONOMI A., *Le norme imperative* (note 3), p. 127 *et seq.*

[32] ECJ, 26 October 2006, C-168/05, *Mostaza Claro v. Centro Móvil Milenium*, in: *Revue de l'arbitrage* 2007, p. 199, note IDOT L., in which the Court affirms that the rules of Directive 93/13/EEC concerning unfair contract terms are a part of the public policy, emphasising 'la nature et l'importance de l'*intérêt public* sur lequel repose la protection que la directive assure aux consommateurs' (*emphasis added*).

interpretation in the case where the overriding nature of the norm does not result clearly from the *littera legis*. On the other hand, if such a distinction were to be adopted in the system of the Regulation, it would no longer have only the function of an interpretive rule for the use of the courts but would also become a limitation imposed equally and immediately on the legislators of the Member States who could no longer attribute the character of overriding mandatory provisions to an internal protective norm. We do not believe that the European legislator wished to restrain the sphere of liberty of the Member States to such an extent.

III. Foreign Overriding Mandatory Provisions

The other substantive novelty introduced by Article 9 of the Regulation relates to the conditions giving effect to foreign *lois d'application immédiate* which belong to the legal order of a third State, *i.e.* a law other than the *lex fori* or the *lex causae*.[33] It is widely recognised that Article 7 of the Rome Convention allows the enforcement of such norms on condition that the case in question presents a close connection with the State that has enacted them. This decision is left to the judge's discretion and is based on diverse considerations related to the nature of these rules and their purpose, as well as any consequences that would derive from their application or non-application.[34]

This innovative provision gave rise to various reactions. Its detractors particularly criticised the legal uncertainty that would result as well as the attribution to the judge of an almost political role that, in any event, is not part of the judge's powers.[35] The Convention thus allows the exclusion of the application of Article 7(2) by means of an express reservation – an option chosen by seven Contracting States.[36] Since the European text does not allow the formulation of reservations, it became necessary to reach a compromise between the States in favour of the rule of Article 7(1) and those that were opposed.

---

[33] As is the case for the Rome Convention, the Regulation does not mention *lois d'application immédiate* as being a part of the law governing the contract. Although the question is quite controversial, we believe that this silence confirms that such norms must be applied in the framework of the *lex contractus* provided that the case in question falls within their scope of application and that they are not contrary to the public order of the forum State. On this question, cf. BONOMI A., *Le norme imperative* (note 3), p. 223 *et seq.*, in particular, p. 233 *et seq.*

[34] Concerning the considerations that should guide the judge in the exercise of his or her discretionary power, see BONOMI A., *Le norme imperative* (note 3), p. 356 *et seq.*

[35] For references to the doctrine, see BONOMI A., *Le norme imperative* (note 3), p. 294, note 229, as well as p. 368 *et seq.* The excessive character of these criticisms is rightly underlined by BOSCHIERO N. (note 4), p. 110.

[36] Germany, Ireland, Estonia, Luxembourg, Portugal, United Kingdom and Slovenia.

The new text of Article 9(3) preserves the possibility of giving effect to the overriding mandatory provisions of a foreign state but imposes more specific and restrictive conditions. The first such condition concerns the object of the mandatory laws in question. While the Convention poses no restriction on this subject and restricts itself to requiring that the norm be considered to be an overriding mandatory provision in the legal order to which it belongs, Article 9(3) only provides for the consideration of mandatory norms that would render the performance of the contract unlawful. The second modification is intended to specify, in a restrictive sense, the connection that must exist between the contractual relationship and the State that enacted the mandatory norm in question: whereas the Convention restricts itself to requiring the existence of a 'close connection' without any further specifications,[37] the Regulation allows the consideration of only those norms that are effective in the State where the 'obligations arising out of the contract have to be or have been performed'.

If we consider the precedents of Article 7(1) from a comparative point of view, it is easy to recognise in the new norm a sort of *restatement* of a rule formulated by English doctrine and adopted in the well-known decision of the English Court of Appeal in the *Ralli Brothers* case.[38] By virtue of this rule, the contract, even though it is valid under the law that governs it, is without effect if its performance requires the accomplishment of an act which is considered illicit by the law of the foreign State of the State of performance (*lex loci solutionis*).

The new provision is the fruit of a political compromise that certainly facilitated the decision of the United Kingdom to submit to the Regulation. It offers the advantage of not completely excluding the possibility of taking into account the overriding mandatory provisions of a third State, contrary to the choice made in Regulation Rome II concerning non-contractual obligations.[39] Although, to the best of our knowledge, the rule of Article 7(1) of the Convention has never been

---

[37] For a construction of this notion, see BONOMI A., *Le norme imperative* (note 3), p. 339 *et seq.*

[38] [1920] 1 K.B. 287, *Ralli Bros v. Compañia Naviera Sota y Aznar* (26 March 1920). The English company Ralli Brothers has chartered a ship belonging to the Spanish company Sota y Aznar in order to transport a cargo of jute from Calcutta to Barcelona. Under the terms of the agreement entered into between the parties, the one half of the payment of the charter was to have been made in London upon the sailing of the ship from its port of embarkation, the remainder being due upon arrival in Barcelona. After the arrival of the goods at destination, the sender refused to pay the second portion of the debt and invoked a Spanish decree setting, as a matter of mandatory law, the total price of the charter in an amount inferior to the agreed upon amount. The English judges accepted this defence despite the fact that the contract was governed by English law, on the grounds that they could not assist in the violation of the laws of other independent countries. For other cases in which this rule was applied, see DICEY & MORRIS, *The Conflict of Laws*, 13e ed. (ed. COLLINS L.), London, 2000, No 32-141 *et seq*., p. 1246 *et seq*.

[39] See Art. 16 of the EC Regulation n° 864/2007 of the European Parliament and Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in: *O.J.*, L 199 of 31 July 2007.

applied in the Contracting States, it is important that the principle of the potential pertinence of foreign overriding mandatory provisions be preserved because of the role that it might play from the point of view of uniformity of decisions and of the cooperation among the States. In this perspective, it is important to note that Article 7(1) has exerted a significant influence on certain national codifications of private international law[40] and that it is often cited in arbitral awards to justify the decision of the arbitrator whether to apply the overriding mandatory provisions that do not belong to the *lex causae*.[41] For these reasons, it is a fortunate circumstance that Article 7(1) of the Convention was not simply abrogated, even if its preservation was possible only at the price of important concessions.

Moreover, it should be recognised, that, in many cases, the solution provided for does permit adequate results. We mention, as an example, a contract which creates obligations which violate the *antitrust* laws of the place where it is to be performed. In such a case, the foreign courts could give effect to the restrictive norms of the place of performance that establishes the illegality of the obligations arising out of the contract.

Nonetheless, it seems to us that the conditions provided for in this new text clearly constitute a step backwards with respect to the content of the provision of the Rome Convention.

First of all, these specifications are not likely to substantially reduce the uncertainty that exists with respect to foreign overriding mandatory provisions.

It is true that the problem will arise in the future only with respect to the laws of *lex loci solutionis* that render illicit the performance of a contractual obligation and such a restriction limits legal uncertainty. Nonetheless, certain factors remain difficult for the parties to predict: this is the case for the qualification of a prohibitive legal norm as an overriding mandatory provision in the legal order to which it belongs and, above all, for the result of the discretionary evaluation that 9(3) continues to require of the organ responsible for its application.

To this are added new elements of uncertainly related to the new wording of the norm. In particular, the reference to the place of performance of a contractual obligation can give rise to serious difficulties of interpretation as is demonstrated by the 'never ending story' of the interpretation of Article 5(1) of the Brussels Convention and, now, of the analogous provision of the Brussels I Regulation.

At first glance, when viewed from this angle, it does not appear that the difficulties can be overcome by a parallel interpretation of the two Regulations Brussels I and Rome I. Of course, the consideration of the overriding mandatory provisions of the Member State whose authorities are competent pursuant to the provisions of the Brussels I Regulation appears to be particularly opportune in order to guarantee the harmony of decisions and to avoid any encouragement of

[40] Analogous provisions can be found, for example, in Art. 19 of the Swiss Statute on Private International Law of 18 December 1987 and in Art. 3079 of the Civil Code of Québec of 1991.

[41] For additional references, see BONOMI A., *Le norme imperative* (note 3), p. 266.

forum shopping.[42] But this consideration is not sufficient in and of itself to exclude the relevance of the overriding mandatory provisions that prohibit, in other States (whether or not Members of the European Union), the performance of a contractual obligation; this is the case even if the latter is not the same as the characteristic obligation (*e.g.* the payment).[43] The consideration of such norms can, indeed, be justified either with a view toward the respect of the legislation of foreign States, or in order to facilitate the recognition and execution of the judgment in a foreign State, the latter being potentially affected by the failure to comply with the overriding mandatory norms of the State in which recognition or execution is sought. At the same time, it is not easy to determine whether, with respect to the new provision of Art. 9(3), it should be possible to give effect to the overriding mandatory provisions in effect in each State in which a part (even if it is only a minimal and negligible part) of the contractual obligations has been or is to be performed.

If the elements of uncertainty are, to some extent, inherent to the treatment of foreign overriding mandatory provisions, a more serious objection is that the two conditions introduced by the new Article 9(3) give the impression that they are arbitrary and that they modify, without saying so, the nature and the function of the mechanism provided for by this article.

In order to specify more clearly our reasoning it is useful to remember the reasons which can justify the consideration of foreign overriding mandatory provisions. Indeed, the objectives of this difficult exercise can be quite varied, relating to interests of the State or of individuals as wells as interests that are typical of private international law. Among the objectives pursued there may be the willingness of a State to cooperate with foreign States in the pursuit of common interests (and therefore also the willingness to refuse to assist in the violation of the laws of other independent States, as affirmed by the English judges in the *Ralli Brothers* case) but also that of avoiding a 'conflict of duties' of one of the parties and, above all, to assure to the extent possible the international uniformity of decisions. It is particularly important that the judgments rendered in the forum country be in harmony with those that could be rendered by another potentially competent court in a foreign State and that such judgments can circulate freely without entering into conflict with the fundamental values and interests of the other interested States.

If these are the objectives, the limitations introduced by the Regulation do not appear to be justified. It is true that, in many cases, the overriding mandatory

[42] The temptation of *forum shopping* is strong if, for example, the judge of the Member State of the defendant's domicile (which is competent pursuant to Art. 2 of Regulation Brussels I) refuses to apply the overriding mandatory provisions of the Member State where the goods are to be delivered or a service provided, since the court of this place – who is also competent by virtue of Art. 5(1) of Regulation Brussels I – will clearly not hesitate to apply the overriding mandatory provisions of the forum.

[43] It should be noted that in the *Ralli Brothers* case (*supra*, note 38) the subject of the litigation was, precisely, the payment. In this hypothesis, the place of payment was also the place of delivery of the merchandise but it is clear that such a coincidence will not always be present in every case.

provisions are prohibitive norms whose violation is deemed unlawful,[44] but why must one exclude *a priori* the possibility of giving effect to a foreign overriding mandatory provision which imposes a specific positive behaviour or guarantees a specific remedy to one of the parties? If we take as an example the French rules that allow a direct action of the subcontractor against the employer or those resulting from the European Directive that guarantee an indemnity to the commercial agent, we do not see why norms of this type could not be given effect for the purposes of avoiding *forum shopping* or guarantee the recognition and execution of the decision in the State that enacted them.

From this standpoint, the limitation of the norms of the *lex loci executionis* also appear to be arbitrary. Taking the rules of this law into consideration is certainly justified when they hold a particular performance to be unlawful but we do not see why such a possibility should be excluded *a priori* with respect to the overriding mandatory provisions belonging to other legal orders, in particular those of the law of the place of domicile or habitual a residence of one of the parties, those of the otherwise applicable law or those in effect in the State in which the judgment is to be executed.[45]

Let us take the case of a contract concluded between parties domiciled in States A and B in violation of a commercial embargo decreed by State A against State C. In the absence of a choice of law, the applicable law would be that of State A, but the parties have opted for the application of the law of State B. The contractual obligations must be performed in States B and C. These two legal orders consider the contract to be wholly valid but the performance required of one of the parties is prohibited and punishable in State A where the debtor is domiciled. In such cases, it may sometimes appear to be justified for the courts in State B to take into consideration the prohibitive norms of the State of domicile of the debtor for a number of reasons which the judge should be able to evaluate (*i.e.*,. in order to favour the uniformity of judgments as between States A and B, since the judges of both of the States are potentially competent; to guarantee the execution in State A of the judgment rendered in State B; to avoid a situation in which the debtor is confronted with an inextricable 'conflict of duties' resulting from the foreign judgment as opposed to the mandatory rules of his State of his/her domicile; to avoid facilitating the violation of prohibitive norms in effect in a foreign and 'friendly' State). Such a possibility is, however, excluded by Article 9(3) since the prohibitive norms in question are not those of the *locus solutionis*.

[44] Consider the norms concerning competition or the prohibitions on import or export of certain products.

[45] See also the critique of D'AVOUT L. (note 4), p. 2167 *et seq*.

IV. Conclusions

Regulation Rome I introduced several significant innovations in the field of overriding mandatory provisions. The role of these norms appears to have been redefined as a whole. The modification made to Art. 9 will probably have the effect of reducing the temptation for national judges to apply or to give effect to mandatory norms of the forum or of a third State.

The new text aims to favour uniformity and legal certainty but the solutions introduced are not always the most convincing ones and will surely reactivate the debate concerning the nature and role of overriding mandatory provisions in private international law.

A SHORT LOOK AT ROME I ON CONTRACT CONFLICTS FROM A JAPANESE PERSPECTIVE

Yasuhiro OKUDA*

I. Introduction

European laws have and continue to be the most important source of reference for Japanese legislation. This does not mean, however, that Japanese law is an imitation of European laws. In fact, Japan's Act on the General Rules on the Application of Laws of 2006 (hereinafter cited as the Japanese Act)[1] differs from European conflict rules on many points.[2] A comparative study is used here as means of raising the standard of new legislation. For this purpose, Japanese law and European laws should be influenced by each other.

---

* Professor of Chuo University, Law School. The author thanks Mr. Trevor Ryan (PhD Candidate of the Australian National University) for revising the English text, and Professor Yukinori Udagawa (Nagoya University, Japan) and Professor Cui Guangri (Shobi Gakuen University, Japan) for information on Chinese law. Hereinafter are cited the Japanese courts, *Chihô Saibansho* [District Court] as D.C., *Kôtô Saibansho* [High Court] as H.C., and *Saikô Saibansho* [Supreme Court] as S.C. The Japanese Annual of International Law is cited as *JAIL*.

[1] *Hô no Tekiyô ni kansuru Tsûsoku Hô*, Law No.78/2006. English translations can be found in: *ZJapanR/J.Japan.L* 2007, at 227; this *Yearbook* 2006, at 427; *Asian-Pacific Law and Policy Journal* 2006, at 138, available at <http://www.hawaii.edu/aplpj/articles/APLPJ_08.1_anderson.pdf>; *JAIL* 2007, at 87.

[2] See OKUDA Y., 'Reform of Japan's Private International Law: Act on the General Rules on the Application of Laws', in: this *Yearbook* 2006, at 145. See also as to contractual obligations, HAYAKAWA Y., 'New Private International Law of Japan: General Rules on Contracts', in: *JAIL* 2007, at 25; NISHITANI Y., 'New Private International Law of Japan: Protection of Weaker Parties and Mandatory Rules', in: *JAIL* 2007, at 40; NISHITANI Y., 'Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law', in: BASEDOW J./BAUM H./NISHITANI Y. (ed.), *Japanese and European Private International Law in Comparative Perspective*, Tübingen 2008, at 77.

Yearbook of Private International Law, Volume 10 (2008), pp. 301-311

As to the law applicable to contractual obligations, the Japanese Act considers *inter alia* the Rome Convention of 1980[3] and the Green Paper of 2003.[4] However, further developments of the 2005 Proposal[5] and the 2008 final version of the Rome I Regulation[6] (Rome I) have shocked Japanese commentators by the large discrepancies with the Japanese Act. This paper deals with some miscellaneous topics of Rome I compared with the Japanese Act, specifically, freedom of choice and procedure law (II), characteristic performance and escape clause (III), approach to protection of weaker parties (IV), and the assignment of claims (V).

II. Freedom of Choice and Procedure Law

Both Rome I and the Japanese Act provide for the freedom to choose the applicable law (party autonomy).[7] The Japanese Act is silent on *dépeçage* and the question of how clear the choice must be. However, the preparatory work shows that the *dépeçage* is allowed, and the conflict rule on choice of the applicable law by the parties only applies in clear cases under the Japanese Act, as in Rome I.[8] The change of applicable law is allowed, as a rule, both under Rome I and the Japanese Act.[9] However, the protection of third party interests and the formal validity of contracts differs somewhat. The Japanese Act confers a right of objection on third parties, who are free to accept a change of applicable law even where this would be prejudicial to their interests.[10] Contrary to this, Rome I automatically protects third parties. Further, under the Japanese Act, the law changed after contracting is never applicable to the formalities, irrespective of whether it could validate or invalidate them.[11] In contrast, under Rome I the change of applicable law is arguably excluded only when it would invalidate the formalities.

---

[3] Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), *O.J.* L 266/1, of 9 October 1980.

[4] Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization, COM (2002) 654 final, of 14 January 2003.

[5] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final, of 15 December 2005.

[6] 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), *O.J.* L 177/6, of 4 July 2008.

[7] Section 3(1), First sentence of Rome I; Section 7 of the Japanese Act.

[8] Section 3(1), second and third sentences of Rome I. See OKUDA Y. (note 2), at 148.

[9] Section 3(2) of Rome I; Section 9 of the Japanese Act.

[10] See OKUDA Y. (note 2), at 151.

[11] See *Id.*, at 151-152.

The above-mentioned provisions raise the question of how they function in court practice. In Japan, there are few cases where a court rules on the express choice of applicable law, except cases on the carriage of goods by sea, where a clause choosing the law of the principal place of business of the carrier is inserted into a bill of lading.[12] Although the carrier alone signs the bill of lading, the courts cast no doubt on the express choice of law by both parties. This is because the agreement on the choice of a particular law is clearly proven in writing.[13]

In some cases of sale of goods, a choice of law clause is inserted into a written contract signed by both parties.[14] Other notable cases exist where the choice of Japanese law is clearly agreed on by both parties in preparatory or oral proceedings, although there was no choice at the time of contract.[15] In these cases, the parties are represented by attorneys who have broad authority under the Japanese Civil Procedure Code (hereinafter cited as CPC)[16] and a power of attorney.[17] In practice, an attorney may agree on behalf of the parties on a withdrawal of suit, a settlement, a waiver or an acceptance of claim, and so forth. Thus, it seems that there is no barrier for the attorneys to make a choice of applicable law during litigation.

Further, in one case, the fact that one party argued for the application of Japanese law and the other party did not demur was considered as one factor in

---

[12] See OKUDA Y., '*Wagakuni no Hanrei ni okeru Keiyaku Junkyo Hô no Kettei* [Determination of the Law Applicable to Contracts under the Japanese Case Law]', in: *Hokudai Hôgaku Ronshû* 45(5) (1994) 1, 15-20, 45. For example, see Tokyo D.C., 19.03.1991, 1379 *Hanrei Jihô* 134; Kobe D.C., 30.03.1983, 1092 *Hanrei Jihô* 114; Kobe D.C., 14.04.1970, 288 *Hanrei Taimuzu* 283; Tokyo H.C., 24.02.1969, 22(1) *Kôminshû* 80; Tokyo H.C., 30.01.1969, 22(1) *Kôminshû* 62.

[13] In a case where a choice of forum clause was inserted into a bill of lading, the Supreme Court argued that the agreement in favour of the existence of an agreement on the exclusive jurisdiction of the foreign court was clear enough because the court of a particular country was expressly designated in the document elaborated by one party. S.C., 28.11.1975, 29(10) *Minshû* 1554. An English translation is available at <http://kanzaki2.lawd.gakushuin.ac.jp/~conflict/procedure/index.html>, <http://www.courts.go.jp/english/judgments/index.html>.

[14] OKUDA Y. (note 12), at 5, 9. See for example, S.C., 28.11.1975, 29(10) *Minshû* 1592; Tokyo D.C., 31.10.1962, 13(10) *Kaminshû* 2169.

[15] OKUDA Y. (note 12), at 6, 10. See for example, Tokyo D.C., 25.04.1990, 1368 *Hanrei Jihô* 123; Nara D.C., 06.02.1951, 2(2) *Kaminshû* 146.

[16] *Minji Soshô Hô* [Civil Procedure Code], Law No. 109/1996 as last amended by Law No. 95/2007, Section 55. An English translation of the whole text can be found in: HATTORI T./HENDERSON D.F., *Civil Procedure in Japan*, 2nd ed., New York 2000.

[17] Under Section 55 of the CPC, no limitation can be imposed upon the authority of an attorney, provided that a special authorization is required for the attorney to carry out certain acts such as cross actions, withdrawals of suit, settlements, waivers or acceptances of claim, appeals, and withdrawals of appeal. In practice, special authorization is printed beforehand in a power of attorney. See AKIYAMA M. et al., *Konmentâru Minji Soshô Hô* [Commentary on Civil Procedure Code], Vol. 1, 2nd ed., Tokyo 2006, 540; UEDA T./INOUE H., *Châshaku Minji Soshô Hô* [Commentary on Civil Procedure Code], Vol. 2, Tokyo 1992, 366 (for old Section 81).

determining an implied choice of applicable law.[18] Similarly, in another case, the argument of both parties being based on English common law was regarded as such a factor.[19] However, more commonly, the court does not rule on the applicable law where both parties are not opposed on the choice of law problem, and directly call upon Japanese substantive rules.[20]

These precedents raise some procedural law questions.[21] Under Section 149 of the CPC, a judge may request that the parties clarify a factual or legal question. Section 149 is construed to mean that the judge is obliged to make such a request on the parties if necessary.[22] Where the judge contravenes this obligation, the judgment is illegal and subject to review by an appellate court.[23] However, as discussed below, the judge may determine the law applicable to the case considering the parties' conduct during litigation, even if they did not clearly bring up the choice of law problem. Thus, failure to ask a question on the choice of law does not infringe upon any provision. Otherwise, most decisions on international contracts could be overruled by an appellate court.

It is disputable whether a judge can determine the choice of law in cases where one party argues for the application of a particular law and another party does not demur (hereinafter, 'non-contested cases'), or in cases where both parties do not discuss the choice of law but refer directly to substantive rules of a particular country (hereinafter, 'non-argument cases'). In favor of rejecting such a determination, it will be argued that the parties are not conscious of reaching an agreement on choice of law in the non-contested case and of even making a choice of law in the non-argument case.[24] However, from the perspective of Japanese proce-

---

[18] Tokyo D.C., 22.04.1977, 28(1-4) *Kaminshû* 399.

[19] Tokyo D.C., 27.08.1991, 1425 *Hanrei Jihô* 100.

[20] These cases are innumerable. OKUDA Y. (note 12), at 8-9 (sales), 22-23 (insurance), 31 (loan), 34-36 (labor), 41 (lease of land), 42 (intellectual property).

[21] For a study from German perspective, see MANSEL H.-P., 'Kollisions- und zuständigkeitsrechtlicher Gleichlauf der vertraglichen und deliktischen Haftung', in: *ZVglRWiss* 1987, at 1 *et seq.*, 10-15. He reached a conclusion different from mine. However, this is essentially due to the differences between Japanese and German procedural laws.

[22] See AKIYAMA M. et al., *Konmentâru Minji Soshô Hô* [Commentary on Civil Procedure Code], Vol. 3, Tokyo 2008, at 267-269; TAKESHITA M./ITOH M., *Chûshaku Minji Soshô Hô* [Commentary on Civil Procedure Code], Vol. 3, Tokyo 1993, at 109-110 (for old Section 127).

[23] It should be noted that under the present CPC, appeal to the Supreme Court is more narrowly permitted than under the old CPC. Under Section 312, appeal to the Supreme Court is admitted only when based on a breach of the Constitution or certain fundamental principles of procedure law (absolute grounds for appeal). Further, under Section 318, the Supreme Court may accept the appeal based on a breach of case law or concerning a significant matter of interpretation of a statute (discretionary acceptance of appeal). Consequently, most issues including the breach of the obligation to require the parties to clarify a factual or legal question may be reviewed only in a High Court. See AKIYAMA M. *et al.* (note 22), at 267-268.

[24] See MANSEL H.-P. (note 21), at 12-13.

dural law, this argument is not always convincing: in non-contested cases, the court may find an admission (*Geständnis*) on a legal matter by the *mutatis mutandis* application of Section 159 of the CPC that provides for the admission on a factual matter;[25] further, in non-argument cases, under the principle of free determination (Section 247 of the CPC), the court may find a choice of law in the fact that the parties consistently referred to the substantive rules of a particular country.[26]

It should be noted that the law chosen during litigation may be different from the law determined at the time of contract, under Section 7 or 8 of the Japanese Act. Although not expressly provided, change of applicable law is allowed 'at any time' under Section 9 of the Japanese Act, as in Section 3(2) of Rome I. Normally, the phrase 'at any time' is construed to mean 'until closing of the oral argument before the instance determining the facts (*Tatsacheninstanz*)'.[27] Thus, the parties may change a law chosen or objectively determined at the time of contract to another law by a new choice made at any time between the institution of litigation and the closing of the oral argument before the instance determining the facts.

At the same time, it should be noted that arguments and the production of evidence by the parties are also allowed 'at any time' during the litigation. Certainly, under Section 156 of the CPC, the parties must in a timely manner present their offensive or defensive measures (*Angriffs- und Verteidigungsmittel*) according to the progress of the litigation. Further, under Section 157 a court may reject the measures if their late presentation is intentional or due to the gross negligence of the party and would cause a later conclusion of the litigation. However, the principle is that all of the argument, regardless of when it is produced, is considered as a unit (principle of unity of the oral argument).[28] Consequently, the party may later dispute the earlier argument of another party for the application of a particular law. Similarly, the parties may later argue for the application of different laws, even though formerly they directly referred to substantive rules of a particular country. In these cases, the court cannot determine the existence of an agreement on a choice of law during litigation, but must rather decide on the law applicable to the case objectively, based on Section 8 of the Japanese Act.

---

[25] As for the admission on a legal matter under the old Section 140 similar to present Section 159, see TAKESHITA M./ITOH M. (note 22), at 296. Similarly, the civil procedure laws of Germany (ZPO), Section 288 and Switzerland (*Bundesgesetz über den Zivilprozess*), Section 36 provides literally only for the admission on a factual matter.

[26] See TAKAKUWA A., '*Keiyaku: Kôtô Benronji ni okeru Junkyo Hô no Gôi* [Contract: Agreement on Applicable Law at the time of oral argument]', in: YAMADA R./ HAYATA Y. (ed), *Enshû Kokusai Shihô* [Exercise of Private International Law], 2nd ed. Tokyo 1992, at 123. However, he does not refer to the principle of free determination.

[27] Under the Japanese procedural law, the first and second instances (fact instances) examine both legal and factual matters, and the third instance (legal instance) examines only legal matters. The facts properly determined by the fact instance are binding on the legal instance (Section 321 of the CPC).

[28] See AKIYAMA M. et al., *Konmentâru Minji Soshô Hô* [Commentary on Civil Procedure Code], Vol. 2, 2nd ed. Tokyo 2008, at 189-190; TAKESHITA M./ITOH M. (note 22), at 87-88 (for the old CPC).

Similar questions must arise regarding Rome I. Certainly Section 3(1) provides that the choice of law should be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. However, it does not clarify whether, and to what extent, the parties' conduct during the litigation should or may be considered to determine the choice of law. The solution depends on the procedural law of each EU member State. In my opinion, the effect of the parties' conduct during litigation should have been expressly regulated in the Japanese Act as well as in Rome I.

It is interesting to note that the Chinese Supreme Court established such a rule in Section 4(2) of the 2007 Regulations on contract conflicts.[29] According to this, the parties are deemed to have chosen the law applicable to the case, where they have not yet made a choice but have referred to (substantive) rules of the same country or region, unless they have disputed the conflict of laws.[30] The Chinese rule will not be accepted as such in Japan and other countries, because it does not allow the court to consider any other circumstances in the case. In my opinion, a rule should be formulated expressly but not too rigidly or restrictively. Further, under Section 4(1) of the 2007 Regulations, the choice of law or a change of applicable law is only allowed before the closing of the arguments in the first instance.[31] This contradicts the principle of the unity of the oral argument.[32] Nevertheless, this author highly regards the fact that the Chinese legislator regulates the parties' conduct during the litigation in a written rule.

---

[29] The 2007 Regulation of the Supreme People's Court on Certain Questions Concerning the Application of Laws for the Examination of Civil and Commercial Law Disputes over a Contract with Foreign Elements. A German translation can be found at: *IPRax* 2008, at 67.

[30] See GEBAUER M., 'Zum Einfluss des chinesischen IPR-Modellgesetzes auf die neuen Regelungen des Obersten Volksgerichts zum Internationalen Vertragsrecht', in: *IPRax* 2008, at 62, 63; MURAKAMI Y., '*Chûgoku no Kokusai Shihô ni kansuru Shin Shihô Kaishaku* [New Judicial Interpretation on Chinese Private International Law]', in: *Kokusai Shôji Hômu* 2007, at 1413, 1414. They criticize the fact that Section 4(2) is not in conformity with Section 3, which requires the choice of law or the change of choice to be made expressly and therefore excludes an implied choice.

[31] Formerly, the choice of law or the change of choice was only allowed before the opening of the court session. See the 1987 Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law, No. 2(4). An English translation is available at <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053740.html>. The 2007 Regulations are to relax the temporary limits. See MA R.-L., '*Dangshiren Yisi Zizhi Yuanze Yu Woguo De Lifa Ji Shijian* [Principle of Party Autonomy and Our Legislation and Practice]', in: *Henan Sifa Jingguan Zhiye Xueyuan Xuebao* 2007, at 70, 72.

[32] Although the second instance is in principle final in China, it examines both factual and legal matters. See the 1991 Civil Procedure Law of the People's Republic of China, Sections 10, 151. An English translation is available at <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053380.html>.

III. Characteristic Performance and Escape Clause

The Japanese Act follows an old-fashioned rule of the Rome Convention concerning the applicable law in the absence of choice, that is, the principle of the closest connection and the presumption according to the theory of characteristic performance (Section 8). Rome I radically changed the Rome Convention in this respect (Section 4). Firstly, it clearly specified the law applicable to no fewer than eight types of contract. Secondly, the law applicable to mixed contracts and other types of contracts is determined by the theory of characteristic performance. This is not a presumption but a clear rule. Thirdly, an exception is only admitted where the contract is manifestly more closely connected with another law. Finally, the closest connection is a last resort where the contract is not covered by the foregoing rules.

Although the text is different, Rome I may be a guideline for the interpretation of the Japanese Act. Firstly, the determination of the law applicable to certain types of contract mentioned in Section 4 (1) of Rome I may be a good example of characteristic performance and its exception under Section 8 of the Japanese Act.[33] Secondly, as to mixed and other types of contract, Japanese judges must decide *ex officio* whether to follow the theory of characteristic performance or to make an exception.[34] It does not wholly depend on the arguments of the parties. Thirdly, the exception must be only admitted where the contract is manifestly more closely connected with another law, as provided in Section 4 (3) of Rome I (escape clause).[35]

As compared with Rome II on the law applicable to non-contractual obligations,[36] it is questionable why Rome I did not provide any factors for the escape clause. Under Section 4(3) of Rome II, the exception might be based in particular on a preexisting relationship between the parties that is closely connected with the tort in question.[37] Certainly, the relevant whereas-clause (20) of Rome I states: 'account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts'. However, it is all the more questionable why that is not expressly provided for in Section 4(3). Furthermore, other factors may be considered, such as (a) that the contract terms were determined by a party other than the party required to effect the characteristic perfor-

[33] The exception for a contract relating to immovable property is provided in Section 8(3) of the Japanese Act, as in Section 4(1) (c) of Rome I. However, another exception for a timesharing contract as provided in Section 4(1) (d) is not found in the Japanese Act.

[34] See OKUDA Y. (note 2), at 150.

[35] See HAYAKAWA Y. (note 2), at 37. He argues that the presumption using the concept of characteristic performance should be highly respected in the operation of Section 8 of the Japanese Act.

[36] 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), O.J. L 199/40, of 31 July 2007.

[37] However, such a factor is provided neither in Section 10(4) on unjust enrichment nor in Section 11(4) on the *negotiorum gestio*.

mance, (b) that the negotiations and the contract were made in the country of that party, and (c) that the contractual obligations should be performed in the country of that party.[38] It is a good thing that Rome I has established more detailed rules on the applicable law in the absence of choice to give a clear guideline for the practice. However, this aim would be better achieved by providing factors for the application of the escape clause.

IV. Approach to Protection of Weaker Parties

The fundamental approach to the protection of weaker parties in consumer and employment contracts is different between Rome I and the Japanese Act.[39] Certainly, the freedom to choose the applicable law is admitted under both rules. Under Rome I, such a choice must not have the result of depriving the consumer and the employee of the protection afforded by a particular mandatory rule. That is, the weaker parties are automatically protected. Contrary to this, the Japanese Act requires a declaration by the consumer and the employee in order for a particular mandatory rule to be applied. The weaker parties are protected only if they make clear their intention to this effect.[40]

The Japanese solution has not been accepted by Rome I. There are several possible reasons for this. Firstly, the consumer or the employee cannot easily access legal information. This is why they should be protected from disadvantageous contracts under the substantive law of various countries. However, under the Japanese Act, they are required to know the special conflict rules and also the mandatory rules to be specified and designated. This contradicts the sense and purpose of the protection of weaker parties.[41] Secondly, the consumer or the employee may declare 'at any time' their intention for the mandatory rules to be applied, although the time of declaration is not expressly provided in the text of the Japanese Act. Thus, the declaration is allowed until the conclusion of oral arguments in the fact instance, as mentioned above at II. The consumer or the employee can declare their intention later, even if they were silent at the start of litigation. In this sense, they are overly protected, because they have a last weapon available at

[38] See Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, Section 8(2).

[39] Sections 6 and 8 of Rome I; Sections 11 and 12 of the Japanese Act. The protection of an insurance policy holder is not dealt with here, because the equivalent of Section 7 of Rome I is not found in the Japanese Act.

[40] As to the reasons for the declaration requirement, see OKUDA Y. (note 2), at 153.

[41] See also NISHITANI Y. (Party Autonomy, note 2), at 96. Section 11(1) 'does not provide for sufficient consumer protection, because we can hardly expect consumers to understand this complicated conflict rules, know the contents of the law chosen by the parties and that of the consumer's habitual residence, and plead the specific effect given by the relevant mandatory rules'.

any time. This is unfair for the other party[42] and inconvenient for the judge. The above mentioned weak points are not found in Rome I, in which the courts must *ex officio* apply the mandatory rules of a particular country despite the choice of another law. Consequently, the European solution seems to be more sophisticated than the Japanese one.

V. Assignment of Claims

The rule concerning the assignment of claims has had a privileged status in the legislative history of the Japanese Act. One of the reasons why the Japanese government decided to amend the old *Hôrei* of 1898[43] and draft a new Act was to promote the global mobilization of claims.[44] Thus, the discussion of the Working Group was focused on the effect of the assignment on third parties. In the 2005 Tentative Draft, it was agreed that the effect on a debtor should be governed by the law governing the claim. However, as regards the effect on third parties, two proposals were presented.[45] The first alternative was the same law as that governing the effect on a debtor, that is, the law governing the claim, and the second was the law of the assignor's habitual residence. The first alternative was supported by Working Group members from banks and other entities in the business world, arguing that they found no need for bulk assignment of claims governed by laws of various countries.[46] The second alternative was presented by the academic members, arguing that the application of the law of the assignor's habitual residence would make possible or facilitate such a bulk assignment.[47] The academic members further contended that they found an international tendency towards the

[42] See also NISHITANI Y. (Protection of Weaker Parties, note 2), at 48. '(I)t is not easy for the business operator to judge when and to what extent (the mandatory rules of) the law of the consumer's habitual residence are to be applied (under Section 11 of the Japanese Act)'.

[43] *Hôrei* [Act on the Application of Laws], Law No. 10/1898. An English translation of the version of Law No. 151/1999 can be found in: *Asian-Pacific Law and Policy Journal* 3(1) (2002) 230, available at <http://www.hawaii.edu/aplpj/pdfs/v3-08-Okuda.pdf>.

[44] *Kokusai Shihô no Gendaika ni kansuru Yôkô Chûkan Shian Hosoku Setsumei* [Supplementary Explanation Concerning the Outline of a Tentative Draft on Modernization of Private International Law], reprinted in: *Hô no Tekiyô ni kansuru Tsûsokuhô Kankei Shiryô to Kaisetsu* [Materials and Comments Concerning the Act on the General Rules on the Application of Laws], in: Special Issue of *NBL* 2006, at 105, 112.

[45] *Kokusai Shihô no Gendaika ni Kansuru Yôkô Chûkan Shian* [Outline of a Tentative Draft on Modernization of Private International Law], reprinted in: *Materials and Comments* (note 44) 91, 102.

[46] Supplementary Explanation (note 44), at 207.

[47] *Id.*, at 208.

law of the assignor's habitual residence, for example in the 2001 UNCITRAL Convention on Assignment of Receivables in International Trade.[48]

The final text of the Japanese Act follows the first alternative designating the law governing the claim to be applied to the effects on both the debtor and third parties (Section 23). After the promulgation of the Japanese Act, some academic authors suggested a review of the provision, in favor of the law of the assignor's habitual residence to be applied to the effect on third parties other than debtors.[49] They referred to the UNCITRAL Convention and also the 2005 Proposal for Rome I, that was published just before the promulgation of the Japanese Act.[50] However, seven years after its adoption by the General Assembly, the UNCITRAL Convention has not yet entered into force.[51] Furthermore, the designation of the law of the assignor's habitual residence in the 2005 Proposal for Rome I was deleted as a result of lobbying by the City of London.[52]

Nevertheless, there are two differences remaining between the Japanese Act and Rome I. Firstly, the Japanese Act clearly provides for the law governing the claim to be applied to the effects on third parties other than the debtor. In contrast, the final text of Rome I provides nothing concerning such effects, although it regulates the relationship between the assignor and the assignee, as well as that between the assignee and the debtor.[53] Secondly, under Rome I, the European Commission is required to submit a report on the effect of the assignment on third parties and, if appropriate, a proposal for amendment.[54] Under the Japanese Act, such a review is arguably neither required nor expected, although a resolution of the Upper House required a review of the double actionability for claims arising from torts, in the light of the international trend, and of the needs of relevant persons.[55] Conse-

---

[48] Furthermore, the 2004 Belgian Act and the Uniform Commercial Code of the U.S.A. were referred to in the Supplementary Explanation (note 44), at 207.

[49] KITAZAWA A., 'Law Applicable to the Assignment of Receivables in Japan', in: BASEDOW J./BAUM H./NISHITANI Y. (note 2) 137, 145-149; KONO T., '*Tokushû Heisei Kokusai Shihô no Hatten to Tenbô (3): Saiken Jyôto* [Symposium on Development and Overview of Private International Law of Heisei Era (3): Assignment of Claims], in: *Minshôhô Zasshi* 2007, at 1, 13-17.

[50] The Japanese Act was promulgated on 21 June 2006, and came into force on 1 January 2007.

[51] The Convention was signed by Luxemburg, Madagascar and the U.S.A., and acceded to by Liberia. The status information is available at <http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables_status.html> (last visit on 9 October 2008).

[52] See LEIBLE S./LEHMANN M., 'Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht («Rom I»)', in: *RIW* 2008, 528, 541.

[53] Section 14(1) and (2) of Rome I.

[54] Section 27(2) of Rome I.

[55] Minutes of the Committee of Justice, Upper House, the 164th Session of Parliament, 18.04.2006, No. 11, at 16-17. Section 22 of the Japanese Act provides for the cumulative application of Japanese law to the formation and effect of torts, though it is criticized by academic authors. See OKUDA Y. (note 2), at 163-164; NAKANISHI Y., 'New

quently, the law applicable to effects on third parties is still pending in Europe, whilst the application of the law governing the claim seems to be steadily taking hold in Japan.

VI. Final Remarks

To be sure, Rome I provides some useful material for further developments in private international law. The Japanese government should review Japan's provisions for the protection of weaker parties in the light of the equivalent provisions of Rome I. However, Rome I should be also reviewed in the future. Under the present text, the parties' conduct during litigation is not expressly regulated. This will result in ambiguity and diversity within the EU member States in determining a choice of law applicable to contracts. Furthermore, the factors to be considered for the application of the escape clause in the absence of choice should be expressly provided in the legal text. This is not only useful for a clear and unified application of the escape clause, but also for consistency within the list of eight types of contracts where the applicable law is clearly determined, following the theory of characteristic performance and its exceptions. In contrast, the question of whether the effect of an assignment on third parties other than the debtor should be governed by the law determining the claim, or the law of the assignor's habitual residence, is a difficult one. The Japanese Act in that it clearly designate the law governing the claim, will be one of the most important reference sources for Europeans. At any rate, a multilateral comparative study is always useful for raising the standard of future legislation in both Japan and Europe.

Private International Law of Japan: Torts', in: *JAIL* 2007, at 60, 72-74; KONO T., 'Critical and Comparative Analysis of the Rome II Regulation on Applicable Laws to Non-contractual Obligations and the New Private International Law in Japan', in: BASEDOW J./BAUM H./NISHITANI Y. (note 2), at 221, 231-232.

THE NEW HAGUE MAINTENANCE CONVENTION AND PROTOCOL

THE HAGUE CONVENTION OF 23 NOVEMBER 2007 ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

COMMENTS ON ITS OBJECTIVES AND SOME OF ITS SPECIAL FEATURES*

William DUNCAN**

* This article builds on a shorter description of the Convention by the same author, 'The New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance', in: *International Family Law*, vol. 64, issue 1, March 2008, p. 13-17.

** Deputy Secretary General of the Hague Conference on Private International Law. Special thanks to Sandrine Alexandre (Legal Officer) and Laura Molenaar (Administrative Assistant) for their help with the footnotes.

Yearbook of Private International Law, Volume 10 (2008), pp. 313-331

Printed in Germany

I. Introduction

The Twenty-First Session of the Hague Conference on Private International Law closed in The Hague on 23 November 2007 with the signing of the Final Act of the Session,[1] which contains the text of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*. The Final Act has been signed by seventy States,[2] as well as the European Community, which is now a Member of the Hague Conference in its own right.[3] Both of the new instruments were agreed by consensus. On the same day the United States of America formally signed the new Convention.[4]

[1] See Final Act of the Twenty-First Session, The Hague, 23 November 2007, at <www.hcch.net> under 'Conventions', then Convention #38, then 'Final Act of the Twenty-First Session'.

[2] Fifty-seven signatures were by Members of the Hague Conference, and a further fourteen were by non-Members. The full list of signatures is as follows: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, European Community, Finland, The former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Morocco, Norway, the Netherlands, New Zealand, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Ukraine, the United Kingdom, the United States of America, Uruguay and Venezuela. The following Observers (non-Member States) have also signed the Final Act: Algeria, Burkina Faso, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, India (as of 13 March 2008 a Member State of the Hague Conference), Indonesia, Iran, Philippines and Vietnam. The following intergovernmental organisations attended: Commonwealth Secretariat and Mercosur. The following non-governmental organisations attended: International Society of Family Law, International Association of Women Judges (IAWJ), International Bar Association (IBA), Defence for Children International (DCI), National Child Support Enforcement Association (NCSEA), International Social Services (ISS) and the International Union of Latin Notaries (UINL).

[3] Member since 3 April 2007.

[4] See the Hague Conference website < www.hcch.net > under 'News & Events', then '2007'.

The completion of the two new instruments is the culmination of work which had begun in the 1990's with two formal reviews[5] of the existing Hague Conventions concerning maintenance[6] and, of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. The formal negotiations had begun in 2003, and involved five Special Commission meetings[7] prior to the final Diplomatic Session.

The subject matter of this Article is the Convention rather than the Protocol, though it is appropriate to point out that the conclusion by consensus of the Protocol, which has thoroughly revised, and is likely eventually to replace, the Hague Conventions of 1956[8] and 1973[9] concerning applicable law, was itself a remarkable achievement which owed much to Professor Andrea Bonomi who led the Working Group[10] which prepared the texts for consideration by the Special Commission and the Diplomatic Session, who chaired Commission II of the Session which agreed the final text, and who moreover, as *Rapporteur*, will be author of the official report on the text of the Protocol.

---

[5] Special Commissions of November 1995 and April 1999 on the operation of the Hague Conventions relating to maintenance obligations and of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

[6] The *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*; *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*; *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*; and *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*

[7] Special Commission meetings on the International Recovery of Child Support and other Forms of Family Maintenance were held from: (1) 5-16 May 2003; (2) 7-18 June 2004; (3) 4-15 April 2005; (4) 19-28 June 2006; (5) 8-16 May 2007.

[8] *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.*

[9] *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*

[10] Members of the Working Group on Applicable Law were as follows: Sheila Bird (Australia), Andrea Bonomi (Switzerland), Alegría Borrás (Reporter), Antoine Buchet (European Commission), Raquel Correia (Portugal), Nadia De Araujo (Brazil), Edouard De Leiris (France), Gloria Dehart (United Status of America), Maria Del Carmen Parra Rodriguez (Spain), Jennifer Degeling (Permanent Bureau), Jérôme Deroulez (France), Michèle Dubrocard (France), Christelle Gavard (Permanent Bureau), Caroline Harnois (Permanent Bureau), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Sarah Khabirpour (Luxembourg), Åse Kristensen (Norway), Philippe Lortie (Permanent Bureau), J. David McClean (United Kingdom), Alberto Malatesta (Italy), Tracy Morrow (Canada), Angelika Schlunck (Germany), Ivana Radic (Permanent Bureau), Andrea Schulz (Permanent Bureau), Werner Schütz (Austria), Marta Sosnovcová (Czech Republic), Robert Spector (Unites States of America), A.V.M. (Teun) Struycken (Netherlands), Lixiao TIAN (China), Dorothée van Iterson (Netherlands), Hans van Loon (Permanent Bureau), Rolf Wagner (Germany).

Negotiations on the Convention benefited from expertise from around the world. Particular mention should be made of Ms Maria Kurucz (Hungary), who was Chairperson of Commission I of the Diplomatic Session, Professor Fausto Pocar, who chaired early meetings of the Special Commission, and Ms Jan Doogue (New Zealand), the Chairperson of a very busy Drafting Committee.[11] The work of the Special Commission was supported by the Administrative Co-operation Working Group (ACWG)[12] which, between the negotiating sessions, was able to address, among other things, some of the practical issues surrounding the processing of international claims. The parallel work of the Forms Working Group[13] was crucial, not only through its work in developing standardised forms for use under the Convention, but also by the attention which it paid to ensuring that texts both of the Convention and the forms were medium neutral and facilitated the employment of modern information technology to enable simplified, swift and low cost communications under the Convention.[14]

II. The New Convention in Context

It was the Special Commission on Maintenance Obligations of April 1999, which had concluded that work on a new global instrument on the international recovery

[11] Members of the Drafting Committee were as follows: Stefania Bariatti (Italy), Paul Beaumont (United Kingdom), Alegría Borrás (Spain), Antoine Buchet (European Commission), Mary Helen Carlson (United States of America), Jan Doogue (New Zealand), Cecilia Fresnedo de Aguirre (Uruguay), Denise Gervais (Canada), Miloš Hatapka (European Commission), Robert Keith (United States of America), Mária Kurucz (Hungary), Edouard de Leiris (France), Maria Elena Mansilla y Mejia (Mexico), Namira Negm (Egypt), Lixiao Tian (China).

[12] The Administrative Co-operation Working Group (ACWG) was chaired by Mary Helen Carlson (United States of America), Mária Kurucz (Hungary), Jorge Aguilar Castillo (Costa Rica). Two sub-committees were established by the ACWG. The Sub-committee on 'Country Profiles' chaired by Danièle Ménard (Canada) and Ann Barkley (NCSEA), and the Sub-committee on 'Monitoring and Review of the Operation and Implementation of the Convention' chaired by Mária Kurucz (Hungary) and Elizabeth Matheson (USA).

[13] Members of the Forms Working Group were as follows: Shireen Fisher (International Association of Women Judges, IAWJ) (Co-Chair), Zoe Cameron (Australia) (Co-Chair), Jorge Aguilar Castillo (Costa Rica), Philip Ashmore (United Kingdom), Ana-Sabine Boehm (*Deutsches Institut für Jugendhilfe und Familienrecht*, DIJUF), Edouard de Leiris (France), Hilde Drenth (Netherlands), Kay Farley (NCSEA), Meg Haynes (United States of America), Helena Kasanova (Slovakia), Katie Levasseur (Canada) (Civil Law), Tracy Morrow (Canada) (Common Law), Anna Svantesson (Sweden), Hans-Michael Veith (Germany), Patricia Whalen (IAWJ), Christina Wicke (Germany), William Duncan (Permanent Bureau), Philippe Lortie (Permanent Bureau) as the principal facilitator, Sandrine Alexandre (Permanent Bureau), Jenny Degeling (Permanent Bureau) (*Rapporteur*).

[14] This aspect is covered fully in a separate article by Philippe Lortie.

of maintenance was needed. The reasons for this conclusion have been summarised as follows:

- 'disquiet at the chronic nature of many of the problems associated with some of the existing Conventions;
- a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;
- a growing acceptance that the New York Convention of 1956, though an important advance in its day, had become somewhat obsolete, that the open texture of some of its provisions was contributing to inconsistent interpretation and practice, and that its operation had not been effectively monitored;
- an acceptance of the need to take account of the many changes that have occurred in national (especially child support) systems for determining and collecting maintenance payments, as well as the opportunities presented by advances in information technology;
- a realisation that the proliferation of instruments (multilateral, regional and bilateral), with their varying provisions and different degrees of formality, were complicating the tasks of national authorities, as well as legal advisers.'[15]

Put simply, the challenge which confronted the negotiators of the new Convention was to usher in a new era in the international recovery of maintenance – one in which cross-border procedures, particularly in child support cases, would be simplified, swift, accessible, cost effective and in tune with modern technologies.

III. How the Convention Pursues Its Objectives

The object of the Convention is 'to ensure the effective international recovery of child support and other forms of family maintenance'.[16] The new Convention pursues these objectives by a combination of means:

- an efficient and responsive system of co-operation between Contracting States in the processing of international applications;
- a requirement that Contracting States make available applications for establishment and modification, as well as for recognition and enforcement, of maintenance decisions;

[15] DUNCAN W., 'The Development of the New Hague Convention on the International Recovery of Child Support & Other Forms of Family Maintenance', in: *Family Law Quarterly* 2004, p. 663-687 at p. 665. See also Report and Conclusions of April 1999 on the operation of the Hague Conventions relating to maintenance obligations and of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* at: <www.hcch.net> under 'Conventions' then 'All Conventions', then Convention N°38, then 'Preliminary Documents'.

[16] Art. 1, *Chapeau*.

- provisions which ensure effective access to cross-border maintenance procedures;

- a broadly based system for the recognition and enforcement of maintenance decisions made in Contracting States;

- expedited and simplified procedures for recognition and enforcement; and

- a requirement of prompt and effective enforcement.

The Convention pays attention to many of the matters of detail which in practice can affect the efficiency with which international claims are pursued, for example, language requirements,[17] standardised forms[18] and exchange of information on national laws.[19] It also allows and encourages the use of new information technologies to reduce the costs and delays which have in the past plagued international claims.

In accordance with the mandate for the negotiations, the new Convention builds on the strengths of existing international instruments, in particular the existing Hague Conventions,[20] the *New York (United Nations) Convention of 1956 on the Recovery Abroad of Maintenance*, as well as several regional and inter-state or inter-provincial instruments and arrangements.[21]

IV. Scope of the Convention

Early discussions in the Special Commission showed that a substantial number of States wished to retain the broad scope for the new Convention that had been a feature of the two Hague Conventions of 1973.[22] These Conventions applied to

[17] Art. 44.

[18] A mandatory transmittal form will accompany all applications under Chapter III (Art. 12(2)). Forms for the applications themselves, whose preparation is almost complete, are recommended rather than mandatory (Art. 11(4)).

[19] Art. 57. See below the *Pre-Convention requirements – provision of information on national laws and procedures* section of this article.

[20] *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*; *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*; *the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* and *the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*

[21] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters; Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; Inter-American Convention of 15 July 1989 on support obligations; the Uniform Interstate Family Support Act (USA) of 1996; in Canada legislation such as the Inter-Jurisdictional Support Orders Act 2001 (Manitoba) based on uniform legislation; Reciprocal Enforcement of Maintenance Orders (REMO).

[22] Art. 1 (Enforcement) and Art. 1 (Applicable law).

maintenance obligations arising from family relationships in general and included within their scope both child and spousal support. On the other hand, several States argued that, while the recovery of spousal support was an important obligation, the new Convention would better concentrate on child support. It was pointed out that several States had introduced special procedures for child support enforcement, and that there was a greater willingness at the political level to devote resources to recovery of child support. If child support and spousal support were placed on the same level, there was a danger that this might result in less generous services and assistance in child support cases. In the end a compromise was struck which places child support at the core of the Convention,[23] which gives an important though lesser status to spousal support, and which, in relation to obligations arising from other family relationships, gives States the option of extending the provision of the Convention on an *à la carte* and reciprocal basis.

The whole of the Convention applies on a mandatory basis to child support cases.[24] Applications for the recognition and enforcement of spousal support when made with a claim for child support also come within the core scope of the Convention,[25] and all chapters of the Convention extend to them. Other claims for the recognition and enforcement of spousal support (*i.e.*, when not made in conjunction with a claim for child support) come within the compulsory scope of the Convention, but do not benefit from the provisions of Chapters II and III[26] which establish the system of administrative co-operation via Central Authorities, and which also contain generous provisions for assistance in child support cases (see below).

In addition, Contracting States may by declaration bring within the scope of the Convention (or any part of it) any other maintenance obligations arising from a family relationship, parentage, marriage or affinity.[27] For example, a particular State may declare that the Convention, or any part of it, extends to certain obligations in respect of children who are over 21, or in respect of vulnerable adults, or in respect of parents or siblings, or in respect of certain forms of partnership where these are seen as 'arising from a family relationship'. A State is also free to declare that the provisions of Chapters II and III will extend to all spousal support obligations. Where such declarations are made they will operate on a reciprocal basis, in the sense that mutual obligations between two States will only arise to the extent that their declarations correspond.

During the negotiations an effort was made by certain Latin American States to bring maintenance obligations in respect of vulnerable persons within the compulsory scope of the Convention. A move in this direction is made in Article 37(3), which covers direct requests (explained below) for recognition and

[23] This is reflected in the title of the Convention.

[24] In the words of Art. 2(1) *a), 'the maintenance obligations arising from a parent-child relationship towards a person under the age of 21*.' However, a Contracting State may by reservation reduce the age to 18 (Art. 2(2)).

[25] Art. 2(1) *b)*.

[26] Art. 2(1) *c)*.

[27] Art. 2(3).

enforcement of certain decisions granting maintenance to a vulnerable adult. The importance which States attach to this matter is further reflected in a recommendation made at the Diplomatic Session that the Hague Conference should in future consider the feasibility of developing a Protocol concerning the international recovery of maintenance in respect of vulnerable persons.[28]

As in the 1973 Hague Conventions, the role of public bodies acting in place of a creditor, or to whom reimbursement of maintenance is owed, is covered by the new Convention.[29]

Finally, a provision of the 1973 Hague Conventions which ensured that a child 'who is not legitimate'[30] would benefit equally under those Conventions, has been retained, but using more modern terminology.[31] Some anxieties had been expressed in the Special Commission, on the part of certain States whose laws are based on 'Shariah', that this provision might make it difficult for them to ratify the Convention. Nevertheless, there was a clear consensus in the Diplomatic Session for re-iterating the principle of non-discrimination.

V. Emphasis on Procedural Matters

From a private international law perspective, and in terms of the general evolution of Hague Conventions, a number of features of the new Convention are of particular interest. There is first a strong emphasis on procedural matters. This begins with the obligations on Contracting States to make a wide range of applications for the recovery of maintenance available within internal law, some to creditors, and others to debtors.[32] These go beyond the usual requirement to provide for the recognition and enforcement, or recognition of foreign decisions; they include applications for establishment and modification of maintenance decisions. The application contents are spelled out in some detail.[33] And the processing of international applications through the Central Authority structures is made subject to rather detailed requirements designed to ensure that cases are handled promptly and responsively.[34] The circumstances in which a Central Authority may refuse to process an application are tightly controlled. This emphasis on procedural matters derives partly from experience of delays in the processing of maintenance applications un-

[28] See the Final Act of Twenty-First Session, para. C.9.

[29] See Chapter VII.

[30] Art. 1 in both Conventions.

[31] Art. 2(4).

[32] Art. 10.

[33] Art. 11.

[34] Art. 12.

der existing instruments, particularly the New York Convention of 1956,[35] and partly from experience with Hague Conventions dealing other forms of application, such as applications for the return of a child under the 1980 Hague Convention.

In this respect one of the more remarkable features of the new Convention is the effort made to harmonise, at least partially, the procedures for recognition and enforcement of a foreign maintenance decision. The approach adopted for example by the 1973 Hague Convention (Enforcement), under which such procedures were left largely to national law,[36] has been set aside in favour of a more prescriptive approach which recognises that cumbersome, costly and slow procedures have been a major reason for under utilisation of the international machinery in the past. These procedures are described in more detail below.

VI. The Processing of Applications

Most applications for child support are likely to be processed through the system of Central Authorities established under the Convention. In many countries, the case-specific functions of the Central Authority will be carried out by child support agencies or authorities operating centrally or regionally.[37] The primary role of such authorities will be to transmit and receive applications and to initiate or facilitate the institution of proceedings.[38] Other functions[39] include assistance in locating a debtor or creditor or obtaining information about the resources of either; encouraging amicable solutions with a view to voluntary payment; facilitating ongoing enforcement, as well as the collection and transfer of maintenance payments; assistance in establishing parentage where necessary for support purposes; and help in obtaining any necessary provisional measures. These functions will mostly be carried out in the context of a specific maintenance application, but certain services (*e.g.*, location of the debtor or assets) may be requested in order to determine whether it is worth bringing an application.[40]

The applications[41] in respect of which Central Authority services are available to a creditor include recognition or enforcement of an existing decision,

[35] For a full listing of the 'problems of process', see DUNCAN W., 'Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance', Prel. Doc. No 3 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance, at para. 25.

[36] Art. 13.

[37] Art. 4.

[38] Art. 6(1).

[39] For the full list see Art. 6(2).

[40] Art. 7.

[41] Art. 10.

enforcement of a decision recognised in the requested State, establishment of a maintenance decision, or where necessary parentage, and modification. Establishment may be applied for where there is no existing decision (*e.g.*, if the creditor decides to make an international application in the country where the debtor resides), or where recognition of an existing decision is not possible. It is noteworthy that a debtor may also avail of Central Authority services in making an application for modification or to obtain recognition of an existing decision. Chapter III of the Convention also sets out documentary requirements as well as other procedural requirements which are designed to promote speed and efficiency in the processing of applications.

VII. Effective Access to Procedures

The Convention is remarkable for the emphasis which it places on 'effective access' to procedures. Here the influence was not only the experience of the operation of previous Conventions (the provision of the New York Convention on legal assistance had been weak leading to disparate State practice),[42] but also the experience under national systems of child support or maintenance recovery. The United States of America was particularly firm, at the outset and during the course of the negotiations, in arguing that the new international system would not work if services to creditors were not provided on a cost-free, or virtually cost-free, basis. It came to be generally understood that even small financial obstacles confronting an impecunious creditor may deter the bringing of an international claim, and that indeed a major contributor to the under-utilisation of existing procedures has been their cost. The resultant provisions in the new Convention, particularly with regard to the provision of free legal assistance in child support cases, go much further than any previous Hague Convention. The resulting costs to be borne by Contracting States were viewed in the light of the considerable savings in social support costs than can accrue from the effective enforcement of private support obligations.

Early on in the negotiations it was agreed that the services of Central Authorities should in general be provided without cost to the applicant.[43] However, discussions on the costs of providing legal assistance were prolonged and difficult and did not reach a conclusion until the final negotiating session. This was not surprising given the resource implications for States, many of which do not have systems of free legal aid in civil cases.

---

[42] See DUNCAN W., 'Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation', Prel. Doc. No 2 of January 1999 for the attention of the Special Commission of April 1999, p. 24.

[43] See Art. 8. There is an exception to this general principle in the case of exceptional costs arising from a request for a specific measure under Art. 7.

The conclusion was in fact quite remarkable and a testimony to the strong wish of all the negotiating Parties to put in place international procedures which are genuinely accessible. The main elements of the agreed package of provisions are in broad terms as follows:[44]

(1) All Contracting States will be under an obligation to provide effective access to procedures, including enforcement and appeal procedures, arising from the applications outlined above.

(2) One way of doing this will be to provide procedures which are simple and which, with the assistance of the Central Authority, allow an applicant to proceed without the need for further legal assistance.

(3) Where legal assistance is needed for a creditor in a child support case, it must be made available free. This applies both to applications for establishment of a decision and for recognition and enforcement.[45] A Contracting State may, as an alternative, in cases involving establishment of child support, declare that it will apply a 'child-centred' means test, *i.e.*, one based on the means of the child rather than the parent.[46]

(4) In the case of other applications under the Convention which are processed through Central Authorities (*i.e.*, all applications which do not concern child support or applications made by a debtor (*e.g.*, for modification) in respect of child support), the provision of free legal assistance may be made subject to a means or merits test.[47]

These provisions are ground-breaking and are likely to be key to the successful operation of the Convention. They also provide a stimulus for the introduction by States of simplified, cost-effective and user-friendly national child support systems.

VIII. Recognition and Enforcement of Existing Decisions

The bases for recognising and enforcing maintenance decisions of other Contracting States under the Convention are broad.[48] The habitual residence of either the respondent or the creditor in the State of origin when proceedings were initiated, are likely to be the principal bases in practice. However, basing recognition on creditor's residence remains a problem for some States, such as the USA,

[44] For the details, see Articles 14–17.

[45] A rare exception will be in an establishment case where the requested State considers that, on the merits, the application or any appeal is manifestly unfounded (Art. 15(2)).

[46] Art. 16.

[47] Art. 17.

[48] For the full list of bases, see Art. 20.

which insist on some nexus between the respondent and the State of origin. For this reason, a reservation in respect of creditor's jurisdiction is possible,[49] but any State making such a reservation will in return be obliged to recognise foreign decisions made in factual circumstances which confer or would have conferred jurisdiction on its own authorities to award maintenance.[50]

This compromise has removed one of the barriers which in the past prevented more widespread ratification of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. In many other respects the basic rules governing recognition and enforcement are similar to those set out in the 1973 Hague Convention, though some changes are made in the grounds for refusing recognition and enforcement.[51]

The detailed procedures set out in the new Convention regulating the procedure on an application for recognition and enforcement represent a considerable advance on the 1973 Hague Convention, in which this matter was left to be regulated largely by the law of the State addressed. It is by now well understood that cumbersome procedures at the stage of recognition and enforcement – including any extensive *ex officio* review – may cause serious delays and costs and place unjustified additional burdens on a creditor. The new procedures will not appear strange to those who are familiar with recent Brussels Regulations,[52] with the UIFSA system in the USA[53] or with the Canadian Uniform Act.[54] All adopt a similar approach, minimising *ex officio* review and for the most part placing the burden of raising objections to recognition and enforcement on the respondent. Given that most applications for recognition and enforcement are likely to be uncontested, this leads to a much expedited procedure. The new procedure, which is set out in Article 23, limits *ex officio* review to the ground of public policy; it rules out submissions by the parties at the initial stage when the foreign decision is registered or declared enforceable; it allows for a challenge by either party to the decision on registration, but within a strict time period and on limited grounds; it also supports, as a general principle, the idea that any further appeal should not have the effect of staying enforcement.

Because procedures whereby foreign decisions are registered for enforcement or declared enforceable are not familiar to certain States in which applications for recognition and enforcement go directly to the court for a decision, it proved necessary to provide in the new Convention an alternative procedure on an

[49] Art. 20(2).

[50] Art. 20(3).

[51] Compare Art. 22 of the new Convention with Art. 5 of *the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*.

[52] See particularly the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001), *O.J.* L 12, p.1 *et seq.*).

[53] Uniform Interstate Family Support Act (USA) 1996.

[54] The Interjurisdictional Support Orders Act 2003.

application for recognition and enforcement, which Contracting States may opt for by declaration.[55] This alternative procedure is also designed to ensure that procedures are expeditious, that the grounds on which the court addressed may review a foreign decision of its own motion are limited, and that the onus of raising certain defences will rest on the respondent. However, in these last two respects the alternative procedure is not as strict as the principal procedure.

IX. 'Decisions' and 'Maintenance Arrangements'

The definition of a decision for the purposes of recognition and enforcement includes a settlement or agreement concluded before or approved by a judicial or administrative authority. It may also include automatic adjustment by indexation, a requirement to pay arrears, retroactive maintenance, interest payable and a determination of costs and expenses.[56]

Moreover, the Convention provides for the recognition and enforcement of 'maintenance arrangements',[57] which include agreements as to maintenance drawn up in the form of an authentic instrument or otherwise authenticated by, or concluded or registered or filed with a competent authority. However, to qualify, such an agreement must be enforceable 'as a decision' in the State of origin. This willingness to include within the scope of recognition a wide range of agreements which have in some way been formalised was motivated by a widespread consensus to accommodate and encourage within the international framework voluntary agreements in respect of maintenance matters. It accords also with the responsibility which Central Authorities will have to encourage amicable solutions with a view to the voluntary payment of maintenance.[58]

X. Direct Requests

Nothing in the Convention prevents an applicant from making an international application directly to the court or other competent authority in the requested State,[59] assuming as is usually the case that the internal law of that State allows this. For example, an application for recognition and enforcement may be made, usually with the assistance of private counsel, without employing the mediating

[55] See Art. 24.

[56] Art. 19(1).

[57] Art. 30.

[58] Art. 6(2) *d).*

[59] Art. 37.

Central Authority procedures. The broad bases for recognition and the expedited procedures for recognition and enforcement outlined above will generally apply in such cases. However, the new generous regime of free legal assistance in child support cases, as well as the more general principle of effective access to procedures, is confined to applications which are channelled through the Central Authorities.

XI. Enforcement under Internal Law

Another traditional preserve of national or internal law into which the new Convention tentatively advances is that of enforcement. Lack of effective enforcement procedures or measures under national law has proved to be something of an Achilles' heel in relation to certain Hague Conventions such as the 1980 Convention. In the case of that Convention efforts are being made to address the shortcomings through encouragement of best practices.[60] In the case of the new Convention many delegations felt that this would not be sufficient. There was a real concern that carefully crafted procedures for recognition and enforcement could be frustrated if enforcement under national law was in the end not effective. On the other hand, certain delegations were opposed to excessive intrusion into national law. The result is the compromise which appears in Chapter VI. Enforcement is to be 'prompt'[61] and the enforcement measures made available must be 'effective'.[62] The burden that is imposed on an applicant when a separate application for enforcement is required is removed. Also, the requirements concerning the provision by Contracting States of 'effective access' to procedures (see below) extend to enforcement procedures. However, the Convention does not go so far as to stipulate that specific measures of enforcement should be made available. Instead, it takes the unusual course of providing an illustrative list[63] of possible enforcement measures. This includes, in addition to some of the more familiar techniques, tax refund withholding, credit bureau reporting and the denial, suspension or revocation of licenses, including driving licenses.

[60] See SCHULZ A., 'Enforcement of orders made under the 1980 Convention - Towards principles of good practice', Prel. Doc. No 7 of October 2006 and *id.*, 'Enforcement of orders made under the 1980 Convention - a comparative legal study', Prel. Doc. No 6 of October 2006, both documents drawn up for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

[61] Art. 32(2).

[62] Art. 34(1).

[63] Art. 34(2).

XII. Applicable Law Rules

In this overview of some major features of the new Convention, something should also be said about what is not included in the Convention. From a private international law perspective, the two glaring examples are the absence of a general regime of rules governing the law applicable to maintenance obligations and the almost complete absence of rules on direct jurisdiction. The Convention does in fact contain specific applicable law rules relating to (a) the right of a public body to act in place of a creditor or seek reimbursement of benefits provided to the creditor,[64] (b) limitation periods for the enforcement of arrears,[65] and (c) the eligibility of a child for maintenance in very specific and limited circumstances.[66] On the other hand the general regime on applicable law is left for the Protocol. Why is this so in a Convention which was intended to be 'comprehensive' in nature?[67] It was obvious from the beginning of the negotiations that a substantial number of States, particularly those from the common law tradition, would not favour an obligatory regime of applicable law. So, even if the applicable law regime had been included in the main body of the Convention it would have been optional and subject either to an opt-in or opt-out mechanism. The decision to draft a separate Protocol came relatively late in the negotiating process, as did the decision that the Protocol may be ratified or acceded to by a State which is not a Party to the main Convention.[68]

The arguments which underlay the different positions on applicable law are complex. For those States which favour a general applicable law regime governing maintenance obligations there are several justifications. The first is that applicable law rules are needed to ensure justice in individual cases and in particular to weight the balance in favour of the creditor. Applicable law rules are also seen as a counter-weight to forum shopping. This is viewed as particularly important vis-à-vis a Convention which contains no rules on direct jurisdiction. Moreover, the States which favour a general applicable law regime have had long experience with the application of foreign law in maintenance cases (for example, under the Hague Conventions of 1956 and 1973 concerning applicable law), and regard the process as normal and practicable. On the other hand, the States which favour the application of forum law in maintenance cases, regard this approach as more practicable and cost effective. They are concerned about the complexity and therefore the practicality and cost of applying what are sometimes complicated foreign rules, especially those relating to the quantification of maintenance. There is also a

[64] Art. 36(2).

[65] Art. 32(5).

[66] *I.e.* in proceedings for the establishment of a child support order where an existing foreign order cannot be recognised by virtue a reservation in respect of certain bases for recognition and enforcement. See Art. 20(5).

[67] See the formal mandate of the negotiations which is included in the Final Act for the Nineteenth Session 2002 in *Proceedings of the Nineteenth Session*, vol. I, *Miscellaneous Matters*.

[68] Protocol, Art. 23.

concern that complex rules on applicable law may be difficult to reconcile with the trend towards simplified low-cost procedures for the recovery of child support, and that their adoption could even inhibit the development of such systems.

XIII. Rules on Direct Jurisdiction

The reasons for the decision, taken early on in the negotiations, not to include rules on direct jurisdiction have been fully explained elsewhere.[69] In short, the view was accepted that any practical benefits to be derived from the inclusion of uniform rules were far outweighed by the cost of embarking on a long, complex and possibly futile attempt to reach consensus. The gap between those systems, which allow jurisdiction based on the creditor's residence and those systems which require some link between the debtor and the forum was too wide to bridge at this time. Equally, differences in the approach to modification jurisdiction would have been difficult to resolve. It may well be that the Hague Conference will return to this issue in the future and consider a Protocol on direct jurisdiction when the time is ripe. It has to be admitted that the problems raised by conflicting decisions, especially where modification of an original decision has occurred, are likely to increase if, as is hoped, the new Convention leads to a rapid increase in the number of applications for recognition and enforcement. The Convention contains some provisions which partially address the problem of conflicting decisions.[70] It is difficult to conceive of a general solution without developing a comprehensive set of rules on jurisdiction to make or modify maintenance decisions.[71]

XIV. Pre-Convention Requirements – Provision of Information on National Laws and Procedures

Another unusual feature of the Convention is the more extensive requirements for the provision of information on national laws and procedures at the time of ratification or accession. These requirements, which are to be found in Article 57, go well beyond the more traditional obligation to give contact details of Central Authorities, or other bodies performing functions under a Convention. In this case

[69] See DUNCAN W., 'Jurisdiction to Make & Modify Maintenance Decisions. The Quest for Uniformity', in: *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh*, The Hague 2004, p. 89-105.

[70] See particularly Art. 8, which limits the fora available to a debtor seeking modification of an existing order, and Art. 22 *d)* dealing with 'incompatible' decisions.

[71] This was a principal motivation for the development in the United States of America of UIFSA.

the requirement is to provide a description of laws and procedures concerning maintenance obligations, a description of how the newly Contracting State will meet its obligations under Article 6 (which concerns the functions of Central Authorities), a description of how it will provide effective access to procedures as required by Article 14, as well as a description of its enforcement rules and procedures. The reasons for these requirements are three-fold. First, it was felt that the authorities in the different Contracting States would need this information in order to co-operate among themselves fully and in order for the Convention to work effectively. The information would also be needed as a basis for providing sound advice to an applicant or prospective applicant concerning the procedures that will apply in the State to which an application is addressed, or indeed about the prospects of success. Secondly, and more unusually, the furnishing of information, particularly in respect of measures that will be taken to meet obligations under Article 6, was seen as compensating in some measure for the rather flexible language in which Article 6 obligations are expressed. Thirdly, there was a view that a pre-ratification / accession requirement for the provision of information would encourage States to consider more carefully and in more detail how to implement the Convention effectively within their own systems. The importance of these requirements concerning information provisions has been further underlined by the detailed work that has already been carried out to develop a standardised format for the provision of such information – the so-called 'Country Profile'.[72] This standardised form will facilitate and simplify the task of information provision which, at an early stage in the negotiations, was regarded by some delegates as too onerous for States and as a possible deterrent to ratifications and accessions.

XV. Post-Convention Requirements – Monitoring and Review

If the new Convention is unusual for its focus on pre-Convention requirements, the negotiations as a whole were similarly striking for the early concern which was expressed concerning post-Convention matters. There was early recognition of the need to consider in some detail the measures that would be needed to ensure that the new Convention will be implemented effectively in Contracting States, that it will be applied consistently and that its operation will be monitored and reviewed on a regular basis. This recognition flowed not only from experience with other Hague Conventions but also from the knowledge that the 1956 New York Convention, despite its many ground-breaking features, had suffered from the lack of any organised system of monitoring. This had contributed in particular to the many divergences, which had developed in the way it was being interpreted and applied

[72] Referred to in Art. 57(2).

in Contracting States.[73] The establishment of a group on Monitoring and Review, as a sub-committee of the Administrative Co-operation Working Group at an early stage in the negotiations on the new Convention was a mark of the importance attached to this matter.[74] The text of the Convention itself, in addition to the now familiar provision concerning the convening at regular intervals of a Special Commission to review the practical operation of the Convention,[75] contains a reference to the development of good practices and requires Contracting States to co-operate with the Permanent Bureau in gathering information, including statistics and case law, concerning the practical operation of the Convention.[76] The Convention also contains a provision which requires that, in its interpretation, regard should be had to its international character and to the need to promote uniformity in its application.[77]

XVI. Conclusion

The negotiations for the new Convention throughout the four years were conducted with vigour and commitment by States from all regions of the world. This work was supplemented by the continuing efforts of a standing committee on administrative cooperation which has already put in place some of the building blocks for the establishment of an effective network of Central Authorities. As indicated above, a great deal of thought has also already been given by the negotiators, as well as the Permanent Bureau, to the measures that are needed to ensure the effective and rapid implementation of the Convention, as well as for the eventual monitoring and review of its operation.

The Explanatory Report on the Convention is in preparation. A Guide to Good Practice is to be drawn up on implementation of the Convention, as well as a handbook for case workers on its practical operation. Work, which is already advanced, will continue on the development of standardised forms for applications under the Convention, and on the country profile mentioned above. Work will also continue on the development of an automated case-management system which will further assist co operation, efficiency and consistency in the processing of

[73] See DUNCAN W., (note 35), Chapter II.

[74] See 'Report of the Administrative Co-operation Working Group', Prel. Doc No 34 of October 2007 for the attention of the Twenty-First Session of October 2007.

[75] Art. 54(1).

[76] Art. 54(2).

[77] Art. 53. Cf. Art. 16 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, Art. 13 of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary and Art. 23 of the Hague Convention of 30 June 2005 on Choice of Court Agreements*. The principle draws on Art. 7(1) of the *United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980*.

applications. All of this work is being carried out with a view to exploiting to the maximum the opportunities presented by new technologies.

The final day of the Diplomatic Session witnessed a general spirit of optimism among the States, the Organisations and the individuals[78] involved. The new Convention does not solve all the problems; further work may become necessary, by means perhaps of a Protocol, on uniform standards of jurisdiction, in order to tackle the problems that may arise from multiple decisions, and work needs to be done to develop efficient methods for the cross-border transfer and conversion of maintenance payments. Nevertheless, a major first step has been taken towards creating an international system which will be efficient, fair and accessible.

[78] 269 delegates were involved in the final round of negotiations.

THE HAGUE PROTOCOL OF 23 NOVEMBER 2007 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

Andrea BONOMI*

---

* The author had the great privilege of being directly involved in the elaboration and the adoption of the Recovery Convention and the Protocol. As a member of the Swiss delegation, he took part in the Special Commission, acted as a Chair of the Working Group on Applicable Law from 2003 to 2007 and finally as Chair of the Commission II of the Diplomatic session of November 2007. He is also a Rapporteur of the Protocol. This article is largely based on the Draft Explanatory Report to the Protocol. The author would like to express his most sincere gratitude to the Permanent Bureau for the English translation of the Report and for all the support that he received for the realisation of the entire project.

Yearbook of Private International Law, Volume 10 (2008), pp. 333-357

I. Introductory Remarks

On 23 November 2007, the Twenty-First Diplomatic Session of the Hague Conference on Private International Law, meeting in the Hague, adopted the text of two international instruments designed to facilitate the international recovery of maintenance: the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the 'Recovery Convention') and the Hague Protocol on the Law Applicable to Maintenance Obligations (hereinafter the 'Protocol').

Although the Recovery Convention will certainly have a more far-reaching impact on the rights of creditors in transnational situations, the Protocol also represents a very interesting and, in certain aspects, quite innovative instrument. Its goals are multiple.

First, it is designed to replace the existing Hague Conventions on the law applicable to maintenance obligations of 1956 and 1973 (hereinafter 'Hague Maintenance Conventions');[1] the solutions adopted by these instruments, albeit globally satisfactory, are in some respects criticised and in need of reform.[2]

The second ambition of the Protocol is to enlarge the number of Contracting States. The existing Hague Maintenance Conventions are in force in a rather limited number of jurisdictions,[3] and it does not appear that they will interest many other States in the near future. Because of its modern solutions and its link to the Convention, the Protocol will probably have broader success. On one hand, the active involvement of the European institutions and of the Member States of the European Union in the development of the new text will lead to its ratification by the EC. This is now a certainty, since Art. 15 of the newly adopted EC Regulation No 4/2009[4] refers to the Hague Protocol for the determination of the law applicable

[1] The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. According to its Art. 18, the Protocol is intended, in relations as between the Contracting States, to replace the 1956 and 1973 Maintenance Obligations Conventions. The replacement shall occur only in relations as between Contracting States.

[2] We refer particularly to Art. 8 of the 1973 Maintenance Convention concerning the law applicable to maintenance obligations between ex-spouses (see *infra*, V(B)(1)).

[3] The 1956 Convention is in force in 6 States (Austria, France, Germany, Japan, Portugal and Spain), the 1973 Convention in 14 States (Estonia, France, Germany, Greece, Italy, Japan, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland and Turkey).

[4] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance, *O.J.*, L 7 of 10.1.2009. Art. 15 of the Regulation replaces the entire chapter III that was included in the proposal presented by the Commission on 15 December 2005, COM(2005)0649 final. According to its Art. 76, the Regulation will apply as of 18 June 2010, subject to the Hague Protocol being applicable in the Community by that date. Pursuant to Art. 69(2), in relations between Members States, the Regulation (and thus the

to maintenance obligations. The application of the Protocol in the Member States of the EU represents, in and of itself, a significant step forward, as compared to the restricted number of States that are presently parties to the existing instruments. On the other hand, some States outside of Europe (such as China, Japan, Switzerland, some Central- and South-American States) have also manifested great interest in the Protocol.

Last but not least, this text, by reinforcing the role of the law of the forum (see Arts. 4 and 7) will also have the effect of reducing the gap between the Contracting States and those (mainly common law) jurisdictions, which systematically submit maintenance obligations to the *lex fori*. In this respect, the Protocol will indirectly contribute to a worldwide harmonisation of the private international law treatment of maintenance claims.

II. Background

The issue of the law applicable to maintenance obligations was included from the outset in the official mandate of the Special Commission on the international recovery of child support and other forms of family maintenance, which drew up the Preliminary Draft Convention and Protocol: the Special Commission meeting in April 1999 had decided that the Agenda of the future work of the Conference should grant priority to the establishment of a more comprehensive Convention with respect to maintenance obligations, that should improve the existing Hague Conventions on the issue and include provisions relating to judicial and administrative co-operation.[5]

Since the first meeting of the Special Commission in May 2003, however, opinions have been divided as to whether the future convention should include rules on the applicable law. While the majority of delegates from civil law jurisdictions favoured the inclusion of some form of applicable law regime, most of the delegations from common law jurisdictions were opposed.[6] That opposition is easily understood if it is borne in mind that in most common law countries, maintenance decisions are traditionally made on the basis of the law of the forum. This tendency has been further heightened by the introduction, in several States, of administrative systems for the recovery of maintenance, pursuant to which it is difficult in practice to determine and apply foreign law.

Most of the delegations favourable to inclusion of a general applicable law regime considered that the current negotiations were a unique opportunity to revise

---

reference to the Hague Protocol) takes precedence over the conventions and agreements which concern matters governed by the Regulation and to which Member States are party.

[5] See Final Act of the Nineteenth Session, *Proceedings of the Nineteenth Session, Volume I Miscellaneous Matters*, pp. 34 to 47, at p. 44.

[6] Canada was willing to include in the future instrument some form of applicable law regime.

the 1956 and 1973 Maintenance Obligations Conventions, which ought not to be missed. While the 1973 Convention was fairly satisfactory on the whole and was to be used as the starting point for the drafting of a new instrument, some of its solutions needed to be revised and modernised, in order to remedy its deficiencies and attract a larger number of ratifications. For that purpose, the revision process needed to involve all States and not merely those already Parties to the 1956 or 1973 Conventions.

Following a proposal by the Chair (Mr. Fausto Pocar), the Special Commission decided to set up a Working Group on Applicable Law (hereinafter the 'WGAL'), including experts from States Parties to the 1956 and 1973 Maintenance Obligations Conventions as well as experts from other States. On the basis of the mandate assigned to it, which was renewed and further detailed at the meetings of the Special Commission of 2004, 2005 and 2006, the WGAL drew up a working draft for an instrument on the law applicable to maintenance obligations (hereinafter the 'Working Draft').[7] On this basis the Special Commission of May 2007 elaborated a Draft Preliminary Protocol (Prel. Doc. No 30 of June 2007) which, accompanied by an Explanatory Report drafted by the author of this article (Prel. Doc. No 33 of August 2007), served as the basis for discussion at the Diplomatic Session of November 2007.

III. Nature of the New Instrument

It is important to note that, notwithstanding its denomination as a 'Protocol', this text is autonomous from the Recovery Conventions. As stated in Art. 23(3), any State may sign, ratify or accede to the Protocol, even if it has not signed, ratified or acceded to the Convention. After some hesitation, this solution was adopted at the Diplomatic Session. Because of the autonomy between the questions regulated by each instrument and their different scope of application, there is no doubt that this approach is justified; it has the clear advantage that the States are free to ratify the Protocol even if they do not ratify the Convention.

In this framework, the use of the term Protocol may be surprising.[8] Although unusual for an instrument adopted at the Hague Conference, it aims to

[7] A first version of the Working Draft was presented as an appendix to the WGAL's report of June 2006 (Prel. Doc. No 22 of June 2006) and discussed at the meeting of the Special Commission in July 2006. The second version of the Working Draft (Prel. Doc. No 24 of January 2007), commented upon in the WGAL's report of April 2007 (Prel. Doc No 27 of April 2007), served as the basis for the proceedings of the Special Commission of May 2007.

[8] The question was discussed in Commission II of the Diplomatic Conference until its last meeting on 22 November 2007, dedicated to the second reading of the Draft Protocol. Pursuant to the decision to make the Protocol formally independent of the Convention, some delegations (Switzerland, the EC) had suggested changing the instrument's title from 'Protocol' to 'Convention', as the dependency between that text and the Convention was not

emphasize the common origin and functional connections existing between the Protocol and the Recovery Convention. Apart from its background, it should be pointed out that the Protocol, like the Convention, is designed to facilitate the international recovery of maintenance: determination of the applicable law (and if relevant, application of a foreign law) is one of the difficulties that may be faced by a maintenance creditor when claiming against a debtor established abroad.

Certain solutions provided by the Protocol (including in particular the heightened role that it confers on the law of the forum in relation to existing instruments) are designed to facilitate the rendering of a maintenance decision, and are accordingly inspired by the same concern that lies behind the Convention.

Finally, it should be noted that having regard to the *erga omnes* nature of the Protocol (see Art. 2), its ratification by a large number of States may be beneficial for creditors, even those who are domiciled in States that have not acceded to it (and which do not contemplate becoming Parties to it): even creditors domiciled in such States will enjoy the benefit, in the course of proceedings initiated in a Contracting State (*e.g.*, in the State of the debtor's domicile), of the application of uniform rules favourable to the creditor, such as those laid down in the Protocol.

IV. The Scope of Application of the Protocol

A. A Broad Scope of Application *ratione materiae*

1. All Family Relationships without a Possibility of Reservations

The scope of application *ratione materiae* of the Protocol is defined in a very broad way. Under Art. 1(1), the new instrument shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage, or affinity.

This phrasing corresponds to that of Art. 1 of the 1973 Maintenance Obligations Convention. Unlike the latter,[9] however, the Protocol does not provide for reservations enabling Contracting States to exclude from its scope maintenance obligations arising out of certain family relationships.[10] Accordingly, the material scope of the Protocol cannot be restricted and necessarily encompasses all maintenance obligations arising out of family relationships.

---

sufficiently marked (see Minutes No 6, paras 11 *et seq.*, 178 *et seq.*). After discussing the benefits and drawbacks of both solutions, a consensus was eventually reached on the term 'Protocol'.

[9] See in particular Arts 13 and 14 of the 1973 Maintenance Convention.

[10] According to Art. 27, '[n]o reservations may be made to this Protocol'. The main argument against the possibility of making reservations was the difficulty in reconciling this technique with the concern of the EC institutions to unify private international law rules inside the European Union.

In the absence of reservations, the reluctance of a number of States regarding maintenance obligations based on certain family relations (*e.g.* obligations towards parents or grand-parents, between collaterals or based on affinity)[11] has been taken into account in a different way. Rather than excluding such obligations from the scope of the Protocol, a special defense rule (Art. 6) has been included in the instrument in order to restrict their impact. According to this rule the debtor may contest the creditor's claim on the ground that there is no such obligation under both the law of the State of the debtor's habitual residence and the law of the State of the common nationality of the parties, if there is one.

This 'defence rule' was inspired by the solution provided by Art. 7 of the 1973 Maintenance Obligations Convention.[12] Its scope however is broader, since it is not applicable only to relations between parties related collaterally or by affinity, but also to any maintenance obligation other than those to children arising out of a parent-child relationship or those between spouses or ex-spouses. Contrary to its model, it thus includes, *inter alia*, maintenance obligations to parents or grand-parents and those between partners.[13]

2. A Scope Broader than That of the 'Recovery Convention'

The Protocol's scope is also broader than the mandatory scope of the Recovery Convention, which is limited, under its Art. 2(1), '*a)* to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years; b*)* to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph *a)*; and c) with the exception of Chapters II and III, to spousal support.'

This difference is due, first, to the desire to make the Protocol's scope coincide with that of the 1973 Maintenance Obligations Convention so as to enable the former to replace (at least between Contracting States) the latter.[14] It also reflects the wish not to restrict too much the scope of a text, which, being the object of a Protocol separate from the Convention, is optional in any event for States ratifying the latter, and conversely, may be ratified by States which are not Parties to the Convention (see Art. 23).[15]

---

[11] The desirability of granting maintenance on the basis of such family relationships is not a matter of international consensus, hence the concern by certain States to be able to limit its impact.

[12] According to Art. 7 of the 1973 Convention, '[i]n the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence'.

[13] Provided that they are included in the scope of the Protocol, see *infra*, IV(1)(*c*).

[14] See Art. 18 (*supra*, note 1).

[15] In fact, the scope of both instruments could not coincide in any event, because their conditions for application *ratione loci* are different: the Convention is an instrument

3. The Notion of Family Relationship

The Protocol does not define the concept of a family relationship, but merely provides a few examples, which correspond to those referred to in the 1973 Maintenance Obligations Convention. Thus parent-child relationships, parentage, marriage and affinity are expressly mentioned in Art. 1(1). This list shows that the concept of a family relationship adopted by the Protocol is rather broad: it thus includes affinity, although not all States recognise such relationships.

The problem that is currently posed is that of the various forms of same sex marriage or same sex partnership. These relationships are recognised in a growing number of legal systems, which often consider them as family relationships that may give rise to maintenance claims. Other States refuse to recognise them, however, considering in some cases that they are inconsistent with their public policy.[16] The Protocol does not specify whether such relationships are included within its scope.

This omission is intentional, in order to avoid the Protocol running up against the fundamental opposition existing between States on these issues. The matter was nevertheless discussed in relation to certain connecting rules, and in particular that under Art. 5 relating to maintenance obligations between spouses or ex-spouses: certain delegations (Switzerland, Israel) had suggested an express statement in the Protocol's text that this provision could, at States' discretion, apply to these institutions similar to marriage. Though that proposal did not achieve the necessary consensus, Commission II of the Diplomatic Session accepted that those States which recognise such institutions in their legal systems, or are willing to recognise them, may make them subject to the rule under Art. 5, which is equivalent to an implied admission that the Protocol may apply to them.

By contrast, nothing was decided as regards Contracting States that refuse such institutions. For the latter, two solutions may be contemplated: either the Contracting State concerned considers that these relationships are not family relationships within the meaning of Art. 1 and the Protocol is therefore not applicable to them (in such case, it will apply its own national conflicts rules), or it considers that they are indeed family relationships, but may not be treated like marriage (in that case, the applicable law will be determined on the basis of other rules in the Protocol, and in particular Arts 3 and 6). Given the silence of the Protocol and preparatory instruments, it must be admitted that both these solutions are legitimate, even though that implies that the Protocol's application will not be uniform among the Contracting States. This lack of uniformity is not too serious, however, if one considers that in any event, the State concerned can always refuse on

---

inter partes, applying in relations between Contracting States (see its Arts 9 and 20), whereas the Protocol is applicable *erga omnes*, even if the law it designates is that of a non-Contracting State (see its Art. 2).

[16] See BOELE-WOELKI K. / FUCHS A. (ed.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp 2003; CURRY-SUMNER I., *All's Well That Ends Registred?*, Antwerp 2005; BOSCHIERO N., 'Les unions homosexuelles à l'épreuve du droit international privé italien', in: *Riv. dir. int.* 2007, p. 50 *et seq.*

grounds of public policy application of a foreign law that recognises a maintenance obligation arising from these controversial relationships (see Art. 13).

4. Maintenance Agreements

The Protocol does not specify whether it is applicable to maintenance obligations arising from an agreement relating to the existence or extent of a maintenance obligation. Such agreements are frequently made between spouses at the time of marriage or in the event of divorce. It will be recalled that it had not been possible to settle this issue when drafting the 1973 Maintenance Obligations Convention, and the latter accordingly allowed the courts 'a large degree of latitude', enabling them to make such obligations subject to the treaty provisions or to the conflict rules that are generally applicable.[17]

Despite the Protocol's silence on this point, this text contains elements allowing an assertion that it is also applicable to agreements relating to maintenance, in so far as such agreements are designed to modify or further specify an obligation arising from a family relationship. Unlike the 1973 Convention, the Protocol allows, subject to certain conditions, the choice of the law applicable to the maintenance obligation.[18] Yet one of the reasons – if not the primary reason – to allow that choice was precisely to provide a measure of stability to agreements made with respect to maintenance matters between spouses or other adults. If it is accepted that the law designated by the spouses under the Protocol applies to agreements relating to maintenance, the same conclusion must be reached for the law designated by the Protocol itself through an objective connection.

B. A Universal Scope of Application

Like the 1973 Maintenance Obligations Convention (Art. 2), and several other Hague Conventions relating to applicable law, the Protocol has a universal scope of application (Art. 2), *i.e.*, it will be applicable in the Contracting States even if the law designated by its provisions is that of a non-Contracting State.

V. The Main Aspects of the *Régime* Provided for in the Protocol

True to its aim of revising the earlier Conventions relating to the law applicable to maintenance obligations without repudiating their approach entirely, the Protocol

[17] See Verwilghen Report, para. 120.

[18] See in particular Art. 8, which allows the parties to designate the applicable law 'at any time'.

follows in many respects the solutions applied by them, and in particular by the 1973 Maintenance Obligations Convention.

That is the case in particular as regards the general rule based on connection of the maintenance obligation to the law of the creditor's habitual residence (Art. 3), the admission of certain 'cascading' subsidiary connections designed to favour the maintenance creditor (Art. 4), the very wide definition of the issues governed by the law designated as being applicable to the maintenance obligation (Art. 11), the special rule concerning the recovery of maintenance by public bodies (Art. 10), and the exception of public policy (Art. 13).

In relation to the 1973 Maintenance Obligations Convention, there are three main innovations.

First, the reinforced role of the law of the forum: for claims made by certain 'privileged' classes of creditors, the *lex fori* becomes the first subsidiary connecting factor after the creditor's habitual residence (Art. 4(2)) and before the common nationality of the parties (Art. 4(4)). Under certain conditions, the *lex fori* is even promoted to the rank of principal criterion, with the law of habitual residence in those cases playing only a subsidiary role (Art. 4(3)).

Next, the introduction for obligations between spouses and ex-spouses of an escape clause based on the idea of close connection and designed to increase the role of the law of the spouses' last common habitual residence (Art. 5), in a break with the immutable connection to the law applied to the divorce under Art. 8 of the 1973 Maintenance Obligations Convention.

Finally, the introduction of a measure of autonomy, in two variations: a procedural agreement enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes of a specific proceeding (Art. 7), and an option regarding the applicable law that may be exercised at any time by adults capable of defending their interests, subject to certain conditions and restrictions (Art. 8).

A. A Reinforced Role of the *lex fori*

1. The Connection to the Law of the Creditor's Habitual Residence

In the absence of special provisions, maintenance obligations are governed by the law of the State of the creditor's habitual residence (art. 3 of the Protocol) This connection corresponds to the one used on a principal basis in the 1973 Maintenance Obligations Convention, and, for child support, in the 1956 Maintenance Obligations Convention. It was accepted unanimously in the negotiations.

The application of the law of the State of the creditor's habitual residence offers several advantages. The main one is that it allows a determination of the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the country where the creditor lives and engages in most of his or her activities. This connection also secures equal treatment among creditors living in the same country, regardless of nationality; one fails to see why a creditor who is a foreign national should be, in the same circum-

stances, treated differently from a creditor having the nationality of the State where he resides.

Furthermore, the law of the creditor's habitual residence often coincides with the law of the forum. As a matter of fact, this criterion is extensively used for determination of the appropriate court with respect to maintenance, both under uniform law instruments (*e.g.* Art. 5(2) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the 'parallel' provision in Art. 5(2) of the Lugano Convention) and in several domestic legislations. Accordingly, use of that same criterion to determine the applicable law often leads to application of the law of the authority seized, which provides obvious benefits in terms of simplicity and efficiency. These advantages are particularly valuable in maintenance cases where the amounts at issue, and accordingly the resources available for the determination of foreign law, are usually very small.

As stressed by Art. 3(1), the connection to the creditor's habitual residence is not applicable if the Protocol provides otherwise. Some important restrictions are provided for by Art. 4, where the role of the *lex fori* is significantly reinforced with respect to the claims made by some privileged categories of creditors.

2. The Role of the lex fori *under Article 4*

Art. 4 provides for some subsidiary connecting factors based on the *lex fori* and the common nationality of the parties, with respect to the cases where the creditor cannot obtain maintenance under the law of his/her habitual residence (Art. 4(2) and 4(4)). Under certain circumstances, it goes further and it provides for the application of the *lex fori* as a principal connecting factor; in such cases, the law of the habitual residence and the law of the common nationality are only subsidiary connecting factors (Art. 4(3)). All these special rules are only applicable to the claims made by certain classes of privileged maintenance creditors in cases where application of the law of their habitual residences is found to be contrary to their interests (Art. 4(1)).

a) Scope of Article 4

In accordance with its purpose, the rule in Art. 4 benefits only certain classes of creditors, defined under its first paragraph. This provision applies to the maintenance obligations of

- parents towards their children (Art. 4(1)(*a*)); in this case the parent-child relationship is the determining factor, regardless of the age of the child;

- persons other than parents towards any person who has not attained the age of 21 years (Art. 4(1)(*b*)); in this case, the favourable treatment depends on the creditor's age. Maintenance obligations arising out of the relationships referred to in Art. 5 (*i.e.*, maintenance obligations between spouses, ex-spouses or parties to a

marriage that has been annulled) are however expressly excluded from the benefit of this provision.

- children towards their parents (Art. 4(1)(*b*))[19].

The application of article 4 to maintenance obligations of parents towards their children (regardless of their age) and of children towards their parents does not raise any particular difficulty.

The other category of privileged creditor is determined on the basis of age (person under the age of 21). The situations referred to are accordingly essentially those of maintenance claims based on a direct or collateral relationship (*e.g.*, a claim made by a grandchild, sister or brother, nephew or niece) or affinity (*e.g.*, a child towards his or her parent's spouse). Maintenance obligations between spouses or ex-spouses are expressly excluded.

It should be noted that these obligations, as those towards parents, are also subject to Art. 6, so that the debtor may, if applicable, raise the defence provided for under that Article. The solution provided for by the Protocol in this respect is not very consistent, as the same relationships are privileged under Art. 4 and disadvantaged under Art. 6. This is naturally a compromise outcome.

b) The Subsidiary Connection to the Law of the Forum

The first advantage afforded to the classes of creditors defined under Art. 4(1) consists of the provision of some subsidiary connections in cases where the creditor is unable to obtain maintenance by virtue of the law of the State of his/her habitual residence (Art. 4(2)). This is a traditional solution inspired by *favor creditoris* and is designed to ensure that the creditor has the possibility of obtaining maintenance.

A similar solution is currently provided for by the 1973 Maintenance Obligations Convention (Art. 6). Contrary to that Convention, however, the Protocol provides for the subsidiary application of the law of the forum (art. 4(1)), whereas the law of the common nationality only comes into play in last resort, where the creditor is unable to obtain maintenance under both the law of the habitual residence and the *lex fori* (art. 4(4).

The switch of these two subsidiary connecting criteria (law of the forum before law of the common nationality) is justified for several reasons.

First, it reduces the importance in practice of the connection to the law of the common nationality, the relevance of which in maintenance matters is disputed. The main criticism addressed against this connecting factor is that it is discriminatory, as its benefit is provided only to creditors having a common nationality with the debtor.[20] Another criticism relates to the equivocal nature of that connection

[19] In the WGAL's Working Draft of January 2007 (Prel. Doc. No 24, Art. D), the special rules in what has become Art. 4 were provided for only in favour of persons under the age of 21 years. The Special Commission of May 2007 extended the privilege of these provisions to children and parents in parent-child relationships.

[20] See already the Verwilghen Report, para. 144.

when the common nationality is that of a multi-unit State.[21] Despite these criticisms, several delegations fought for keeping that subsidiary connection in the Protocol. Its 'demotion' to the rank of a *second* subsidiary connection, however, will greatly reduce both its practical impact and its drawbacks.

Second, the switch of the two subsidiary connecting factors facilitates the work of the authority seized, which may apply its own law on a subsidiary basis without being required first to ascertain the content of the law of the parties' common nationality. As a result, this solution is also beneficial to the creditor, as it allows a decision to be made more quickly and at lower cost.

Unlike the 1973 Maintenance Obligations Convention, under which the subsidiary connections to the law of the forum and to that of the common nationality have a general scope (see Arts 4-6), the Protocol provides for them only in favour of the classes of creditors referred to under Art. 4(1). This difference might be regarded, in the Contracting States of the 1973 Convention, as a step back in relation to the current level of protection afforded to maintenance creditors. However, this view would not be entirely accurate: the 1973 Convention already excluded a cascade of connecting factors for maintenance between divorced spouses, which was governed in all cases by the law applied to the divorce (Art. 8 of that Convention). The same was true of legal separation, nullity and annulment of marriage. Accordingly, if the two instruments are compared, it is observed that they only diverge as to the treatment of married spouses (who were included in the scope of Art. 5 of the Protocol, whereas they were excluded by Art. 8 of the 1973 Convention), and of certain adult creditors whose maintenance claims are not a matter of unanimous opinion in comparative law (*e.g.*, persons related collaterally or by affinity), and for whom the Protocol contemplates the introduction of certain specific defences for the debtor (Art. 6). Having regard to the fact that these classes of creditors are covered by less favourable special rules, it appeared to be contradictory to provide these creditors with the benefit of the cascade of connecting factors under Art. 4.

c) The Principal Connection to the Law of the Forum

The second, more radical derogation from the law of the creditor's habitual residence provided for by Art. 4(3) to the benefit of the classes of creditors referred to in art. 4(1) is that, under certain circumstances, the law of the forum is promoted to the role of principal connecting factor. This is the case when the creditor has seized the competent authority of the State where the debtor has his habitual residence. In that case, however, if the maintenance creditor is unable to obtain maintenance under the law of the forum, the law of the creditor's habitual residence and the law of the common nationality become applicable again on a subsidiary basis.

This is a major switch of the connecting factors provided for under Arts 3 and 4(2) (law of the forum before law of the creditor's habitual residence). This

[21] The solution settled upon for that case in the Protocol is the recourse to the concept of the closest connection, see Art. 16(1) *d)* and *e).*

provision is the outcome of a compromise between supporters of undifferentiated application of the law of the creditor's habitual residence (the present solution under the 1956 and the 1973 Maintenance Obligations Conventions) and those of the law of the forum (the approach prevailing in many countries, in particular in common law jurisdictions).

Application of the law of the forum on a principal basis is subject to two conditions: first, the authority seized must be that of the State of the debtor's habitual residence, and second, the proceedings must be instituted by the creditor.

The first condition is the one justifying application of the law of the forum instead of the law of the creditor's habitual residence. It should be considered that, when the maintenance proceedings are instituted in the State of the debtor's habitual residence, the connecting factor of the creditor's habitual residence loses some of its virtues. In such a case, that criterion does not result in application of the *lex fori*, so that the authority seized will be required to determine the substance of a foreign law, an operation that may be costly and time-consuming. In addition, that foreign law will have to be applied even if, in the case in point, it is *less favourable* to the creditor than the law of the forum.[22] In such a situation, application of the law of the creditor's residence leads to a result contrary to the concern for the creditor's protection on which it is based. It accordingly appeared that it would be appropriate to replace this connection by the law of the forum.

The second condition for application of the law of the forum is that the proceedings be instituted by the creditor. This condition is designed to restrict, in the creditor's interest, the departure from the principle of connection to the law of his/her habitual residence. It appeared that this departure could be justified if the creditor decides himself/herself to institute the proceedings in the State of the debtor's habitual residence, whereas it seems excessive if the proceedings are instituted in that country at the debtor's initiative (*e.g.*, for the purposes of an application for modification of a previous maintenance decision). The creditor often has the option of bringing proceedings in the country where he resides or the country where the debtor resides.[23] If he opts for the second solution, he cannot complain of application of the domestic law of the debtor's country.

With this in mind, the solution settled upon constitutes a kind of compromise between the supporters of automatic application of the law of the forum and those who would have preferred making it subject to an option on the part of the creditor (*cf*. the WGAL report of June 2006, Prel. Doc. No 22, paras 24 and 25).

Furthermore, it should be noted that if the proceedings are instituted by the creditor, the jurisdiction of the authorities of the State of the debtor's residence will be very solidly grounded (as it will be based on the broadly accepted principle of *actor sequitur forum rei*), providing sounder justification for application of the law

[22] The only exception from application of the law of the creditor's habitual residence provided for under Art. 4(2) and 4(4) is the situation in which the creditor *is not entitled to any maintenance* under the law of his or her habitual residence). Only in such case resort to the *lex fori* and to the law of the common nationality is possible on a subsidiary basis.

[23] Such is the case in particular within the European judicial area by virtue of Arts 2 and 5(2) of Regulation (EC) No 44/2001 and of the Lugano Convention.

of the forum. If, on the other hand, the proceedings are instituted by the debtor in his/her State of residence, the jurisdiction of that State's authorities (if it exists under the law of the forum) will be based on a jurisdiction criterion that is far less significant (such as the nationality of one of the parties), or even clearly exorbitant (*forum actoris*). All the more reason to rule out application of the law of the forum in such a case.

Application of the law of the forum on a principal basis is provided only for the classes of creditors referred to under Art. 4(1) (children, creditors under 21 years of age and parents). This restrictive solution[24] is due mainly to the following two reasons.

It appeared, on one hand, that application of the law of the forum to the conditions laid down by the provision in question is of substantial benefit to the creditor: by seizing the authorities of the State of his residence or those of the State of the debtor's residence, the creditor is granted the right to choose indirectly the law applicable to his maintenance claim (a sort of *forum shopping*). According to the Diplomatic Session, such a privilege was justifiable only for the classes favoured under Art. 4.

As regards maintenance obligations towards children, on the other hand, application of the law of the forum also rests on a further consideration. In a growing number of countries, the task of determining these obligations is assigned to administrative authorities, which usually have neither the expertise nor the means required to determine and apply the foreign law. Accordingly, only application of the law of the forum seems consistent with establishment of an administrative-based system for the recovery of maintenance. This is naturally far less of a concern with respect to the maintenance claims of adult creditors, which are usually determined by the judicial authorities (at least when they are not linked to their children's maintenance claims).

B. The Escape Clause for Maintenance Between Spouses and Ex-Spouses

1. The Ratio of Article 5

Art. 5 of the Protocol contains a special rule for maintenance obligations between spouses and ex-spouses. For such obligations, the connection in principle to the creditor's habitual residence is to yield, when one of the parties so requests, to application of the law of another State, in particular the State of the spouses' last common residence, if that law has a closer connection with the marriage.

The provision of a special rule for this class of maintenance obligations is based on the observation that application of the law of the creditor's habitual residence is not always suitable for obligations between spouses or ex-spouses. It should be taken into consideration that in certain domestic systems, maintenance is granted to a spouse only with great restraint and in exceptional cases (in Europe,

[24] Which differs from that proposed by the WGAL in the 2006 Working Draft (*cf.* the WGAL Report of June 2006, Prel. Doc. No 22, paras 20 *et seq.*).

this restrictive attitude is a feature of the law of Scandinavian States in particular). Against that background, indiscriminate application of the rules inspired by *favor creditoris* is seen in certain States as being excessive. In particular, the possibility for one of the spouses (the potential creditor) of influencing the existence and substance of the maintenance obligation through a unilateral change of residence may lead to a result that is less than fair and contrary to the debtor's legitimate expectations.

Take for instance the case of a couple of citizens of State A, the law of which does not in principle provide for maintenance after a divorce. After living all their married life in that State, the spouses divorce and one of them moves to State B, where the law is more generous to divorced spouses, and then claims maintenance on the basis of the law of his/her new habitual residence. According to the general connecting rule under Art. 3, that claim ought to be allowed. In such circumstances, however, application of the law of State B, a State where the spouses never lived during their marriage, seems less than fair to the other spouse and contrary to the legitimate expectations the spouses may have held during their marriage.

The weaknesses of the connection to the creditor's habitual residence in the case of maintenance obligations between divorced spouses had already been observed during the drafting of the 1973 Maintenance Obligations Convention. The latter provides a special rule for this situation, whereby the maintenance obligations between divorced spouses are governed by the law applied to the divorce (Art. 8). The same is true *mutatis mutandis* of cases of legal separation, and of marriages declared void or annulled (Art. 8(2)). This solution applies not only when the maintenance claim is settled in the course of the divorce proceedings (or at the time of divorce), but also to proceedings instituted subsequently to revise or supplement the divorce decree. The reason stated for this *perpetuatio juris* is the requirement of securing continuity, by preventing the change of the creditor spouse's residence from leading to a change of the applicable law.

This solution has several drawbacks, however, which attracted lively criticism. It should be noted first that, as the conflict rules with respect to divorce have not been harmonised at the international level, Art. 8 in fact in no way standardises the law applicable to maintenance obligations. That law continues to depend on the private international law of the State of the court seized of the divorce proceedings, and this solution inevitably favours forum shopping. In addition, the selection of a connecting factor that is invariable in time can cause, when the maintenance obligation between spouses needs to be determined after the divorce, application of a law that has become entirely irrelevant to the ex-spouses' situation and their respective interests: the court may not take into account the law of the creditor's or debtor's current residence. The divorce decree may also contain no provision relating to maintenance; in that case, the concern for continuity on which Art. 8 rests is less relevant. This is especially true when the spouses have divorced in a country that does not provide for maintenance to a divorced spouse. In such case, application of the law of the divorce results in denial of any maintenance, unless that application is set aside on grounds of public policy. Finally, application of the law of the divorce can give rise to practical difficulties because, in some cases, it

may be difficult to detect in the decision the law on the basis of which the divorce was decreed. All these considerations are equally valid, *mutatis mutandis*, for cases of legal separation, or declaration of nullity or annulment of marriage.

In its search for a balance between the concern for protection of the creditor and the concern for application of the law of a State with which the marriage is significantly connected, the Special Commission turned initially towards use of the connection to the last common habitual residence of the spouses or ex-spouses. In certain circumstances, that criterion probably represents a more significant link than the residence of the maintenance creditor only, and accordingly enjoys greater legitimacy. That is not always the case, however. If the last common residence is located in State A where the spouses had recently established themselves after having lived for several years in State B, and the creditor returns to the latter State after the separation, the connection to the creditor's habitual residence (which in this case is also the State of a former common residence) is better suited to the parties' expectations. In other circumstances, a different connection may be more significant, such as for instance a previous common habitual residence or the common nationality of the parties.

Having regard to the specific features of each particular case and the difficulty of setting a rigid and comprehensive connecting rule, the Diplomatic Session settled upon a flexible solution. The connection to the creditor's habitual residence provided for under Art. 3 remains applicable in principle to maintenance obligations between spouses and ex-spouses. It may be excluded, however, upon the request of one party, if the marriage has closer connections with another State, in particular that of the last common residence.[25]

2. The Operation of the Escape Clause

The new rule is in the form of an escape clause based on the idea of 'proximity' (the closest connections), application of which is contingent, however, upon a request by one of the parties. This is an original solution which does not correspond to the structure of the 'traditional' escape clauses contained in several national and international conflict-of-laws instruments.[26] Such provisions allow the court to deviate from the inflexible connections when that is required for reasons of proximity, but they do not depend on a request by one of the parties. The advantage of the solution contained in the Protocol is that it reduces the uncertainty

[25] This solution is based on a proposal from the delegation of the European Community (Work. Doc. No 4).

[26] See Art. 15 of the Swiss Federal Act of 1987 on Private International Law; Art. 4(5) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations and Art. 4(3) of Regulation (EC) No 593/2008 of the EU Parliament and Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Art. 15(2) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

inherent in any escape clause, by restricting the search for the closest connections to only those cases where one party asks for it. It should be also noted that when such a request is made, the task of the authority will usually be facilitated by the information provided by the requesting party.

The objection by one of the parties, however, does not automatically result in setting aside the law of the creditor's habitual residence designated under Art. 3. The authority seized will also have to assess that the law, the application of which is requested, has closer connections with the marriage. The 'proximity principle' is accordingly indeed the basis for the rule. This implies that the court, pursuant to such a request, will ascertain whether the marriage has closer connections with a law other than that of the creditor's habitual residence. In so doing, it shall have regard to all the connections of the marriage with the various countries concerned, such as the spouses' residence and/or domicile during the marriage, their nationalities, the location where the marriage was celebrated and the location of the legal separation or divorce. In addition, it will have to weight them so as to determine whether they are more or less significant than the current habitual residence of the maintenance creditor.

Among these criteria, Art. 5 confers a primary role on the spouses' last common habitual residence. This is not a real presumption, as used in other instruments,[27] but a mere indication,[28] reflecting the belief of the Diplomatic Session that, in many cases, the law of the last common habitual residence has very significant connections with the marriage.

The spouses' current common residence is not mentioned in Art. 5, for the simple reason that it coincides with the creditor's habitual residence and may therefore not result in an exception from the connection under Art. 3. This does not mean that the spouses' current residence in the same State plays no part in the application of Art. 5. Quite the opposite, the fact that both spouses reside in the same State at the time of the request will make it more difficult (though theoretically possible) to set Art. 3 aside, on the grounds that the law of another State (*e.g.*, that of the State of an earlier common residence) has a closer connection with the marriage.

While the criterion of the last common habitual residence is designed to play a leading role pursuant to Art. 5, other criteria may also be significant for that Article's application. This is the case of a former common habitual residence of the spouses, which may, in certain circumstances, constitute a very close connection. Take the case of spouses having lived for several years in a State A, and then very briefly in State B, and assume that the creditor in the meantime has left that country to establish himself in a State C. In such a case, there is no very close connection with the State B of the spouses' last common habitual residence, but there is such a connection with the State A of the former common residence.

Other criteria, such as the spouses' common nationality or the place of celebration of the marriage, could be taken into account theoretically, but they seem to

[27] *E.g.* Art. 4(2) of the Rome Convention of 19 June 1980.

[28] Work. Doc. No 2.

be of secondary importance only. They can certainly play a part to increase the weight attributed to the habitual residence (present or past) of the spouses (for instance, it will be weightier if it coincides with the spouses' common nationality). Taken in isolation, they will be decisive only in exceptional cases (*e.g.*, where the spouses never had their habitual residence in the same State, or moved very frequently during the marriage).

3. The Scope of Article 5

It should be noted that the scope of Art. 5 is extensive, as it covers both spouses and ex-spouses. Unlike Art. 8 of the 1973 Maintenance Obligations Convention, this provision of the Protocol is meant to be applicable not only to obligations between divorced or separated spouses, or spouses whose marriage has been annulled or declared void, but also to maintenance obligations between spouses during their marriage. The Special Commission considered that it was preferable to have a single connecting rule for obligations during the marriage and after divorce (or separation), in order to avoid changing the applicable law as a result of divorce (or *a fortiori* as a result of mere legal separation). Furthermore, this choice is justified in so far as the connecting criterion settled upon as a guideline in that provision, the last common habitual residence, is even weightier for obligations between the spouses during the marriage.

Despite the proposals to that effect made by certain delegations,[29] Art. 5 does not mention the institutions similar to marriage, such as certain forms of registered partnership having, with respect to maintenance obligations, effects comparable to marriage. Despite the silence of the instrument, the Diplomatic Session admitted that States recognising such institutions in their legal systems, or willing to recognise them, may subject them to the rule in Art. 5.[30] This solution will enable the authorities of those States to avoid treating differently institutions which, under their domestic law, are equivalent to marriage. This is all the more so for same sex marriage, which is recognised in certain States.

This solution is optional, in that it is not binding on States which refuse such relationships. We have already mentioned the solutions that may be contemplated for such States. It should also be pointed out that if the law designated by the Protocol provides for maintenance obligations in favour of a registered partner or same-sex partner, the States refusing recognition of any effect of such a relationship (including in maintenance matters) will still have the possibility of setting the foreign law aside on grounds of public policy (Art. 13 of the Protocol).

[29] Switzerland, Israel; see Work. Docs. Nos 8 and 15; Minutes No 5, paras 84 *et seq.*; Minutes No 6, paras 56 *et seq.*

[30] Minutes No 6, paras 59 *et seq.* See *supra*, IV(A)(3).

C. Party Autonomy

The provisions of Arts 7 and 8 allow the parties, subject to different conditions and with different effects, to choose the law applicable to the maintenance obligation. The admission of party autonomy is one of the main novelties introduced by the Protocol in relation to the 1956 and 1973 Maintenance Obligations Conventions. This solution corresponds to a strong international trend towards recognition of the freedom to choose the applicable law, even in areas from which it was traditionally excluded.[31]

While the admission of party autonomy with respect to maintenance obligations is a novelty for most States as regards conflicts of laws, this is not true of conflicts of jurisdictions: the possibility of entering into agreements relating to jurisdiction is already recognised in several international instruments. This is the case in particular in the European judicial area under Art. 23 of Regulation (EC) No 44/2001 and Art. 17 of the Lugano Convention of 16 September 1988. The 2007 Recovery Convention also recognises the legitimacy of choice of forum, by providing that States are bound to recognise and enforce a decision made in one Contracting State in the forum designated by the parties, except for maintenance obligations towards a child.[32] In this context, the admission of choice of the applicable law establishes a measure of consistency between the solutions accepted with respect to conflicts of laws and of jurisdictions.

The choice of law is subject to several restrictions, designed to protect the parties (and in particular the maintenance creditor) against risks of abuse. This risk is more serious where the choice is made before the occurrence of a dispute. This is why the Protocol's system includes two variations for party autonomy, in two separate provisions; Art. 7 governs the choice of law applicable for the purpose of a particular proceeding (procedural agreement), whereas Art. 8 allows – on a more limited basis – a choice at any time.

1. Designation of the Law Applicable for the Purpose of a Particular Proceeding

Art. 7 allows the parties to designate expressly the law of the forum as the law applicable to the maintenance obligation for the purpose of a particular proceeding. This is a 'procedural agreement' (*accord procedural*) on the applicable law, relating to the domestic law of the authority seized, and the effect of which is limited to a particular proceeding.

It should be emphasized that the choice provided for under Art. 7 is made for the purpose of a particular proceeding; it accordingly assumes that the mainte-

[31] Such as torts (see Art. 14 of the 'Rome II' Regulation) and successions (where the choice of law by the testator, which is presently admitted only in a few national systems and by the 1989 Hague Convention on successions, will probably be included in a future EC Regulation).

[32] Art. 20(1) *e)* of the Recovery Convention.

nance creditor has already brought, or is about to bring, a maintenance claim before a specific authority. At the time of that choice, the parties have the opportunity to obtain information (or will sometimes be informed by the authority seized) regarding the existence and nature of the maintenance provided for under the law of the forum. The risk of abuse is accordingly low.

The parties' choice under Art. 7 produces effects only for the particular proceeding for the purpose of which it is made. On the other hand, if a further claim or an application for revision is made subsequently before the same authority or the authority of another State, the choice of law made previously will no longer have any effect and the applicable law will have to be determined according to the objective connections. This limitation of the effects of choice is justified, as the law chosen is that of the forum.

Since the choice of applicable law under Art. 7(1) may also occur before the proceedings are instituted, Art. 7(2) includes some details as to form, by providing that in such case, the designation of applicable law shall be in an agreement in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference. It appeared essential, first, for the existence of the agreement to be easy to prove, avoiding any dispute, and second, that the parties' attention should be drawn to the important consequences that the choice of applicable law can have in relation to the existence and extent of the maintenance obligation.

Finally, it should be noted that if the choice provided for under Art. 7 is made before the proceedings are instituted, it will be valid only in so far as the parties have specified the law they intend to designate, or at least the authority before which the proceedings contemplated are to be instituted. It will not be sufficient for the parties to designate in general fashion 'the law of the forum', since until an authority has been seized, the 'forum' has not been determined. Such a choice made blindly does not provide an assurance that the parties have been informed, and are aware, of the object of their choice. If, subsequently, no claim is brought before the authorities of the State, the law of which has been chosen, the choice will remain ineffective (unless it meets the requirements of Art. 8).

The choice of applicable law as provided for under this provision ought to play an important role especially in relations between adults. In cases of legal separation or divorce, in particular, the spouses will have the option of making the maintenance claims subject to the domestic law of the authority seized, which cannot fail to facilitate the proceedings. However, the opportunity to choose is also provided for as regards maintenance obligations towards children. It appeared that the possible risks connected with the introduction of party autonomy are amply counterbalanced by the benefits in terms of simplicity that arise from application of the law of the forum.[33]

[33] Having regard to the special rule under Art. 4(3), whereby the parents' maintenance obligations towards their children and those of any other person towards persons under the age of 21 years are in any event governed by the law of the forum when the claim is brought by the creditor in the State of the debtor's habitual residence, the impact of the choice of applicable law on maintenance obligations towards children is bound to remain

2. Designation of the Applicable Law 'at Any Time'

Art. 8 allows the parties to choose the law applicable to the maintenance obligation at any time and even before a dispute arises. Unlike the choice of the law of the forum provided for under Art. 7, the choice of applicable law under Art. 8 is not made only 'for the purpose of a particular proceeding'; its effects are accordingly not limited to a proceeding that the maintenance creditor has already instituted or is about to institute. The law chosen by the parties is intended to govern the maintenance obligations between the parties from the time of the choice and until when they choose to cancel or modify it.

The main advantage of the choice of applicable law as provided for under Art. 8 is to secure a measure of stability and foreseeability with respect to the applicable law. If the parties have made such a choice, the chosen law remains applicable despite any changes in their personal situations, regardless of the authority seized in the event of a dispute. In particular, the change of the creditor's habitual residence does not cause a change of the applicable law, unlike in the absence of choice under Art. 3(2).[34]

a) The Scope of Article 8

The choice of applicable law is particularly useful in the relationship between spouses when they enter into, before or during marriage, an agreement relating to maintenance obligations during marriage and/or after divorce. As a result of that choice, the law applicable to the maintenance obligation is determined in advance, which prevents subsequent challenges of the agreement in the case of a change of residence of the spouses or of the creditor spouse. In fact, even in the absence of an agreement relating to maintenance obligations, the choice of law can avoid the changes of applicable law caused by a change of circumstances (*conflit mobile*).

Once the choice of applicable law had been accepted for spouses, it appeared that it could be useful to extend it to all adults, other than persons who, by reason of an impairment or insufficiency of personal faculties, are not in a position to protect their interests. Though such 'vulnerable' adults are usually protected by mechanisms set up in the various systems of domestic law (in the form, *e.g.*, of appointment of a guardian or trustee), the Diplomatic Session eventually excluded

---

rather limited. Art. 7 may be useful, nevertheless, when the claim is brought by the debtor before the authorities of the State of his residence or those of a State other than that of the creditor's residence.

[34] According to Art. 3(2) of the Protocol, '[i]n the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs'.

the choice of applicable law to maintenance obligations for these persons, in order to avoid any risk of abuse (Art. 8(3)).[35]

The choice of applicable law was also excluded for maintenance obligations towards minors, as the potential risks of that choice seem to outweigh the possible benefits. It should be borne in mind that a minor is usually represented by either of his/her parents, who are also bound to provide maintenance for the minor; the Diplomatic Session considered, therefore, that admitting the choice of applicable law involves an excessive risk of conflicts of interest in such cases. After some hesitation as to determination of the age from which the choice might be accepted (18 or 21 years), the age of 18 years was eventually settled upon, as it is the age of legal adulthood in most countries.

b) The Selection of Laws Eligible for Choice

With a concern for protection of the maintenance creditor, Art. 8 makes the option for the parties to choose the applicable law subject to several conditions and restrictions. The first group of restrictions concerns the object of the choice and is designed to limit the range of options available to the parties.

First, the Protocol allows for the choice of the national law, and of the law of the habitual residence, of either party at the time of designation (Art. 8(1)(*a*) and (*b*)). These possibilities already open a quite broad range of options to the parties in an international situation.

The third and fourth options opened by the Protocol (Art. 8(1) (*c*) and (*d*)) relate to the law *designated* by the spouses to govern the property regime between spouses, or legal separation or divorce, respectively, and the law that was actually *applied* to those matters. It is accordingly obvious that these options are open only to spouses and ex-spouses.[36]

The desirability of allowing these further options was debated at length in the Special Commission. Against their admission, it was pointed out that they create a very complex system, without being really necessary, having regard to the very broad options for choice already created by sub-paragraphs *a)* and *b)*. Furthermore, the additional options provided for under sub-paragraphs *c)* and *d)* depend on the conflicts rules in force in the State of the forum; they accordingly create only a semblance of uniformity, as the validity of choice depends in fact on

[35] The definition of vulnerable adults used by Art. 8 of the Protocol is reproduced from the Hague Convention of 13 January 2000 on the International Protection of Adults (*cf.* Art. (1(1)).

[36] It should be stressed that Art. 8 does not allow the spouses to choose the law *applicable* to the property regime or divorce. Since this issue is governed by the domestic systems of private international law of the Contracting States (including those which arise at an international or community level), and the solutions provided for may be very different, the law applicable to the property regime or divorce may vary according to the rules in force in the State of the authority seized. In such case, designation of that law to govern the maintenance obligation would be made blindly.

the law of the authority seized. This is true, first, for the choice of the law *designated* to govern property regimes, and divorce or separation, respectively; the choice of law applicable to property regimes between spouses and that applicable to the separation or divorce is not governed by the Protocol, and accordingly depends solely on the law of the forum. If the *lex fori* does not allow such a choice by the parties, its invalidity will entail that of the choice of law applicable to the maintenance obligation. This risk is particularly acute with respect to divorce, as party autonomy in such matters is recognised by a small number of States only.[37] As a result, there is a risk that the choice validly made under the private international law of one Contracting State will be considered as being void by the authorities of another Contracting State applying their own conflict of laws rules. This lack of uniformity may also occur in the case of choice of the law actually *applied* to the property regime or divorce; as the connecting rules have not been unified in such matters, the law applied may change according to the conflict of laws rules of the court seized.

Despite these drawbacks, the options of sub-paragraphs *c)* and *d)* were endorsed by the Diplomatic Session, as they enable spouses to ensure that a single law is applicable to the various issues to be determined in the case of dissolution of the couple (divorce and legal separation, dissolution of matrimonial property regime and maintenance obligations). This concurrence is particularly important having regard to the links between these various aspects in several domestic legal systems. Thus, the determination of property consequences is sometimes considered as a condition for the grant of divorce (such is the case in particular for procedures based on mutual consent of the spouses). In addition, in certain laws (and in several common law jurisdictions in particular), the distinction between dissolution of the property regime and maintenance obligations is unclear or non-existent, as the settlement of any economic effects of the divorce is entrusted to the courts.

c) The Modalities of the Choice

In formal terms, the choice of applicable law is to be made in writing signed by the parties (Art. 8(2)). Without even mentioning its evidential advantages, the requirement of writing serves to draw the creditor's attention to the importance of the choice and to shelter him/her from the consequences of a heedless choice.[38]

[37] An evolution is looming in EC private international law, since the choice of law applicable to the divorce and legal separation is provided for in the Proposal for a Council Regulation amending Regulation No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ('Rome III'), presented by the Commission on 17 July 2006 (COM(2006) 399 final, Art. 1(7)). The risk is far less acute for the choice of the law designated for the property regime, since in this area the choice of law is widely accepted in comparative law; it is provided for, *inter alia*, by the Hague Convention of 14 Mars 1978 on the Law Applicable to Matrimonial Property Regimes (art. 3).

[38] In the minds of the delegates to the Diplomatic Session, this provision only provides for minimum formalities in relation to the agreement; the States may provide for other

The writing may be replaced by any medium, the contents of which are accessible so as to be usable for future reference. This provision is intended to allow the use of information technologies. This does not dispense, however, with the requirement of a signed document; an electronic document will be sufficient, therefore, only if accompanied by an electronic signature.

d) Restrictions Affecting the Effects of Choice

Major restrictions have been introduced in the Protocol with respect to the effects of the choice of applicable law (Art. 8, paras 3 and 4). Since the choice of a law that is restrictive in maintenance matters may deprive the creditor of his/her right to maintenance, or limit his/her entitlement to a large extent, it seemed indispensable to restrict its effects.

i. Application of the Law of the Creditor's Residence to the Right to Renounce Maintenance

Art. 8(4) provides that notwithstanding the law designated by the parties, the question of whether the creditor can renounce his/her right to maintenance shall be determined by the law of the State of the creditor's habitual residence at the time of the designation.[39] This rules implies a major restriction of the scope of the law designated by the parties; regardless of the contents of that law, the possibility to renounce maintenance, and the conditions of such a renunciation, shall remain subject to the law of the creditor's habitual residence. This provision is naturally intended to prevent the creditor, through the choice of a particularly liberal and unprotective law, being made to renounce the maintenance to which he/she would be entitled under the law applicable if there had been no choice.

In its literal sense, the provision seems designed to apply to the case in which the creditor has renounced his/her rights, and that renunciation is accompanied by the choice of a law allowing it. The justification for the provision suggests, however, that it should be applied also in the case where the choice of a particular law implies, in itself, a renunciation, as the designated law provides for no maintenance in favour of the creditor.

The operation of Art. 8(4) can raise certain doubts in cases where the right to maintenance in favour of the creditor is not based on the law of his/her habitual residence but on another law designated by Art. 4 (law of the forum, law of the common nationality) or by Art. 5 (law with the closest connection with the marriage). In such a case, the reference in Art. 8(4) to the law of the creditor's habitual residence does not seem very suitable. Let us suppose that a person, residing in State A, agrees to assist his/her father, residing in State B, in paying the latter's

---

requirements, by laying down for instance requirements to ensure that the parties' consent is free and sufficiently informed.

[39] This rule was introduced into the text of the Protocol at the Diplomatic Session, pursuant to a proposal by the European Community (Work. Doc. No 5).

debts, provided that he renounces any maintenance. In that agreement, the parties make the maintenance obligation subject to the law of State B, which allows the renunciation. Subsequently, being reduced to indigence, the father brings action in State A (domicile of the debtor) to obtain maintenance in accordance with the law of that State, which is applicable as the law of the forum by virtue of Art. 4(3) of the Protocol; under that law, the prior renunciation of maintenance is void. Under Art. 8(4), the validity of the creditor's renunciation is not governed by the chosen law but by the law of the creditor's habitual residence; in this case, however, both criteria lead to one and the same law, the law of State B, which validates the renunciation. At first sight, the latter is therefore valid. In our case, however, the claim made by the creditor is not based on the law of the State of his habitual residence (State B), but on the law of the forum (State A), which would be applicable by virtue of Art. 4(3) in the absence of choice. Should Art. 8(3) be construed literally, and therefore the renunciation be considered as being valid, or should it be considered that in this case, the right renounced by the creditor is not based on the law of his State of residence but on the law of the forum, which does not allow the renunciation? In other words: is Art. 8(3) intended to refer solely to the law of the creditor's habitual residence, or more generally to the law that would have governed the maintenance obligation in the absence of choice ('the otherwise applicable law')? As the history of the provision does not provide an answer to this question, the solution will depend on the choice between a literal and a teleological construction, and it seems to us that the latter ought to prevail.

ii. Mitigating Powers of the Court

The effects of the choice of applicable law are, moreover, limited by the provision of mitigating power of the authority seized of the claim (Art. 8(5)). If that authority finds that application of the law chosen by the parties leads, in the specific case, to manifestly unfair or unreasonable consequences, the law chosen may be set aside in favour of that designated by the objective connecting criteria in Arts 3 to 5. This escape clause is based on considerations of substantive justice and corresponds to the powers that several national laws confer on courts to amend, or even set aside, maintenance agreements made between the parties when they lead to unfair or unreasonable results. Among the circumstances that could trigger application of this clause, one may mention the fact that the chosen law, at the time of the dispute, has only a very weak link to the parties, or the fact that one of the parties (the creditor in particular) consented to the choice of applicable law without being sufficiently informed of its consequences.

THE DEVELOPMENT OF MEDIUM AND TECHNOLOGY NEUTRAL INTERNATIONAL TREATIES IN SUPPORT OF POST-CONVENTION INFORMATION TECHNOLOGY SYSTEMS

THE EXAMPLE OF THE 2007 HAGUE CONVENTION AND PROTOCOL

Philippe LORTIE*

I. Introduction

Over the years, the Hague Conference has developed a unique system of post-Convention services to monitor the operation of the Hague Conventions, to assist Contracting States with their effective implementation and to promote consistency and the adoption of good practices in the daily operation of the Conventions. These services include, *inter alia*, maintaining an international network of Central Authorities and other bodies charged with implementing the Conventions; providing technical assistance to countries on matters of implementation; and, encouraging consistent practices and uniform interpretation of the Conventions through promotion of electronic case law, statistical and case management databases and electronic communication systems.

Since 23 November 2007 the Hague Conference has two new treaties to care for. The international recovery of maintenance calls for the application of information technology solutions for many reasons:

- The very large number of cases involved which is steadily increasing;[1]

* First Secretary, Hague Conference on Private International Law.

[1] Within the Member States of the Organisation for Economic Cooperation and Development it is estimated that there is an average of 1 case of international recovery of maintenance per 1000 habitants. It is also important to note that the number of legal separations and divorces keep increasing in many countries.

Yearbook of Private International Law, Volume 10 (2008), pp. 359-365

- Maintenance cases often have a long life-span (in some countries child support can last until the age of 25);
- Maintenance cases are subject to a high number of transactions such as for example regular modifications (*i.e.* variations of the needs of the creditor and of the resources of the debtor) or regular electronic transfer of funds;
- A high number of repetitive transactions take place which can be standardised;
- Communications take place regardless of time zones;
- A vast amount of information has to be available in real time;
- Means of communications have to address language barriers.

It is in response to this environment that the Preamble of the Convention states that: 'the States signatory to […] the Convention […] [seek] to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities'. Furthermore, Article 12(7) of the Convention provides that Central Authorities, charged with the operation of the cooperation system established under the Convention, shall employ the most rapid and efficient means of communication at their disposal. In that respect the Convention will require the use of website databases to provide real time information about its operation (Art. 57), will invite the use of electronic fund transfers (Art. 35) and will be geared towards the use of cross-border electronic case management and communication systems.

II. The Development of a Convention That Would Accommodate the Use of Information Technology Solutions

In order to accommodate effectively the use of information technology at the global level, it was necessary to develop a text that would be medium and technology neutral. That is a text that could be used either in a paper environment, an electronic environment or a combination of the two. This neutrality would also allow the text to pass the test of time as technologies will evolve. There are several reasons upon which this decision rests.

First, at present very few judicial or administrative authorities around the glob deliver or accept electronic data. Where the information and documents could be transmitted electronically between Central Authorities, some of the information and documents in the State of origin may only exist in paper form and could only be filed in such form with the competent authority in the requested State. In this respect, Article 13 of the Convention provides that '[a]ny application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communication employed between the Central Authorities concerned'.

Secondly, the objective was to develop a text that could stand-alone from functional equivalents found in domestic law, or the lack thereof, and the different technologies available within the different States. Worldwide, less than 30 States have enacted legislation that provides functional equivalents for concepts such as 'signature', 'writing', 'original', 'sworn' and 'certified'. States that have done so have either implemented the 1996 UNCITRAL Model Law on Electronic Commerce[2] as such or drawn from it, and where they did, even less have extended the application of their legislation beyond the context of commercial activities such as the area of family law and more specifically the field of child support and other forms of family maintenance. Furthermore, in the light of this lack of functional equivalents in domestic laws of a number of States it was clear that, where possible, other drafting techniques would have to be relied upon to find solutions.

However, the development of a medium and technology neutral text did not mean that the entire Convention had to be medium neutral. For example, connecting factors such as 'habitual residence' that point to a geographic location cannot be adapted to a virtual world. Furthermore, the Convention does not aim at changing material law of the future Contracting States to the Convention. In that respect, whether the defendant appears in person or by video link is left to domestic rules of procedure or rules of court. But the Convention should not prevent it.[3] In addition, there was no intention to change the rules concerning the transmission of treaty related documents such as Instruments of Ratification. The main objective was to ensure that the text of the Convention would create as few as possible barriers to the use of information technologies by Central Authorities in their mutual communications under the Convention.

Another issue that required the attention of the Secretariat of the Conference when developing the text of the Convention was the use Public Key Infrastructures (PKIs) and certification authorities in relation to the transmission of data and moreover their retransmission. Under the Convention, a large number of documents that will be transmitted from one Central Authority to another will originate from other bodies or persons in the requesting State, such as judicial or administrative authorities or the applicant, for the attention of similar bodies in the requested State or the defendant. This raises the difficult issue of retransmission of data, also called 'in-chaine transmission' of data. Further to consultations with the UNCITRAL Secretariat it was clear that existing technologies were limited in this respect. In fact, in receiving a document through a PKI communication from the Central Authority of State B, it will be long and complex for the Court in State B to verify the identity / 'authentication' of the author and irrevocability of the document from State A sent through the Central Authority of State A. In addition, the UNCITRAL Secretariat brought to our attention the fact that PKI standards differ from one country to another. Therefore, even if in-chain PKI communications were possible it could be that Sate B would not accept documents transmitted electroni-

[2] Consult <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html> to obtain the text of the Model Law.

[3] See Article 29 of the Convention.

cally within State A because of those different standards. The UNCITRAL Secretariat also noted that it will take some time before judicial and administrative authorities issue and accept electronic document that meet integrity, irrevocability and identification / 'authentication' requirements. The solution retained in this respect is one that favours the cross-border transmission of information and documents between Central Authorities.

Taking into account these different elements, the text that has been adopted is autonomous from the solutions found in domestic law regarding information technology. The Convention uses neutral terms in relation to medium and technologies so that it can be used in either a paper or electronic environment or a combination of the two. Therefore, the Convention avoids using as much as possible terms such 'signature' (when what is actually required is a simple identification of the user), 'writing', 'original', 'sworn' and 'certified'. Furthermore, this has been done while providing for the protection of personal data,[4] confidentiality[5] and non-disclosure of information[6] and without endangering due process principles. In this respect, it has to be noted that some of the solutions adopted for this purpose have been drawn from the area of uncontested claims. It is important to remember that in the area of child support it is the establishment of paternity or the amount of maintenance that are the most contested issues and not the documentary evidence *per se*.

The term 'signature' has been replaced by an identification/'authentication' requirement where a signature is required to make the link between an information or document and its author or originator.[7] On the other hand, where the signature signifies 'consent' to a legal act or 'approval' of the contents of information or documents a system of attestation will be used.[8] It is to be noted that signatures will be of little use in the State where the information is being sent (*i.e.* the requested State or the State addressed). First, the competent authorities in the receiving State will not be in a position to verify whether the signature belongs to the person it pertains to. Secondly, if the person signing the document makes a false declaration the consequences of this false declaration could only be effectively resolved in the State where that false declaration would have been made.

The term 'agreement in writing', which is a legal term of art, is more difficult to provide for in neutral terms. However, the expression benefits from a widely accepted and used functional equivalent which has passed the test of time in many international instruments. Thus, Article 3 *d)* provides that '«agreement in writing» means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference'. The expression

[4] Article 38 of the Convention.

[5] Article 39 of the Convention.

[6] Article 40 of the Convention.

[7] See for example Article 11(1) *h)* of the Convention.

[8] See for example the first sentence of Article 12(2) and the first sentence of Article 16(3). It is to be noted, that an attestation in relation to Article 12(2) is included in all the forms developed for the applications provided for under Article 10.

is used on three occasions in the Convention, once with regard to the definition of 'maintenance agreement' in Article 3 *e)* and twice in relation to agreements with regard to jurisdiction[9].

The term 'original' does not appear once in the text of the Convention.[10] This required a number of adaptations to the text. Understandably, since many legal systems, in evidentiary matters, give priority to original of documents. However, because maintenance claims share many features of uncontested claims it was agreed to do away with the requirement of originals. But this does not mean that any document will be accepted as such under the Convention. The system put in place under the Convention will ensure in a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities, while recognising the need for sometimes making available at a later stage, most often probably for evidence purposes, a complete copy certified by the competent authority of certain documents.[11] This second transmission could be done by any means at the request of: (1) the requested Central Authority;[12] (2) of the competent authority of the requested State;[13] and (3) further to a challenge or appeal by the defendant.[14] It is to be noted that in this latter case, a challenge or appeal may be founded only on the authenticity or integrity of the documents.[15]

The negotiations revealed that a small number of States still make use of 'sworn' statements when producing evidence. The solution found in this respect is similar to the one used for the 'signature' requirement. This involves a combination of an attestation and the identification of the person or institution it pertains to.

Consultations with information technology law experts have confirmed that the 'certification' requirement could be easily met irrespective of the medium or

---

[9] Articles 18(2) *a)* and 20(1) *e)* of the Convention.

[10] Except for the reference to 'original language' in Articles 44 and 45 of the Convention.

[11] This technique is very often used in the context of commercial arbitration and is being used more often in the context of court proceedings. The documents covered by this procedure under the Convention are: (1) the formal attestation stating the child's means (art. 16(3)); (2) the complete text of the decision (art. 25(1) *a)*); (3) the document stating that the decision is enforceable in the State of origin (art. 25(1) *b)*); (4) the document showing the amount of arrears (art. 25(1) *d)*); (5) the abstract or extract of the decision drawn up by the competent authority of the State of origin (art. 25(3) *b)*); et, (6) a complete text of the maintenance arrangement and a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (art. 30(3)).

[12] Article 12(2) of the Convention.

[13] Article 25(2) of the Convention.

[14] Articles 23(7) *c)*, 25(2) and 30(5) *b)*.

[15] It is to be noted that some States may want to extend by declaration this possibility to their competent authorities in application of the Article 24. Furthermore, it is also to be noted that in accordance with Article 25(3) some States could declare 'that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application' at all times.

technology used. It is hoped that 'certification' could be made without the need for signature or stamp with the help of an attestation and identification of the competent authority. Hopefully, we will see good practice in this respect emerge.

Finally, consultations have revealed that the use of terms such as 'applications', 'requests', 'documents' and 'texts' were sufficiently neutral to be used either in a paper environment or an electronic environment.

III. The Development of Electronic Case Management and Communication System in Support of the 2007 Maintenance Convention (iSupport)

The Secretariat of the Hague Conference has been examining the possibility of developing a common multilateral electronic case management[16] and Internet based communication system[17] for the Convention (hereinafter iSupport) during the last three years as the text of the Convention was being developed. The system would assist the effective implementation of the Convention and lead to greater consistency in practice in the different States as it would follow the language of the Convention. The system would also help significantly to improve communications between Central Authorities[18] and could alleviate translation problems as it could operate in different languages.[19] Such a system could assist the daily operations of the Central Authorities set-up under the Convention and help considerably to improve standards of case management to lead the way towards paperless case management. The system could also generate the required statistics[20] as part of the means of monitoring the operation of the Convention. In addition to the management and monitoring of cases, the system could provide instructions to banks with

[16] Under the system envisaged, all the information pertaining / belonging to a Central Authority would be stored on servers within that Central Authority. Information / data would not be stored with third parties.

[17] This would be a secured system guaranteeing integrity, irrevocability, identification / authentification, access control and confidentiality of the information communicated. For further information regarding these concepts, see the Report drawn up by Philippe Lortie, First Secretary, 'Transfer of Funds and the Use of Information Technology in relation to the International Recovery of Child Support and other Forms of Family Maintenance', Prel. Doc. No 9 of May 2004, for the attention of the Special Commission of June 2004, and Annex to Prel. Doc. No 9. Both documents are available at < www.hcch.net >, supra, note 1.

[18] Article 5 of the Convention.

[19] Articles 44 and 45 of the Convention.

[20] Article 54(2) of the Convention.

regard to electronic transfer of funds[21] and could send and receive secured online communications and applications[22] under the Convention.

Since the beginning of the negotiations, the value of model forms to be used primarily between Central Authorities, whether mandatory or recommended, for the transmission and receipt of applications has been emphasised again and again. The model forms would be the corner stone of the development of a multilingual international electronic case management and communication system in support of the Convention. They facilitate the presentation of information and provide the opportunity to summarise and list documents for specific applications while reducing documentary requirements to a necessary minimum. While they may not act as substitutes for certain required documents, they may reduce the need for full translations. The familiarity of model forms, even when translated into different languages, facilitates the handling of applications. The forms developed for the Diplomatic Session make use as much as possible of 'tick-boxes' and require 'open-text' answers as little as possible, such as for names of parties and competent authorities and their contact details. Thus making these forms available in different languages will allow countries to overcome language barriers; it will be possible to complete a form in English and to read it in Spanish, with the exception of the 'open-text' answer, which, in most cases being names and numbers, would not need to be translated.[23] Model forms will encourage consistent practices, regular operation and uniform interpretation of the Convention. They will assist with the swift transmission of documents and information even more so if used within an electronic case management and communication system such as iSupport.[24]

[21] Articles 10(1) f) and 35 of the Convention.

[22] Article 12(7) of the Convention.

[23] 'Open-text' answers would be completed using alphabetical characters agreed-upon by the users.

[24] A summary description of a mock-up iSupport system can be found in Annex II to this note.

NATIONAL REPORTS

A DECADE OF PRIVATE INTERNATIONAL LAW IN AFRICAN COURTS 1997-2007 (PART II)*

Richard Frimpong OPPONG**

> 'The materials are loose and scattered, and are to be gathered from many sources, not only uninviting, but absolutely repulsive, to the mere Student of the Common Law'
> Joseph Story, *Commentaries on the Conflict of Laws* (1834)

* This is the concluding part of a two-part paper. It deals with the enforcement of foreign judgments and arbitral awards, international civil procedure, judicial and administrative cooperation. It also provides concluding observations on the cases reported in both parts. For the first part, see this *Yearbook* 2007, pp. 223-255. This work forms the foundation of my book, *Private International Law in Commonwealth Africa*, which is to be published by Cambridge University Press.

** Lecturer, Lancaster University Law School. For enduring many lonely and cold nights whilst I searched for and struggled with these cases, this work is dedicated to Mrs. Joyce Okofo Adjei and Miss Mary Adjei.

Yearbook of Private International Law, Volume 10 (2008), pp. 367-408

Printed in Germany

I. Enforcement of Foreign Judgments and Arbitral Awards

A. International Competence

There are two means by which foreign money judgments are enforced in the countries under review. These are at common law and under statutes dealing with the registration of foreign judgments from designated countries.[1] Where a judgment is from an undesignated country, it can only be enforced at common law. Thus, in *Mileta Poku v. Rudnap Zambia Limited*,[2] a judgment from Yugoslavia was held unenforceable under Zambia's Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76. Also, in *Heyns v. Demetriou*,[3] it was held that a South African judgment cannot be registered under Malawi's British and Commonwealth Judgments Act, 1922 or the Judgment Extension Act 1922. In both cases, Yugoslavia and South Africa were not designated under the respective statutes.

Both approaches to enforcing foreign judgments have substantive and procedural requirements that must be strictly met before judgment is enforced. In the Botswana case of *Barclays Bank of Swaziland v. Koch*,[4] the plaintiff's failure to annex the foreign judgment to the summons for provisional sentence was held to be fatal to enforcement. In *Shona-Jason Nigeria Limited v. Omega Air Limited*,[5] the Nigerian court held that it had jurisdiction to set aside the registration of a foreign judgment even where the application for the registration of the judgment was made with notice and the judgment debtor had not opposed the application for registration of the judgment at that stage. The existence of this jurisdiction under Nigeria's Foreign Judgment (Reciprocal Enforcement) Act cannot be denied. But,

[1] Among the cases decided under such statutes are *Ssebaggala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd.* [2000] L.L.R. 931; *Northern Executive Aviation Ltd. v. Ibis Aviation Ltd.*, Civil Case No. 1088 of 1998, (High Court, Kenya, 2001); *Re The Foreign Judgment* [2001] L.L.R. 1429; *Patel v. Bank of Baroda* [2000] L.L.R. 3413; *Patel v. Bank of Baroda* [2001] 1 E.A. 189; *The Society of Lloyd's v. Charles Julian Burton Larby* [2005] eK.L.R.; *Transroad Ltd. v. Bank of Uganda* [1998] UGA J. No. 12; *Ghassan Halaoui v. Grosvernor Casinos Ltd.* [2002] 17 N.W.L.R. 28; *Shona-Jason Nigeria Ltd. v. Omega Air Ltd.* [2005] 22 *Weekly Reports of Nigeria* [W.R.N.] 123; *Thelma Hyppolite v. Dr. Joseph Egharevba* [1998] 11 N.W.L.R. 598.

[2] [1998] Zam. L.R. 233.

[3] (High Court, Malawi, 2001).

[4] [1997] B.L.R. 1294.

[5] [2005] 22 W.R.N. 123.

it can be argued that the court should not have exercised this jurisdiction in favour of a party who basically sat on his right when an earlier opportunity to vindicate it existed. One would have expected that the ordinary principles of estoppel would have been at play here.

A cardinal condition for the enforcement of foreign money judgments is that the foreign court must be competent under the enforcing court's rules of private international law.[6] It is not enough for the foreign court to be competent under its own national rules of jurisdiction. The countries under review differ in terms of what they regard as international competence. The South African case of *Erskine v. Chinatex Oriental Trading Co.*[7] involved an application to enforce a default judgment obtained in England against the appellant. The court acknowledged the existence of some debate on the issue, but held that domicile could be a ground of international competence. The party who sought enforcement of the foreign judgment had the burden of proving that the judgment debtor was domiciled in the jurisdiction of the foreign court. This ground of international competence appears to be unique to Roman-Dutch law. At common law, only presence, residence and submission suffice.

Perhaps the most remarkable decision in this area was *Richman v. Ben-Tovim*[8] where the South African Supreme Court of Appeal settled an issue for which there was no recent direct authority in the common law world. The defendant, the judgment debtor, was served with the claim form at his hotel in London during a temporary presence there. The court held that the defendant's mere physical presence in England at the time of instituting the English proceedings and the service of process on him sufficed to establish the international competence of the English court. The decision is interesting from many perspectives. It is the first definitive judicial pronouncement on the issue in South Africa. The courts found 'compelling reasons' for coming to its conclusion, but failed to explain what those reasons were apart from the broad reason of facilitating international trade and

[6] Often, it is assumed that, in an action to enforce a foreign judgment, the domestic court has jurisdiction over the defendant. This is not always the case. In *Zwyssig v. Zwyssig* 1997 (2) S.A. 467, the defendant unsuccessfully argued that the South African court had no jurisdiction to entertain the provisional sentence application because he was neither domiciled nor resident in South Africa. Also, although the issue of international competence was the central issue in most of the cases reviewed, in *C. Hoare v. Runewitsch* 1997 (1) S.A. 338 the defendant unsuccessfully challenged the enforcement of an English judgment on the ground that it was not final.

[7] 2001 (1) S.A. 817. In this instance, the court found that the respondent was not able to discharge that burden. This case was an appeal from *Chinatex Oriental Trading Co. v. Erskine* 1998 (4) S.A. 1087.

[8] 2007 (2) S.A. 283. The trial court held that mere presence was not enough to establish international competence. See *Richman v. Ben-Tovim* 2006 (2) S.A. 591. Another interesting case is *Adwork Ltd. v. Nigeria Airways Ltd.* [2000] 2 N.W.L.R. 415 which deals with the relationship between the original court in which a judgment is granted and the court where enforcement is sought.

commerce.[9] It is also arguable whether an English court would have enforced a similar judgment.[10]

Indeed, in Europe, such an exorbitant basis of jurisdiction has been excluded by the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters to protect European domiciled defendants.[11] In Canada, the Supreme Court has expressly approved presence as a basis of international competence.[12] However, Castel and Walker suggest that, today, only ordinary residence would seem to conform to the constitutional principles enunciated in *Morguard v. De Savoye*.[13] Given this international context, it is debatable whether *Richman* affords enough legal protection to South Africans who are likely to be victims of such exorbitant jurisdiction.[14] *Richman* may be taken as pointing to a new direction of flexibility in the approach to enforcing foreign judgments in South Africa. But, there is need for caution in going down that route in order to ensure that the multiple, and sometimes conflicting, interests of facilitating international trade and commerce and protecting individual rights are catered for and reconciled.

Submission to the jurisdiction of a foreign court is a recognised basis of international competence in all the countries examined. A number of the judgments turned on it.[15] Submission may be by express agreement or may be inferred from the parties' conduct. In *Blanchard, Krasner & French v. Evans*,[16] the South African court held that a provision in a contract which stipulated that it should be construed and governed by the laws of California, and that actions under it should be tried by reference to the California Code of Civil Procedure, amounted to submission.

---

[9] *Richman v. Ben-Tovim* 2007 (2) S.A. 283, 289.

[10] There are a couple of English decisions which appear to hold that mere physical presence is enough to confer international competence. However, to Professors North and Fawcett, such a basis of international competence is not desirable. See NORTH P.M./FAWCETT J.J/CARRUTHERS J.M., *Cheshire and North's Private International Law*, Oxford, 2008, p. 518.

[11] Article 3(2).

[12] *Morguard Investments Ltd. v. De Savoye* (1990) 76 D.L.R. (4th) 256 at [43] where the fact that the 'defendant was within the jurisdiction at the time of the action' was held to be an appropriate exercise of jurisdiction for the purpose of recognising a judgement from another province within Canada.

[13] CASTEL J-G./WALKER J., *Canadian Conflict of Laws*, Lexis Nexis Butterworths 2001, p. 14.5.c.

[14] I explore this theme in greater detail in OPPONG R.F., 'Mere Presence and International Competence in Private International Law', in: *Journal of Private International Law* 2007, p. 331-332.

[15] *Purser v. Sales; Purser v. Sales* 2001 (3) S.A. 445; *Blanchard, Krasner & French v. Evans* 2002 (4) S.A. 144; *Mashchinen Frommer GmbH & CO KG v. Trisave Engineering & Machinery Supplies (Pty) Ltd*. 2003 (6) S.A. 69; *Richman v. Ben-Tovim* 2006 (2) S.A. 591; *Ghassan Halaoui v. Grosvernor Casinos Ltd.* [2002] 17 N.W.L.R. 28; *Transroad Ltd. v. Bank of Uganda* [1998] UGA J. No. 12.

[16] 2002 (4) S.A. 144.

A contentious issue in the judgments was the degree of proof needed to sustain an inference of submission from conduct. In *Blanchard, Krasner & French v. Evans*,[17] the South African court rejected the trial court's ruling that submission must be proved as a matter of legal certainty.[18] It held that submission must be proved on the balance of probabilities. In *Richman v. Ben-Tovim*,[19] the trial court laid down the test for the degree of proof required to sustain a claim that there has been submission by conduct as conduct which clearly indicated and was consistent only with an unqualified acceptance of or acquiescence to jurisdiction. From these cases it appears that although the South African courts have accepted that submission to jurisdiction may be express or implied, they have set a high threshold test for it, especially where it is to be inferred from conduct. It is arguable whether other jurisdictions adhere to this high threshold test. What is certain is that, in the Ugandan and Nigerian cases where submission was also argued, enforcement was refused.[20]

An interesting issue in the Ugandan Supreme Court case of *Transroad Ltd. v. Bank of Uganda*[21] was whether acts subsequent to a judgment can amount to submission to jurisdiction. The case was an appeal against a decision to register an English judgment in Uganda. Although the appellant was served with process in the English proceedings, it did not appear or defend the suit. After the judgment, it unsuccessfully applied to the English court to set aside the judgment. However, it got a consent order discharging a garnishee order *nisi* issued in execution against the appellant's debts due and accruing from a bank in England. The appellant also entered into negotiations with the respondent with a view to paying the debt. In this appeal, the appellant contended that it did not submit to the jurisdiction of the English court. The court held that the post-judgment conduct of the appellant could not be construed as submission. Justice Oder suggested that conduct or acts of a defendant subsequent to its appearance or to an *ex parte* judgment may constitute submission. He gave an example of such conduct as an acceptance (express or implied) to be bound by the *ex parte* judgment.[22] It is submitted that such conduct cannot amount to submission to the jurisdiction of the court since it postdates the exercise of the court's jurisdiction. However, it can create an enforceable contract between the judgment debtor and judgment creditor.

The difficulties and debate surrounding the bases of international competence reflected in the cases bring into focus the inadequacy of existing law for the

[17] 2002 (4) S.A. 144.

[18] See *Blanchard, Krasner & French v. Evans* 2002 (4) S.A. 87.

[19] 2006 (2) S.A. 591, 602. The Supreme Court of Appeal did not comment on this ruling.

[20] *Transroad Ltd. v. Bank of Uganda* [1998] UGA J. No. 12; *Ghassan Halaoui v. Grosvernor Casinos Ltd.* [2002] 17 N.W.L.R. 28.

[21] [1998] UGA J. No. 12 on appeal from *Transroad Ltd. v. Bank of Uganda* [1996] VI K.A.L.R. 42.

[22] *Transroad Ltd. v. Bank of Uganda* [1998] UGA J. No. 12 at [98].

current international climate.[23] Canadian courts have experimented with another ground of international competence, namely the real and substantial connection test.[24] This ground was unsuccessfully invoked in the South African case of *Supercat Incorporated v. Two Oceans Marine*.[25] The plaintiff sought enforcement of a Florida, USA judgment against the defendant South African company. The Florida court assumed jurisdiction on the basis that the tort involved, fraud, was committed within its jurisdiction. At the time of the action the defendant was neither resident nor domiciled in Florida. It, however, entered appearance, denied the jurisdiction of the court, and thereafter failed to proceed with its defence. The court held that the Florida court was not internationally competent under South African law. Counsel referred to several Canadian cases and argued that the traditional approach to the recognition of foreign judgments was obsolete and that the exigencies of international trade called for a new approach. The judge found the Canadian cases 'informative,' but felt 'not inclined or, sitting as a single judge, entitled to ignore the considerable weight of judicial authority in this country.'[26]

B. Public Policy

Public policy provides a defence against the enforcement of foreign judgments and the application of foreign *lex causae*. In the years under review, courts grappled with the defence and defined its scope.[27] In *Eden v. Pienaar*,[28] the respondent challenged the recognition and enforcement of an Israeli judgment as being contrary to South African public policy. The judgment contained a linkage provision, the effect of which was to ensure that depreciation of the Israeli currency did not redound to the benefit of the judgment debtor. The trial court refused enforcement on the grounds that the linkage provision escalated the face value of the debt to an unconscionable amount, and that the Israeli statute on which the action was based (the statute created liability for failure to negotiate in good faith) was contrary to South African law. In allowing the appeal, the court held that the linkage provision was an aspect of revalorisation, which increased the face value of the debt, but did

[23] See generally BRIGGS A., 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments', in: *Singapore Yearbook of International Law* 2004, p. 1-22.

[24] *Morgaurd Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077; *Beals v. Saldanha* [2003] 3 S.C.R. 416. See generally BLOM J./EDINGER E., 'The Chimera of the Real and Substantial Connection Test', in: *University of British Columbia Law Review* 2005, p. 373-422.

[25] 2001 (4) S.A. 27.

[26] *Supercat Incorporated v. Two Oceans Marine* 2001 (4) S.A. 27 at 31.

[27] See e.g. *Dale Power Systems plc v. Witt & Busch Ltd*. [2001] 8 N.W.L.R. 699 in which the court defined public policy as the community sense and common conscience extended and applied throughout the State to matters of public morals, health, safety, welfare and the like.

[28] 2001 (1) S.A. 158.

not affect its real value. The purchasing power of the debt remained the same and there was nothing unconscionable or *contra bonos mores* about the revalorisation. It was further held that the mere fact that a foreign statute embodied concepts not recognised by South African law did not of itself constitute a ground for refusing to enforce the judgment. There was nothing contrary to South African public policy in requiring a party to pay damages for not negotiating in good faith.

In *Patel v. Bank of Baroda*,[29] the appellant sought to set aside the registration of an English judgment on the grounds that it was contrary to Kenyan public policy, in that the guarantees on which the English judgment was founded were made at a time when the Exchange Control Act, Cap 113 (since repealed), was in force. The aim of the Act was to conserve foreign currency by requiring the minister's consent to foreign exchange transactions. The court held that public policy was ordinarily manifested in Acts of Parliament passed from time to time. But since the Act had been repealed, it was incorrect to claim that the minister's consent was still required merely because the guarantees were made before the repeal. The court was prepared to give full faith and credit to the judgments of English courts with the expectation that they too would give full faith and credit to the judgments of Kenyan courts.[30]

C. Enforcing Judgments against States

Two principal difficulties face plaintiffs who seek to enforce foreign judgments against states.[31] These are states' immunity from jurisdiction in actions to enforce foreign judgments, and immunity from execution of judgments. The Botswana case of *The Republic of Angola v. Springbok Investment (Pty) Ltd.*[32] was an application to set aside a garnishee order attaching the funds in the embassy's bank account to satisfy a default judgment given against the applicant. The applicant argued that the diplomatic account of a foreign state was immune from execution in civil proceedings according to the doctrine of sovereign immunity. The court set aside the order. It held that although there was no Botswana statute dealing with sovereign immunity, the rules of customary international law, including those of sovereign immunity, are automatically incorporated into Botswana law. Botswana adhered to the restrictive doctrine of sovereign immunity under which commercial transactions were exempt from sovereign immunity. But a judgment obtained in a process arising under a commercial transaction could not be executed on all the property of a foreign sovereign state. In this instance, there was no evidence that the account in question was used wholly or in part for commercial purposes. The account fell into

[29] [2001] 1 E.A. 189.

[30] For a recent English case dealing with the enforcement of a judgment from Kenya, see *Pattni v. Ali* [2006] UKPC 51.

[31] The cases cited in this section involved domestic judgments but the principles therein could be relevant in international cases.

[32] 2005 (2) B.L.R. 159.

the category of property needed to maintain the 'diplomatic functions and dignity' of the applicant and thus immune under international law from garnishment or attachment.

In the Ugandan case of *Emmanuel Bitwire v. The Republic of Zaire*,[33] the plaintiff successfully sued the Embassy of the Democratic Republic of Congo for the recovery of rent arrears, interests, mesne profits and costs. It sought execution of the judgment on premises held in the name of the embassy and occupied by its accountant and his family. The court held that for the premises to be immune from attachment in execution under article 30 (1) of the Vienna Convention on Diplomatic Relation of 1961, it must be shown that it was the private residence of a diplomatic agent. Staff, like the accountant, were not diplomatic agents. Accordingly, the premises were liable to attachment.

In *Frans Edward Prins Roothman v. President of the Republic of South Africa*,[34] the applicant sought the aid of the South African government to enforce a judgment on its behalf. The applicant obtained a judgment against the Democratic Republic of Congo in an action in South Africa in which the Democratic Republic of Congo submitted to jurisdiction. The applicant was unable to obtain full satisfaction of the judgment debt either within or outside South Africa. The applicant relied on various constitutional arguments, including the right of access to justice, the rule of law, and the duty of the state to ensure the effectiveness of its courts and to assist its citizens to enforce their rights. The applicant sought a declaratory order[35] that the state take reasonable steps to assist him to ensure compliance with the judgment. To the respondent, the matter was governed by the private international law regime on the enforcement of foreign judgments, and it was from that regime that the applicant should seek remedy. The court held that the state had created mechanisms for the enforcement of judgments against commercial creditors. There was no reason for the state to take additional steps in cases involving a commercial contract between a citizen and a foreign state. Thus, there was no duty on the state to intercede on the applicant's behalf. This is an important case. Had the applicant been successful, it would have set an interesting legal precedent. The constitutional provisions on which the applicant relied are found equally in the constitutions of many African countries. Admittedly, a state may, without any judicial compulsion, offer diplomatic assistance to its citizens to help them secure satisfaction of their judgment debt against other states.

In cases where a state is the plaintiff, a means of overcoming the difficulties of enforcing judgments against states is for the defendant to apply for the plaintiff state to be ordered to furnish security for costs. The Kenya case of *State of Israel v. Somen*[36] was a claim brought by the State of Israel against the defendants relating to a property in Nairobi. The court held that in light of the laws on diplomatic

[33] [1998] I K.A.L.R. 21.

[34] [2006] South African Supreme Court of Appeal 80.

[35] In the trial court, the applicant sought a structural interdict directing the state to ensure compliance with the judgment.

[36] [2001] L.L.R. 5932.

immunity, the defendants would have difficulties in executing for costs should they be successful in the suit. It accordingly ordered that the plaintiff furnish security for the costs of the defendants.

D. Limitation of Actions and Currency Conversion

The interaction between limitation periods, foreign currency rules and foreign judgment enforcement regimes was in issue in some of the cases.[37] In *Society of Lloyd's v. Charles Julian Burton Larby*,[38] the court addressed the issue of how long a party can take to register a judgment under Kenya's Foreign Judgments (Reciprocal Enforcement) Act.[39] On 10 March 2004, the applicant brought an application in which it sought to register an English judgment obtained on 11 March 1998. Section 5(1) of the Act provided that 'the judgment creditor may apply to the High Court to have that judgment registered within six years of the date of the judgment.' The issue was whether the application for registration should be filed within six years of the judgment or whether the registration should be completed within six years. The court held that time was predicated upon when the application was made, and not when the registration was completed, i.e. time stopped running when proceedings were instituted. If this was not the case, applicants who sought enforcement of foreign judgments would be disadvantaged by delays in the judicial process, something over which they often have little control. The case is important as a number of African countries have legislation for the registration of foreign judgments with provisions similar to the one at issue in this case.

In *Ssebaggala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd*.,[40] the applicant sought to register and enforce, in Kenya, a Ugandan judgment which was denominated in British pounds. The application was brought under the Foreign Judgment (Reciprocal Enforcement) Act.[41] Two issues that arose for determination were the currency in which the judgment was to be registered and the time for conversion of currency. The court held that under section 7 of the Act, a foreign currency judgment *may* be registered as a judgment for a sum payable in such sums in Kenya currency as are equivalent thereto on the basis of the rate of exchange prevailing at the time of registration. Also, the time of conversion was when the judgment was registered and not the date of enforcement.

---

[37] See e.g. *Eden v. Pienaar* 2001 (1) S.A. 158; *Society of Lloyd's v. Price* 2005 (3) S.A. 549; *Society of Lloyd's v. Price* 2006 (5) S.A. 393; *Society of Lloyd's v. Romahn* 2006 (4) S.A. 23.

[38] [2005] eK.L.R.

[39] Cap 43, Laws of Kenya. See also *Macaulay v. Raiffeisen Zentral Bank Osterreich Akiengesell Schaft (RBZ) of Austria* [2003] N.W.L.R. 282 on limitations and foreign judgments in Nigeria.

[40] [2000] L.L.R. 931.

[41] Cap 43, Laws of Kenya.

Currency conversion issues are of great financial significance to parties, especially in times of fluctuating exchange rates. Where a party seeks to register a foreign judgment, some statutes compel the conversion of the judgment into the currency of the enforcing forum.[42] Unlike Kenya's Act, there is no discretion to register the judgment in foreign currency. This is ironic since the courts in these countries have jurisdiction to give judgment in foreign currencies. It is suggested that, in future reform of these statutes, judgment creditors should be given the option to state in their application for registration whether they wish the judgment to be registered in the currency of the original judgment.[43]

E. International Arbitral Awards

As of July 2007, thirty African countries were parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[44] In some cases, applicants sought enforcement of arbitral awards under national legislation implementing the Convention.[45]

In *Seton Co. v. Silveroak Industries Ltd.*,[46] the South African court held that parties may be held to different standards depending on whether they were enforcing a foreign judgment or an arbitral award. To the court, there was a difference between the recognition of arbitral awards and the recognition of foreign judgments. When enforcing a foreign judgment, the position was normally that of a defendant who was an unwilling litigant under the vagaries of a foreign legal system. In the case of an arbitral award, the position was of parties who voluntarily contracted to submit their dispute to arbitration, and had a great deal of control

[42] Botswana: Judgments (International Enforcement) Act 1981 Ch. 11:04, sec. 5(5); Namibia: Enforcement of Foreign Civil Judgments Act 1994, Act 28 of 1994, sec. 3(4); Tanzania: Foreign Judgments (Reciprocal Enforcement Ordinance 1935, sec. 4(3); Ghana: Courts Act 1996, Act 459, sec. 82(7); Zambia: Foreign Judgment (Reciprocal Enforcement) Act, Chapter 76, sec. 4(3); Uganda: Foreign Judgment (Reciprocal Enforcement) Act, Chapter 9, sec. 3(3); Nigeria: Foreign Judgments (Reciprocal Enforcement) Act, Chapter 152 LFN 1990, sec. 4(3).

[43] See e.g. Australia: Foreign Judgment Act 1991, sec. 6(11)(a); New Zealand: Reciprocal Enforcement of Judgment Act, 1934 sec. 4(3).

[44] Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Senegal, South Africa, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (last visited 24 July 2007).

[45] *Seton Co. v. Silveroak Industries Ltd*. 2000 (2) S.A. 215; *Bauman, Hinde and Company Ltd. v. David Whitehead & Sons (MW) Ltd.* Civil MSCA Civil Appeal No. 17 of 1998, (Supreme Court of Appeal, Malawi, 2000); *Tanzania Cotton Marketing Board v. Cogecot Cotton Company SA* [1997] T.L.R. 165.

[46] 2000 (2) S.A. 215.

over the applicable substantive law, the arbitrator, location of arbitration and more. Accordingly, it was only in exceptional cases that the courts would not give effect to an arbitral award. The basis of the distinction is tenuous. There are foreign judgments founded on express submission like arbitration, and, like arbitration, parties can choose the applicable law in litigation. The importance of the distinction may lie in its signal to parties to prioritize arbitration in the resolution of disputes since it offers the prospect of easier enforcement.[47]

In *Christ for All Nations v. Apollo Insurance Co. Ltd.*,[48] the Kenyan court discussed the scope of the defence of public policy against the enforcement of arbitral awards. It held that an award might conflict with Kenya's public policy if it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The court held that the second category included the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. The third category included such considerations as whether the award was induced by corruption or fraud or was founded on a contract contrary to public morals. In *Glencore Grain Ltd. v. TSS Grain Millers Ltd.*,[49] the Kenya court held that the enforcement of an arbitral award which awarded compensation for a contract, the performance of which would have released onto the Kenyan market maize which had been certified as unfit for human consumption, was contrary to public policy.

In *Zimbabwe Electricity Supply Authority v. Maposa*,[50] the Zimbabwean court held that the approach to be adopted as regards the public policy defence was to construe it restrictively in order to preserve and recognise the basic objective of finality in all arbitrations. The defence should be upheld only if some fundamental principle of law or morality or justice was violated. In *Seton Co. v. Silveroak Industries Ltd.*[51] the South African court held that where extraneous evidence was necessary to prove an award was contrary to public policy, as in the case of fraud, it was better for the respondent to seek remedy in the jurisdiction where the award was made. To the court, this was in accordance with the spirit of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

---

[47] *Telcordia Technology Inc v. Telcome SA Ltd*, Case No 26/05, (Supreme Court of Appeal, South Africa, 2006) at [4] it was held that the South African courts have since the 19th century consistently given due deference to arbitral awards and that an approach was indeed part of a worldwide tradition. For a comment on this cases see BURROW A., 'Telcordia Technologies Inc. v. Telkom SA Ltd: A Fresh Start for International Arbitration in South Africa?', in: *Arbitration International* 2008, p. 337-343.

[48] [1999] L.L.R. 1635. The case related to the enforcement of a domestic arbitral award. The court interpret for the first time section 35(2)(b)(ii) of the Arbitration Act of 1995. Under section 2 of the Act, it applies to domestic arbitration and international arbitration.

[49] [2002] K.L.R 1.

[50] 1999 (2) Z.L.R. 452.

[51] 2000 (2) S.A. 215.

Awards and the pragmatic consideration that the courts of that forum were better able to assess whether the original award was obtained by fraud.

The South African case of *Telcordia Technology Inc. v. Telcome SA Ltd.*[52] was an application for review of an international arbitration award. The court discussed the relationship between the South African Constitution and Arbitration Act. It noted that while the constitutionality of the Act was not at issue, the Act must be read in the light of the provisions of the Bill of Rights and the meaning attributed to it must promote the spirit, purport and objects of the Bill of Rights. To the court, Article 34 of the Constitution,[53] on the right of access to court, did not prevent parties from defining, at least in private consensual disputes, what is fair for the purposes of their dispute. The rights contained in Article 34 may also be waived unless the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores*. Parties to a private dispute may, for instance, compromise their dispute and thereby forego all their rights under Article 34. By agreeing to arbitration, parties waive their rights *pro tanto*. They usually waive the right to a public hearing. They may even waive their right to an independent tribunal. Such a waiver was permissible and was not inimical to the fair trial guarantee of Article 34.

F. Recognition of Foreign Non-Money Orders

Non-money orders have increasingly become an important aspect of international litigation. Their recognition and enforcement can raise quite difficult problems, including extra-territoriality, sovereignty, the appropriate use of national judicial resources and the rights of third parties. In some cases, courts grapple with some of these issues.[54] In *Kobina Hagan v. Sam Aboagye Marfo*,[55] the plaintiff sought to tender, in the Ghana proceedings, a Statutory Declaration which the US Superior Court of the Judicial District of Waterbury in the State of Connecticut had ordered should not be used in any proceedings in the US or elsewhere. The defendant challenged the tender of the document. The court held that it would recognise the US restraining order and prevent the plaintiff from tendering the declaration in violation of the order. The court held that although there was no reciprocal arrangement between Ghana and the USA for the enforcement of each other's judgments, the fact that the US court had received and acted upon the statutory

[52] Case No 26/05 (Supreme Court of Appeal, South Africa, 2006).

[53] 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[54] See further the section on Foreign Evidence and Service Abroad (below).

[55] Suit No. M 745/02, (High Court of Justice, Ghana, 2002).

declaration which originated in Ghana,[56] and that both are common law countries, merited the recognition of the USA court order.

In *Minister of Water Affairs and Forestry v. Swissborough Diamonds Mines (Pty) Ltd.*,[57] subpoenas were issued out of the High Court of Lesotho for the applicants, South African state officials and representatives, to give evidence in an application before the court. They were also to produce certain documents in court. Some of the documents, for which privilege had been claimed, were being used in South African proceedings. Some were also official government documents. The subpoenas were endorsed by a magistrate in South Africa under Section 7 of the Foreign Courts Evidence Act 80 of 1962. The section allowed for the endorsement of subpoenas lawfully issued from designated countries, including Lesotho, to be enforced in South Africa under pain of criminal sanctions. The applicants applied for an order that the endorsement was null and void since Section 7 did not bind the state, its officials or representatives and also did not apply to subpoenas *duces tecum*. The court held that the section did not bind the state, its officials or representative. It also held that the Act was not intended to require a South African witness to take books and documents with him to a foreign country or court. This holding constrains the utility of the Act as a means of obtaining evidence from South Africa.

In *Mtui v. Mtui*,[58] both the applicant and respondent were Tanzanians who had married in Tanzania, but lived and had assets in Botswana. The respondent, the husband, obtained a decree of divorce from a Tanzanian court which also held that since the couple's assets were located in Botswana, it did not have jurisdiction to distribute those assets, and ordered that they should be distributed under Botswana law. In this action, the applicant sought an order from the High Court of Botswana that the court should apply Botswana law to distribute the matrimonial property. The court held that although there is no Botswana statute for the recognition of foreign divorce decrees, they are recognisable and enforceable under common law, and that only decrees granted by the courts of the domicile of the parties at the time of their marriage should be recognised. It further held that since the parties were domiciled in Tanzania, the Tanzanian court was competent to grant the decree, but it did not have jurisdiction to distribute the Botswana assets, and those assets should be distributed under Botswana law.

[56] This was an irrelevant consideration since the document was not a Ghanaian court judgment or order.

[57] 1999 (2) S.A. 279.

[58] 2000 (1) B.L.R. 406.

II. International Litigation Procedure, Judicial and Administrative Cooperation

A. International Child Abduction

As of July 2007, four African countries were parties to the Hague Convention on the Civil Aspects of International Child Abduction.[59] In a number of cases, applicants sought the return of children wrongly removed from their countries of habitual residence.[60]

In *Sonderup v Tondelli*,[61] the Hague Convention on the Civil Aspects of International Child Abduction Act, which is the South African legislation implementing the Convention, survived a constitutional challenge. The respondent argued that the Act obliged the courts to act in a manner inconsistent with article 28(2) of the Constitution which required that a child's best interests were of paramount importance in every matter concerning the child. The court rejected the challenge. It reasoned that the Convention clearly recognised and safeguarded the best interests of the child. Even assuming an inconsistency, it was prepared to hold that it could be justified under Article 36 of the Constitution which required a proportionality analysis and the weighing up of relevant factors in deciding the justifiability of a limitation of fundamental rights. For countries which may potentially become parties to the Convention, the judgment is significant since provisions comparable to Articles 28(2) and 36 are found in the constitutions or statutes of other African countries.

The decision in *Sonderup*[62] does not mean that the best interest of the child has no relevance in applications under the Convention. In *Senior Family Advocate,*

---

[59] South Africa, Burkina Faso, Mauritius, Zimbabwe.

[60] See e.g. *WS v. LS* 2000 (4) S.A. 104; *Sonderup v. Tondelli* 2001 (1) S.A. 1171; *Smith v. Smith* 2001 (3) S.A. 841; *Chief Family Advocate v. G* 2003 (2) S.A. 599; *Pennello v. Pennello (Chief Family Advocate as Amicus Curia)* 2004 (3) S.A. 117; *Senior Family Advocate, Cape Town v. Houtman* 2004 (6) S.A. 274; *Central Authority v. Houwert* Case No 262/06, (Supreme Court of Appeal, South Africa, 2007) [2007] S.C.A 88; *The Family Advocate of Cape Town v. Kudzaishe Chirume*, Case No 6090/05 (High Court, South Africa, 2005); *Central Authority (South Africa) v. A* 2007 (5) S.A. 501; *Secretary of State v. Parker* 1998 (2) Z.L.R. 400; *Kumalo v. Kumalo*, HC 226 1/04 (High Court, Zimbabwe, 2004); *Posen v. Posen*, HC 16238/98 (High Court, Zimbabwe, 2002). In *S v. H* 2007 (3) S.A. 330, it was held that a South African court may be the holder of rights of custody for the purposes of Article 3 of the Hague Convention. Such rights arise where an application for custody is served and the application is pending. In this instance it was held that the father of a child who had been removed from South Africa to Switzerland, and who, under South African law, did not yet have rights of custody but had a pending application for that purpose, was entitled, prior to his application in Switzerland under the Hague Convention for the return of the child, to a declaration that rights of custody were vested in the South African court.

[61] 2001 (1) S.A. 1171.

[62] 2001 (1) S.A. 1171.

Cape Town v. Houtman,[63] the court cautioned against blindly following cases from other jurisdictions given the special dictates of the South African Constitution. The courts have, however, emphasised that in an application under the Convention, the best interest of the child analysis should not be pursued as in a custody application.[64] The Convention operates on the presumption that the best interest of the child is served by ordering the return of the wrongfully removed child to his place of habitual residence.

A contentious issue considered in the cases was the degree of proof required of a party who wished to rely on the Convention's Article 13 defences against the return of the child.[65] In *WS v. LS*,[66] the court held that the onus on a person opposing an application under the article was no greater than that ordinarily applicable in civil cases. The phrase 'grave risk' used in Article 13 did not introduce an onus above that normally applicable, but meant there had to be a serious or well-founded reason why the situation of the child would be intolerable if the application were granted. To the court, the high test of intolerability set by English courts was not required under South African law given the country's Bill of Rights.[67]

An issue that arises from the decision in *B v. S*[68] is the effect of the Convention, or becoming a party to it, on the inherent jurisdiction of the country's courts. Can they, where they have jurisdiction in domestic law, make an *in personam* order against the person who has wrongfully removed a child to another Convention country, or do they have to follow the Convention and leave it to the latter's court to order the return? In *B v. S*,[69] the court held that it had no jurisdiction to order a person resident in the USA to return to South Africa a child who had been removed from South Africa to the USA. To the court, such an order would be ineffective since the court could not enforce it and, under the Convention, the court which should order the child's return was the appropriate USA court. A similar conclusion had been reached in the earlier case of *Brown v. Stone*.[70] In this case, the

---

[63] 2004 (6) S.A. 274.

[64] In *Kuperman v. Posen* 2001 (1) Z.L.R. 208, it was held that the conduct of an applicant for custody who previously removed the child in question from Zimbabwe to Israel, and who was subsequently ordered by the Israeli court to return the children to Zimbabwe, was a significant consideration in the determination of an application for custody on the child now residing in Zimbabwe.

[65] Under Article 13, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[66] 2000 (4) S.A. 104.

[67] Compare *Secretary of State v. Parker* 1998 (2) Z.L.R. 400.

[68] 2006 (5) S.A. 540.

[69] 2006 (5) S.A. 540.

[70] Case No 489/05, (Supreme Court of Appeal, South Africa, 2005).

court *a quo* made an interim custody order to the respondent's parents. It also, ordered that the applicant, a South African resident in the USA, return their child, wrongfully retained in the USA, to South Africa. The South African Supreme Court of Appeal held that the order that the child be returned was ineffective in that it could not be enforced by the court *a quo*, and therefore it had no jurisdiction to make such an order. To the court, it was for the judicial and administrative authorities in the USA to order the return of the child to South Africa, and to determine under what conditions the return should take place.

The question left unanswered by *B v. S* and *Brown* is what happens if the foreign, in this case USA, court refused to order the return the child, but the South African court had *in personam* jurisdiction over the person who removed the child to the foreign jurisdiction? Can it order that person to return the child?[71] Arguably, Article 18 of the Convention, which provides that it does not 'limit the power of a judicial or administrative authority to order the return of the child at any time', suggests they retain this jurisdiction. If this is the case, it raises the prospect of conflicting judgments between parties to the Convention. This can adversely affect the operation of the Convention.

Another issue that arises from the cases is the interaction between the Convention and national civil procedure rules, especially the effect of the latter on the expedited return of wrongfully removed children. The unsuccessful argument in *Secretary for Justice v. Parker*[72] that, in applications involving children, rule 249 of the Zimbabwe Rules of Court required the appointment of a curator *ad litem* to investigate and submit a report for consideration was one instance of this.[73] Such a course would have delayed the proceedings. The fact that one can appeal a decision ordering the return of a child, or apply for judicial review of a decision of a Central Authority to request a return, are additional examples.[74] The Convention does not

[71] See e.g. *G v. G* 2003 (5) S.A. 396 in which the Zimbabwe High Court ordered the defendant in an action for divorce to return to Zimbabwe children of the marriage whom she had unlawfully taken to California.

[72] 1999(2) Z.L.R. 400.

[73] 1999(2) Z.L.R. 400, 403. However, the court accepted that there may be instances in Convention application where they may be assisted by a specialist reports, for example touching on the health of the minor.

[74] An interesting comparative case in this respect is *Kolbatschenko v. King No* 2001 (4) S.A. 336. The underlying cause in this application was in criminal law. The ruling of the court has, however, relevance for international civil procedures, especially in instances where the state or its apparatus have to intervene in something outside their jurisdiction. A principal argument in the case was that as requests for international mutual assistance are directed to foreign states, the making of such requests is essentially a political act in the realm of international relations, and hence constitutes the non-justiciable conduct of foreign affairs by the Republic. The court held that the issue of letters of request is an administrative action and it is only in highly exceptional cases that a court will adopt a hands-off approach where discretion has been exercised or where an executive or administrative decision has been made which directly affects the rights of an individual applicant. This suggests that, potentially, a request by a Central Authority for the return of a child may be open to judicial review.

purport to override national civil procedure rules such as those on the right of appeal and judicial review, which sometimes have constitutional foundations. In *Central Authority v. Houwert*,[75] the South African court was troubled by the three-and-a-half years which had elapsed from the time of the wrongful retention. The delay was in part attributable to national procedural rules.[76] Compliance with these rules may, in large measure, be unavoidable. But where there is an element of discretion in their implementation, it should be exercised to facilitate the expeditious return of the child as envisaged under the Convention.

For countries that are not parties to the Convention, the courts may order the return of a child who has been wrongfully removed from their jurisdiction in instance where they have *in personam* jurisdiction over the removing person. In *Sello v. Sello (No. 2)*,[77] the Botswana court ordered the return of two children who had been removed from Botswana to Lesotho. The court rejected the contention that since the children were outside its jurisdiction, it had no jurisdiction over the matter. This *in personam* jurisdiction should be exercised with caution. It involves a positive act affecting a child within a foreign state. The removal is not likely to go unnoticed by the authorities of that state, including its courts who, as guardians of children within the jurisdiction, can restrain the removal. This can put the removing person in an insurmountable legal dilemma; each option he pursues may be visited with contempt of court proceedings. This is a recipe for international judicial conflicts and the impact on the child can be adverse. Consequently, it is suggested that the considerations that underlie extra-territorial remedies relating to acts and things within a foreign state should not be routinely extended to cases involving children.

B. Inter-Country Adoption

As of July 2007, eight African countries are parties to the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption.[78] A number of cases involved inter-country child adoption.[79] Most of these cases were from Kenya. This is not to suggest that inter-country adoptions are not taking place in other jurisdictions. The low reporting from other countries may be attributed to

[75] Case No 262/06 (Supreme Court of Appeal, South Africa, 2007), [2007] S.C.A. 88.

[76] The court also found serious managerial, training, and human resource shortfalls at the South African Central Authority. It directed a copy of the judgment be sent to the Minister of Justice and Constitutional Development and the Director-General for attention.

[77] 1999 (2) B.L.R. 104, on appeal from *Sello v. Sello* 1998 B.L.R. 502.

[78] South Africa, Burkina Faso, Burundi, Guinea, Kenya, Madagascar, Mali, Mauritius.

[79] In *Re SK (An Infant)* [2007] eK.L.R.; In *Re Baby P. A. (Infant)* [2005] eK.L.R.; In *Re EJ (An Infant)* [2004] eK.L.R.; In *Re A.A.R.E (A Child)* [2005] eK.L.R.; In *Re EC (an Infant)* [2006] eK.L.R.; In *Re Baby W B (A Child)* [2004] eK.L.R.; In *Re AW (A Child)* [2006] eK.L.R.; In *Re Edith Nassaazi* [1997] VI K.A.L.R. 42.

the fact that, by the time adoption applications reach the court for approval, they might have gone through many procedures of extra-judicial scrutiny such that they do not raise serious reportable issues.[80]

During the years under review, inter-country adoptions were judicially sanctioned in South Africa and Namibia after years of statutory prohibition. *Detmold v. Minister of Health and Social Services*[81] decided that section 71(2)(f) of the Children's Act which precluded non-Namibians from adopting Namibia children was unconstitutional. This opened up the prospect of foreigners adopting Namibian children. The South African Constitutional Court came to a similar conclusion in an earlier case in respect of a similar provision.[82]

A fundamental issue in inter-country adoption is the need to ensure adequate protections for the adopted child, including ensuring that the adoption order will be recognised abroad. In *De Gree v. Webb*,[83] the South African Supreme Court of Appeal emphasised that while the benevolent and personal motives of adopting parents were important, they cannot displace the correct procedures laid down in law to ensure the protection of the child to be adopted. It held that non-South African citizens who sought to adopt a South African child were required to comply with the adoption machinery provided for in the Children Care Act 74 of 1983, and had to apply to the Children's Court.[84] They might not circumvent those provisions by approaching the High Court for sole custody and sole guardianship of the child concerned, with a view to later adopting the child abroad.[85]

When the *De Gree* decision was appealed in the South African Constitutional Court, the court affirmed the Court of Appeal's decision. It however held that, in exceptional cases, by-passing the Children's Court procedure could be justified. It further held that the starting-off point and the overall guiding principle in inter-country adoption cases must always be that there are powerful considerations favouring children growing up in the country and community of their birth. This is the subsidiarity principle. However, the subsidiarity principle must be seen as subsidiary to the paramountcy principle which makes the best interests of the child paramount in all matters affecting the child. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters, such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.

---

[80] All the Kenya cases were reported online where, unlike law reports, there is room to report almost every case.

[81] 2004 N.R. 175.

[82] *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) S.A. 422.

[83] 2006 (6) S.A. 51 affirmed in *De Gree v. Webb* 2007 (5) S.A. 184.

[84] As at December 2007 proposed amendment to this Act was yet to come into force.

[85] See *AD v. DW* 2008 (3) S.A. 183 at [34].

From an African perspective, the *De Gree* decisions are particularly important since, as regards inter-country adoptions, Africa states can be considered as sending states. With the socioeconomic challenges on the continent, the tendency to 'get the child out', and short cut the processes of adoption, is real. Indeed, after examining the Kenyan cases, one cannot but be worried at the cursory manner in which such a weighty subject was approached. Fundamental issues such as the recognition of the adoption in foreign countries and the legal status and rights of the adopted child in such foreign countries did not receive any detailed attention in the cases. Perhaps it was assumed that with the procedures outlined in the Children Act 2001 and the Children (Adoption) Regulation 2005, by the time an application is made to the court, these issues would have been resolved.

In only one of the Kenya cases examined was the application declined. The rather terse nature of the judgments prevents me from concluding that the result of the others could have been different. *Re A.A.R.E (A Child)*[86] was an application for leave to institute adoption proceedings in respect of a Kenyan child. The applicant, a citizen of Spain and a Catholic priest, had been resident in Kenya since 1997. He had lived with the child since 2002. The court declined the application. It held that section 158 (3)(e) of the Children Act 2001, which prohibited adoption orders in favour of sole foreign male applicants, was intended to protect children from such applicants who were likely to take them out of its jurisdiction. The section was also meant to protect children from being adopted by a single foreigner without a family. Although the Act did not define 'foreign,' the court accepted counsel's argument that 'foreign' meant not a citizen of Kenya. Thus, although being a resident in Kenya for 7 years, as was the case with the applicant, he was still considered foreign. It is hoped that with Kenya's recent ratification of The Hague Adoption Convention, greater protection will be accorded to children who are adopted,[87] and that courts will be more careful and detailed in the scrutiny of adoption applications. Other African countries are also encouraged to ratify this Convention which deals with an issue that should be considered important for all African children.

C. Foreign Evidence and Service Abroad

A formidable challenge for the international administration of justice is putting the wheels of justice in motion, and ensuring that parties have access to all available evidence within and outside the jurisdiction to make their case. The service of documents and the taking of evidence abroad, and the rules relating to the introduction of foreign documents in domestic judicial proceedings, are aspects of this challenge. African courts have grappled with this challenge. Some countries are parties to a number of Conventions regulating these issues. As of July 2007, nine are parties to the Hague Convention on Abolishing the Requirement of

[86] [2005] eK.L.R.

[87] Kenya ratified the Convention in February 2007 and it entered into force in June 2007.

Legalisation for Foreign Public Documents,[88] four to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[89] and two to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[90]

In the Kenyan case of *Fonville v. Kelly III*,[91] the difficulties parties face in serving defendants abroad, and the consequences of trying to circumvent the often slow existing procedures for service, were brought to the fore. The case involved a dispute over a stock purchase agreement executed in the USA which purported to sell shares in Fonville Enterprises Incorporated, a company incorporated under the laws of Texas, and its two Kenyan subsidiaries. Three of the defendants were domiciled in the USA. The defendants had been served with a notice of summons via DHL, a private international courier company. They filed a defence under protest and argued, *inter alia*, that proper and lawful service of the summons had not been effected upon them. The court held that the order of the court *a quo*, which gave leave to serve out of the jurisdiction through DHL, was a nullity. The correct procedure under Order V Rule 27 was that the plaintiff should have made a formal request in the prescribed form. The Chief Justice would then have forwarded the notice of summons to the Minister of Foreign Affairs in the prescribed form for transmission through diplomatic channels to the government of the USA requesting service. The USA government would then have communicated service or acted otherwise through diplomatic channels. This case can be contrasted with the Tanzanian case of *Willow Investment v. Mbomba Ntumba*[92] where the court directed that service be effected on the applicant in Zaire through DHL. The court treated this as service by post governed by Rule 30 of Order 5 of the Civil Procedure Code.

The issue of admissibility of foreign affidavits was raised in the Kenyan cases of *Microsoft Corporation v. Mitsumi Computer Garage Ltd.*[93] and *Pastificio Lucio Garofalo SPA v. Security & Fire Equipment Co*.[94] In *Pastificio*, the court held that there was no specific Kenya legislation dealing with the formalities and admissibility in court of affidavits taken abroad. However, under Section 88 of the Evidence Act Cap 80,[95] and the relevant English Rules,[96] affidavits taken in Com-

[88] South Africa, Botswana, Lesotho, Liberia, Malawi, Mauritius, Namibia, Seychelles, Swaziland. The interaction between this convention and Namibian law was an issue in *S. v. Koch* 2006 (2) N.R. 513.

[89] Egypt, Botswana, Malawi, Seychelles.

[90] South Africa, Seychelles.

[91] [2002] 1 E.A. 71.

[92] [1997] T.L.R. 47.

[93] [2001] K.L.R. 470.

[94] [2001] K.L.R. 483.

[95] When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by

monwealth countries are admissible in Kenya without proof of the stamp and seal of the official position of the person taking the affidavit. But there is no such presumption in favour of documents made outside the Commonwealth. Thus, in this instance, it was held that an affidavit made in Naples, Italy had to be proved by affidavit or otherwise to have been taken by a notary public in Italy and the signature and seal of attestation affixed thereto must be that of the notary public. In *Microsoft* an affidavit taken in the UK by a Microsoft employee was held admissible. As regards the formal validity of such affidavits, it was held that, in the absence of legislation, it suffices that the document is valid according to the laws of England.

In *Mashchinen Frommer GmbH & CO KG v. Trisave Engineering & Machinery Supplies (Pty) Ltd*.[97] and *Blanchard, Krasner & French v. Evans*,[98] the South African courts discussed the nature, relevance and consequence of the rules on the authentication of foreign documents. They held that the rules were designed to ensure that documents were genuine before they could be used in South Africa, and that the prescribed formalities were not mandatory or exhaustive, but merely declaratory. To the courts, the genuineness of foreign documents could be proved on a balance of probabilities by direct or circumstantial evidence or both.[99] The approach of the South African courts can be contrasted with that of the Zambia Supreme Court in *Lamus Agricultural Services Co. Ltd. v. Gwembe Valley Dev Ltd*.[100] The court held that the rules on authentication of foreign documents were mandatory and failure to authenticate a document rendered it unusable for any purpose at all in Zambia. It further held a document needing authentication might be authenticated at anytime, but it should not have retrospective effect. In *Slyvanus Juxon-Smith v. KLM Royal Dutch Airline*,[101] the Supreme Court of Ghana held that no foreign official document was admissible in evidence without authentication. The court may exclude such evidence irrespective of whether or not there had been any objection to its admissibility.

While foreign evidence may be critical to the proper determination of a case, there are national legal limits on how and when such evidence can be taken.

---

whom it purports to be signed – (a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and (b) the document shall be admissible for the same purpose for which it would be admissible in England.

[96] Order 41 Rule 12 of the Rules of the Supreme Court.

[97] 2003 (6) S.A. 69.

[98] 2004 (4) S.A. 427. See also *Chinatex Oriental Trading Co. v. Erskine* 1998 (4) S.A. 1087.

[99] See also *Zhou v. Hong* 2006 (1) N.R. 85. This case also addresses the issue of using translated foreign language documents (in this instance a document in Chinese) in Namibian proceedings.

[100] [1999] Zam. L.R. 1.

[101] Civil Appeal No. J4/19/2005 (Supreme Court of Justice, Ghana).

In *Kells v. Ako Adjei*,[102] it was held that under Ghana's civil procedure rules, a judge had no power to move to a foreign country to take evidence from any witness. It did not matter that the evidence was taken on the premises of the Ghana High Commission. If evidence was to be taken abroad from a witness, the judge's duty was to decide whether such evidence was necessary. He must then make the necessary order for the said evidence to be taken on a commission by writ before a Commissioner, or a request to examine in lieu of a commission.

These cases bring into question the adequacy of existing rules to deal with the ever-changing aspects and demands of international litigation. As already noted, not many African countries are party to international conventions in the area. Also, from the cases reported, it appears that the relevant national legal infrastructure is absent or not convenient to use. The service of documents and taking of evidence abroad, the admissibility of foreign evidence, and the need for authentication may not be the only problematic areas as far as international civil procedure in Africa is concerned. In *Raytheon Aircraft*,[103] the Kenyan court expressed concern about the absence of rules of court on how a defendant, who had been sued in Kenya in breach of a choice of forum agreement, can challenge the jurisdiction of the High Court. To the court, this was an 'important area of litigation' which could no longer be left uncertain. It recommended that the Rules Committee adopt appropriate comprehensive rules of procedure for this area to aid the administration of justice.

D. Foreign Plaintiffs and Security for Costs

Foreign plaintiffs, including sovereign states, may be required to deposit security for costs in litigation against local defendants.[104] In the Botswana case of *Geborone v. Lowrenco*,[105] it was held that an application for rescission of a judgment given against the respondent *peregrinus* could not be viewed as amounting to an initiation of proceeding, and therefore the respondent could not be compelled to give security for costs. In *Botswana Insurance Company Ltd. v. Matan Trucking Company*,[106] the applicant, a Botswana-registered company, instituted proceedings in Botswana against the respondents (as defendants) who were resident in Zimbabwe. The applicant applied for security for costs from the respondents. It was held that the application was misconceived as it was not the respondents (defendants) who had come into the jurisdiction to call in aid to its judicial system. The respondents had been dragged into it by the applicant. Therefore, the latter could not be heard to complain about its own vulnerable position when it chose the forum in the first place.

---

[102] Case No. CA 8/2000 (Supreme Court, Ghana).

[103] [2005] eK.L.R. at 9-10.

[104] *State of Israel v. Somen* [2001] L.L.R 5932.

[105] 1999 (1) B.L.R. 11.

[106] 2003 (2) B.L.R. 380.

The deposit of security for costs can be a huge financial burden on foreign litigants. It can potentially force some to abandon litigation or seek a settlement. It speaks ill of a legal system if foreigners believe that applications for security for costs are being used to obstruct legitimate claims. It is suggested that courts must exercise discretion to grant security for costs reasonably to ensure that, while protecting the legitimate interests of domestic defendants against frivolous claims, the deposit of security for costs does not cause undue hardship to foreign plaintiffs in a manner that defeats the cause of justice.[107]

In *Fasco Trading Co Ltd. v. Goodearth Ltd*.[108] the defendant prayed that the plaintiff, a foreign company registered in Japan, be made to furnish security for costs under Order 25 Rule 1 of the Kenya Civil Procedure Rules. The plaintiff had no local representative or assets in Kenya. The court held that the granting of security for costs was entirely at its discretion. In this instance, the court took into account the fact that the plaintiff was a foreign company, that it had no place of business or assets in Kenya, and that the Foreign Judgments (Reciprocal Enforcement) Act did not apply between Kenya and Japan.[109] It is interesting that the judge considered the foreign judgment enforcement regime as a relevant factor in this application.[110] It shows the court's appreciation of the ever-present interconnectedness of all the branches of private international law. Unfortunately, the judge did not look beyond the statute to consider whether, outside any reciprocal arrangement between Kenya and Japan, the Japanese courts would have enforced a Kenyan judgment against the Japanese plaintiff. Admittedly, even where the Japanese courts might have enforced such a judgment, it is debatable whether a domestic defendant should be put to the expense and inconvenience of litigating in Japan to enforce a Kenyan judgment.

In the light of the numerous regional economic integration initiatives in Africa, it is heart-warming that residence in the economic region has also become a relevant consideration in applications for security for costs. In the Ugandan case of *Shah v. Manurama Ltd*.,[111] the defendant brought an application seeking an order requiring the plaintiff to pay security for costs. The plaintiff was resident in Kenya. The defendant argued that the fact that the plaintiff was resident abroad was prima facie ground for ordering payment of costs. The plaintiff argued that given the re-

---

[107] See generally, *B & W Industrial Technology Ltd. V. Baroutsos* 2006 (5) S.A. 135; SCHULZE C., 'Should a Peregrine Plaintiff Furnish Security for Costs for the Counterclaim of an Incola,' in: *South African Mercantile Law Journal* 393-399.

[108] [2000] L.L.R. 1236.

[109] In the *Ugandan case of Noble Builders (U) Ltd. v. Sandhu* [2004] 2 E.A. 228, the court came to a similar conclusion against the Canadian respondent who had no property or investment in Kenya.

[110] See also *Parmex Ltd. v. Austin & Partners Ltd.* [2006] eK.L.R. It was held that the existence of a scheme for the enforcement of judgments between the two countries affected is a relevant consideration in the exercise of the court's discretion to grant security for costs but it is in no way conclusive.

[111] [2003] E.A. 294.

establishment of the East African Community (EAC),[112] the question of residence for the purpose of ordering security for cost needed re-examination. The court denied the application. It reasoned that, in East Africa, there could no longer be an automatic and inflexible presumption for the courts to order security for costs with regard to a plaintiff's resident in the EAC. To the Ugandan court, the fact of EAC residence 'begs for a fresh re-evaluation of our judicial thinking' as regards the implementation of the law requiring plaintiffs to pay security for costs. Among the factors that the court considered in coming to its decision were that the Treaty establishing the East African Community[113] made express provision for the unification and harmonization of the laws of the partner States, including standardization of the judgments of courts within the Community and establishment of a common bar (that is cross-border legal practice) in the partner States, and the existence of a regime for the reciprocal enforcement of judgments among the member states. *Shah* can be contrasted with the Kenyan case of *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.*[114] In *Healthwise*, the Kenyan court rejected the applicant's argument that it was a resident of the EAC and therefore the defendant would have no difficulties in recovering any costs that may be awarded in the suit.

III. Lessons from the Cases Studied

A. Introduction

In his Hague Academy of International Law lecture, Professor Uche called for the development of a 'genuinely African-based and African-influenced work on the conflict of laws.'[115] He described it as a work which was not merely a reproduction of the distinguished works of Professors Cheshire, Dicey and Morris interlaced with African cases. In my opinion, such work, and I include here judicial decisions, while not discounting the relevance of extra-African sources, should take its principal sources of law (case-law, legislation and academic commentary) from Africa. It should also situate its discourse within the context of the present challenges facing Africa. These challenges include regional economic integration, promoting trade and development, harmonization of laws, immigration, constitutionalism, human rights and legal pluralism. Private international law can make contributions

[112] The EAC currently consist of Kenya, Uganda, Tanzania, Burundi and Rwanda.

[113] *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 United Nations Treaty Series I-37437.

[114] [2001] L.L.R. 1279.

[115] UCHE U.U., 'Conflicts of Laws in a Multi-Ethnic Setting: Lessons from Anglophone Africa', in: *Recueil des Cours* 1991, p. 273. Compare Gonidec P.F., 'Towards a Treatise of African International Law', in: African Journal of International and Comparative Law 1997, p. 807-821 (suggesting that an 'African international law' regime has emerged.

in addressing issues emanating from these challenges. Concomitantly, these challenges will impact private international law. Indeed, I argue that in addition to a 'genuinely African-based and African-influenced work on the conflict of laws', Africa also needs to develop regional and perhaps continental regimes of private international law.

A principal source of private international law is judicial decisions. While some countries and regions of the world have experienced increased emphasis on treaties and legislation,[116] Africa and African legal systems have largely remained insulated from these experiences. Thus, it is important that the development of an African private international law regime pays close attention to case law. As noted in Part I of this work, one difficulty in doing this is that of getting access to judgments. Law reports are seldom available outside their country of origin. Even where they are, they are rarely up-to-date. It is therefore unsurprising, but nonetheless unfortunate, that no attempt has been made to systematically record or study African private international law cases.[117] An effect of this access problem is that the existing African texts are jurisdictionally constrained.[118] They tend to focus on one country and seldom draw on decisions from other jurisdictions or legal traditions.[119] With fifty-three countries and multiple legal traditions,[120] the development of an African private international law regime will require both academic and judicial awareness of materials outside the comfort of one's country.

It was against this background that I set out to record the last decade's judicial decisions in Commonwealth Africa. So far, I have chronicled, with some modest analysis, over three hundred and fifty cases from thirteen countries.[121] In this concluding section, I discuss a number of issues and draw out lessons emanating from this work.

---

[116] See e.g. ZHU W., 'China's Codification of the Conflict of Laws: Publication of a Draft Text', in: *Journal of Private International Law* 2007, p. 283-308; FIORINI A., 'The Codification of Private International Law: The Belgian Experience', in: *International and Comparative Law Quarterly* 2005, p. 499-519.

[117] An exception to this may be KUTNER, P.B., *Common Law in Southern Africa: Conflict of Laws and Tort Precedents*, New York 1990.

[118] The only recent text that is multi-jurisdictional is SCHULZE C., *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments*, UNISA Press 2005. The countries studied are Botswana, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zambia.

[119] See e.g. FORSYTH C.F., *Private International Law the Modern Roman Dutch Law including the Jurisdiction of the High Court*, Cape Town 2003; KIGGUNDU J., *Private International Law in Botswana, Cases and Materials*, Gabarone 2002.

[120] Common law, Roman-Dutch law, Civil law, Islamic law and Customary law traditions.

[121] The only former British colonies and common law jurisdictions not studied were Gambia and Sierra Leone. In the case of Sierra Leone, the period under review overlapped with the country's civil war, and it can therefore be assumed that nothing of much significance for private international law would have happened over the period.

B. Level of Inter-African Private International Law Problems

Let us begin from home. How often did African legal systems engage with each other on private international law issues? Did they assume jurisdiction over persons domiciled or resident in each other's jurisdiction? Did they apply each other's laws? Did they assist in judicial proceedings in each other's countries? And, did they enforce each other's judgments? These questions are important. Private international law provides a barometer for measuring the extent to which a country's legal system interacts with other legal systems through the medium of litigation. It creates linkages between legal systems without unifying them. As legal systems become more interconnected and their citizens interact, so the number of private international law issues should, in theory, increase and the need to address those issues should become more immediate. Admittedly, this is only one of the means through which legal systems interact. Even if it was the only means, it would be unlikely to give a wholly accurate picture. Many transnational disputes do not make it to the courts, and for those which do, the court may miss the private international law issue at stake.[122]

Africans have been promoting African unity for over forty years.[123] Regional economic integration processes in Africa also date back to 1910 when the Southern Africa Customs Union was formed. So what have the last ten years taught us, through the prism of inter-African private international law problems, about how interconnected African legal systems are? From the cases examined one thing stands out in this regard: just a small number – less than ten percent – involved inter-Africa parties, judgments of other African courts or the laws of other African countries.[124]

One difficult issue in the inter-African cases was the enforcement of foreign judgments.[125] In a few cases, judgments from African countries were denied

[122] See e.g. *Mohammed Ali v. Abdullahim Maasai* [2005] eK.L.R., where the Kenyan court failed to appreciate the choice of law issue at stake in a case involving an accident in Uganda.

[123] The Organisation of African Unity (now the African Union) was established in 1963. Under article 2(1)(a) of the Charter, a principal purpose of the organisation was to 'promote the unity and solidarity of the African States.'

[124] See e.g. *Ssebaggala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd*. [2000] L.L.R. 931(enforcement of judgment from Uganda); *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47 (enforcement of judgment from Zaire); *Mtui v. Mtui* 2000 (1) B.L.R. 406 (recognition of divorce decree from Tanzania); *Molly Kiwanuka v. Samuel Muwanga* [1999] Swaziland High Court 13 (maintenance of a child in Uganda); *Sello v. Sello (No 2)* 1999 (2) B.L.R. 104 (order to return child in Lesotho to Botswana).

[125] For an example outside the limits of the years under review, see *Italframe Ltd. v. Mediterranean Shipping Company* [1986] K.L.R. 54, where the Kenya court set aside the registration of a judgment from the High Court of Tanzania on the ground that Kenya's Foreign Judgment Act Cap 43 referred to the High Court of Tanganyika not the High Court of Tanzania.

recognition or enforcement in sister African countries.[126] In some, this was due to the fact that there was no reciprocal judgment enforcement regime between the relevant countries.[127] These judgments reflect a wider problem, which is that, under the statutes on enforcement (through registration) of foreign judgments in the countries studied, not many African countries are designated to benefit from the regime.[128]

After years of promoting economic integration and African unity, this is worrying. The statutes deny judgments from other Africa countries that expedited and simplified statutory procedures for enforcement of foreign judgments. To be certain, it is not being argued here that judgments from every African country must be enforced in every other African country. The argument is that, if a more simplified and expedited procedure for enforcing foreign judgments was available, in this instance through the registration of judgments, then one would expect that the executive,[129] in their 'determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States',[130] would make the

[126] *Minister of Water Affairs and Forestry v. Swissborough Diamonds Mines (Pty) Ltd*. 1999 (2) S.A. 279 where the South African court refused to enforce subpoenas issued out of the High Court of Lesotho for the applicants to give evidence in an application before the Lesotho court.

[127] *Heyns v. Demetriou* [2001] Malawi High Court 52 (a South African judgment could not be registered under Malawi's British and Commonwealth Judgments Act, 1922 and the Judgment Extension Act 1922). *Barclays Bank of Swaziland v. Koch* 1997 B.L.R. 1294 (a Swaziland judgment could not be enforced under Botswana's Judgments (International Enforcement) Act (Cap 11: 04) since it was not registerable under section 3 of the Act). See also *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47 (the Tanzanian court refused to enforce a judgment from Zaire); *SDV Transmi (Tanzania) Ltd. v. MS STE Datco* Civil Application No. 97 of 2004 (Tanzania, Court of Appeal 2004) where the absence of a regime for the reciprocal enforcement of judgments between Tanzania and the Democratic Republic of Congo was the determinative consideration that made the court grant a stay of execution in favour of the applicant against the DRC resident respondent judgment creditor who had no assets in Tanzania.

[128] For example, South Africa's regime designates only Namibia; Namibia's regime designates only South Africa; Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya, and Tanzania; Ghana's designates only Senegal (First Schedule of Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument, 1993 (LI 1575)); Tanzania's regime names (Lesotho, Botswana, Mauritius, Zambia, Seychelles, Somalia, Zimbabwe, and the Kingdom of Swaziland (Reciprocal Enforcement of Foreign Judgments Order (GN No 8 & 9 of 1936)); Kenya's regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda (Section 2 of Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order).

[129] Under the statute for the registration of foreign judgments, it is the executive that designates countries whose judgments may benefit from that regime.

[130] Preamble, Constitutive Act of the African Union, *reprinted in* (2005) 13 African Journal of International and Comparative Law 25.

procedure available to judgments from sister African countries.[131] Of all the regional economic communities in Africa, it is only between the founding members of the East African Community[132] that judgments can be registered in each other's country.

It is suggested that to remedy immediately this problem, African countries should designate many more African countries to benefit from their statutory regimes for the registration of foreign judgments. A more ambitious and long-term project that could be undertaken by African governments would be to conclude an African judgment enforcement convention.[133] But, given the paucity of inter-African judgment enforcement cases, the similarities in the provisions of exiting national statutes on foreign judgment enforcement, and the challenges of negotiating an international convention on judgment enforcement,[134] and the general ambivalence towards private international law issues in Africa, the statutory designation of more African countries may be the only feasible option, at least for the immediate future. This is an easier course to take and can be done immediately. Negotiating an African-wide convention on judgment enforcement could take years, although with the benefit of the experiences of others such as the European Community and the Organization of American States that need not be the case.

Choice of forum and choice of law agreements adopting African courts or the law[135] of another African country were also in issue in a few cases.[136] Party

---

[131] See e.g. *Ssebaggala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd.* [2000] L.L.R. 931 and *Pioneer General Assurance Society Ltd. v. Zulfikarali Nimji Javer* [2006] eKLR (where the Kenyan courts registered judgments from Uganda under the Foreign Judgment (Reciprocal Enforcement) Act Cap 43).

[132] They are Kenya, Tanzania and Uganda. Recently admitted are Burundi and Rwanda. See generally THANAWALLA S., 'Foreign *Inter Partes* Judgments: Their Recognition and Enforcement in the Private International Law of East Africa', in: *International and Comparative Law Quarterly* 1970, p. 430.

[133] But see OPPONG R.F. 'Private International Law in Africa: The Past Present and Future', in: *American Journal of Comparative Law* 2007, p. 704 where I suggested 'it is time we begin discussing the possibility of an international foreign judgments enforcement convention for Africa.'

[134] The collapse of the attempt by the Hague Conference on Private International Law to negotiate one such convention illustrates this challenge.

[135] *Friendship Container Manufacturing Ltd. v. Mitchell Cotts (K) Ltd.* [2001] E.A. 338 (the court upheld an exclusive choice of forum agreement contained in a bill of lading which vested jurisdiction in the South African courts); *Barlows Central Finance Corporation (Pty) Ltd. v. Joncon (Pty) Ltd.* Case No. 2491/99 (Swaziland, 1999) (The sales agreement contained a South African choice of law and forum clause. The Swaziland court upheld the choice of law clause, but declined to enforce the choice of forum agreement). See also, *Afinta Financial Services (Pty) Limited v. Luke Malinga T/A Long Distance* Civ. Case No 123/2001 (a lease agreement provided that it 'shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland.' The Swaziland court applied Swaziland law. It held that the agreement was entered into in Swaziland by parties domiciled, resident and carrying on business in Swaziland and the agreement was to be performed wholly in Swaziland.

autonomy is generally respected in the countries examined. In the absence of substantive harmonization of laws in Africa,[137] judicial enforcement of choice of law and forum agreements is an alternative which parties may use to regulate the law which governs their transactions. Admittedly, there are limitations to this approach. One is the possibility that effect will not be given to a choice of law agreement which violates mandatory rules of the forum.[138] Another is badly drafted choice of law clauses which place the courts in a difficult position as to the parties' intention.[139]

C. Comparative Law and African Private International Law

Comparative law and the use of comparative foreign material enrich judicial decisions. For private international lawyers, their use has been argued as a path to harmonization (or unification) in the absence of international conventions.[140] Southern Africa provides a good example of how comparative law aids international (in this

[136] In the absence of such agreements, the courts applied various tests including the place of performance and real and substantial connection. See e.g. *Georgina Ngina v. Inter Freight East Africa Ltd*. [2006] eK.L.R., where a contract was entered into in Kigali (Rwanda), but the place of performance was in Kenya. It was held that the Kenya courts had jurisdiction. *Roger Parry v. Astral Operations Ltd.* Case No. C 190/2004 (Labour Court, South Africa, 2005) a central issue in the dispute over a contract of employment which was performed in Malawi was the applicable law. The South African court rejected the respondent's argument that the contract was governed by Malawi law since it was the place of performance. The court found there were strong factors connecting the contract with South Africa to make its law the applicable law.

[137] Currently, such harmonization is being pursued by some principally civil law countries under the aegis of the Organisation for the Harmonization of Business Law in Africa (OHADA). None of the countries studied is currently a member of the OHADA.

[138] See e.g. *Roger Parry v. Astral Operations Ltd*. Case No. C 190/2004 (Labour Court, South Africa, 2005). (The employment contract at issue did not contain a choice of law clause, but even if it did the court was willing to uphold that choice only if it did not deprive the employee of the protections afforded by the mandatory rules of South African law).

[139] See e.g. *Afinta Financial Services (Pty) Ltd. v. Luke Malinga T/A Long Distance*, Civ. Case No 123/2001 ('This agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland.'); *Ekkehard Creutzburg v. Commercial Bank of Namibia* Case No 29/04 (Supreme Court of Appeal, South Africa, 2004). ('This suretyship shall in all respects be governed by and construed in accordance with the law of the Republic of South Africa and/or the Republic of Namibia, and all disputes, actions and other matters in connection therewith shall be determined in accordance with such law.')

[140] FORSYTH C.F., 'The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era', in: *Journal of Private International Law* 2005, p. 93-113.

case regional) harmonization of private international law.[141] Judgments of Southern African courts, but mainly those of South Africa,[142] were variously relied upon in other Southern African countries. This may in part be attributed to the fact that they all share the same legal tradition. Also, the system of law reporting is fairly up-to-date in the principal jurisdictions of the region.[143]

The common law countries of East and West Africa did not demonstrate an appreciable level of reliance on each other's case law.[144] Their principal source of comparative law was England. This is worrying in some respects. Cases from other common law jurisdictions, such as Canada and Australia that have developed highly innovative approaches to private international law issues were hardly looked at.[145] Also, with the increasing Europeanization of English private international law, a development currently reflected in the amount of textbook space devoted to 'the traditional rules', there will be a need for common law African countries to diversify their sources of law. It is suggested that South Africa may be a good place to look at. There are a number of areas where the common law converges with Roman-Dutch law. Indeed, this work has revealed two recent judgments from the South African Supreme Court of Appeal which have brightened up the prospect of closer convergence.[146] A study that distils the common core of principles between these two legal traditions in Africa will be an important step in this area.

---

[141] See e.g. *American Flag plc v. Great African T-shirt Corporation* 2000 (1) S.A. 356, where it was held that where a foreign defendant had submitted to the jurisdiction of the court, an attachment was neither necessary nor permissible. This decision was followed by the Botswana courts it in *Bizy Holdings (Pty) Ltd. v. Eso Management (Pty) Ltd.* 2002 (2) B.L.R. 125.

[142] In *Silverston (Pty) Ltd. v. Lobatse Clay Works* 1996 B.L.R. 190 Justice Tebbutt held that '… the common law of Botswana is the Roman-Dutch law…. The courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirement of modern times, to have regard to the approach of the South African courts and to the writings of authoritative South African academics.'

[143] Southern Africa, Namibia, Botswana and Zimbabwe.

[144] But see *Eastern and Southern African Trade v. Hassan Basajjabalaba* [2007] Uganda Commercial Court 30. The Ugandan court referred to two very recent decisions on the effect of choice of law agreements on the court's jurisdiction. They were *Fonville v. Kelly* [2002] 1 E.A. 71 and *Tononoka Steels Ltd. v. East & Southern African Trade & Development Bank* [2002] 2 EA 536. It noted in respect of one of the cases: 'It is a case from a sister Republic, with comparable jurisprudence. The decision, though not binding upon the High Court of Uganda, is pleasantly persuasive.' The court followed it.

[145] In *Supercat Incorporated v. Two Oceans Marine* 2001 (4) S.A. 27 the court rejected Canada's real and substantial connection test as a basis of international competence in South Africa.

[146] See *Richman v. Ben-Tovim* 2007 (2) S.A. 283, which accepted mere presence as a basis of international competence, a position well entrenched, albeit highly criticised, at common law; *Bid Industrial Holding v. Strang* 2008 (3) S.A. 355 which abolished arrest of foreign defendants as a basis of jurisdiction and accepted mere presence as a basis of jurisdiction and the prospect of applying the principles of *forum non conveniens* in such cases.

In general, the extent of inter-African comparative law engagement in the cases examined was minimal, especially in instances where the courts were faced with difficult and novel issues. It was not uncommon for two neighbouring countries to be faced with a similar legal issue and yet come to two different conclusions,[147] one conclusion often being superior to the other.[148] The development of an African private international law regime will demand much more comparative awareness among African judges and lawyers. Also, the use of comparative law should not be limited to foreign cases. Judges and lawyers must also be aware of the growing volume of private international law conventions. This is especially so if Africa's private international law regime is not going to be isolationist in its character. It is significant that, in the cases examined, judges and counsel showed an awareness of relevant international conventions.[149]

[147] But see *Coutts v. Ford* 1997 (1) Z.L.R. 440 and *Society of Lloyd's v. Price* 2006 (5) S.A. 393 where both the Zimbabwean and South African courts adopted the via media approach to solving the problem of gap in characterisation as to substance and procedure. *Detmold v. Minister of Health and Social Services* 2004 N.R. 175 and *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) S.A. 422 where both the Namibian and South African courts sanctioned inter-country adoption of children by foreign nationals, and held their respective national legislation prohibiting such adoptions unconstitutional.

[148] *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.* [2001] L.L.R. 1279 versus *Shah v. Manurama Ltd* [2003] E.A. 294 (on the issue of whether a plaintiff who is resident in an East African Community (EAC) country should be ordered to pay security for costs when litigating in another EAC country). *Metlika Trading Ltd. v. Commissioner, South African Revenue Service* 2005 (3) S.A. 1 versus *Bozimo Trade and Development Co Ltd. v. First Merchant Bank of Zimbabwe Ltd* 2000 (1) Z.L.R. 1 (on the issue of whether the court might assume jurisdiction to grant an *in personam* interdict against an *incola* in respect of conduct in another country.)

[149] See e.g *Sello v. Sello (No. 2)* 1999 (2) B.L.R. 104 at 109; *De Gree v. Webb* [2007] S.C.A. 87 at [11], [17], [47]-[55], [85]-[94], [98]; *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) S.A. 422 at [26], the Minister submitted that reform of the Child Care Act, Act 74 of 1983 should 'contain the kind of safeguards and standards found in The Hague [Adoption] Convention.' South Africa became party to the Convention in 2003. *K v. K* 1999 (4) S.A. 691 (on the application of the Hague Abduction Convention at a time when it had not been incorporated into South Africa law); *Roger Parry v. Astral Operations Ltd*. Case No. C 190/2004 (Labour Court, South Africa, 2005) (the court was prepared to be 'guided by' Article 6 of the Rome Convention on the Law Applicable to Contractual Obligations on the issue of the applicable law in a contract of employment.); *Kisko Products (GH) Ltd. v. Delmas America Africa Line Inc*. Civil Appeal No J4/28/2005 Supreme Court of Justice Ghana (2 March 2004) (the court found the United Nations Convention on the Carriage of Goods by Sea, especially Article 5 on the liability of carriers, 'highly relevant' even at a time when the convention had not been incorporated into Ghanaian law).

D. Constitutional and Human Rights Law and African Private International Law

The impact of constitutional and human rights norms on the development of private international law has been felt in some jurisdictions and, increasingly, academic attention is being devoted to the issue.[150] Africa has been susceptible to the impact of these norms, but so far strong academic interest in the issue appears lacking. In a number of cases, mainly from South Africa,[151] courts grappled with the challenges that interaction between constitutional and private international law brings.[152] Human rights have also been used to query the continued application of some private international law principles.[153]

---

[150] See generally FAWCETT J., 'The Impact of Article 6(1) of the ECHR on Private International Law', in: *International and Comparative Law Quarterly* 2007, p. 1-48; JURATOWITCH B., 'The European Convention on Human Rights and English Private International Law', in: *Journal of Private International Law* 2007, p. 173-199; VAN DEN EECKHOUT V., 'Promoting Human Rights within the Union: The Role of European Private International Law', in: *European Law Journal* 2008, p. 105-127.

[151] See e.g. *Frans Edward Prins Roothman v. President of the Republic of South Africa* [2006] S.C.A. 80, [2007] 2 L.R.C. 229 (the applicant unsuccessfully relied on various constitutional arguments, including the right of access to justice, the rule of law, and the duty of the state to ensure the effectiveness of its courts and to assist its citizens to enforce their rights, in an application for a declaratory order that the South African government should offer him diplomatic assistance to enforce a judgment against the Democratic Republic of Congo); *Telcordia Technology Inc. v. Telcome SA Ltd*. Case No 26/05 (South Africa, Supreme Court of Appeal, 2006) (the court held that the Arbitration Act must be read in the light of the provisions of the Bill of Rights and the meaning attributed to it must promote the spirit, purport and objects of the Bill of Rights).

[152] *Sonderup v. Tondelli* 2001 (1) S.A. 1171 (which involved an unsuccessful constitutional challenge to the Hague Convention on the Civil Aspects of International Child Abduction Act); *Bid Industrial Holding (Pty) Ltd. v. Strang* 2008 (3) S.A. 355 (which involved a successful constitutional challenge to procedure of arrest of a foreign *peregrinus* to found or confirm jurisdiction in claims sounding in money must be abolished.). Earlier cases questioned obiter the constitutionality of arrest. See *Himelsein v. Super Rich* 1998 (1) S.A. 929 at 936; *Naylor v. Taylor* 2006 (3) S.A. 546 at 557; *Tsung v. Industrial Development Corporation of SA Ltd*. 2006 (4) S.A. 177 at 181. See also *Raytheon Aircraft Credit Corporation v. Air Al-Faraj Limited* [2005] 2 K.L.R. 47 and *Eastern and Southern African Trade v. Hassan Basajjabalaba* [2007] Uganda Commercial Court 30 (on the relations between the constitutionally guaranteed unlimited original jurisdiction in civil matters of national High Courts and choice of law and choice of forum agreements).

[153] See e.g. *Emmanuel Rotimi Sadiku v. Grace Jumai Sadiku* Case No 30498/06 (High Court, South Africa, 2007) and *Esterhuizen v. Esterhuizen* 1999 (1) S.A. 492 (in which the courts queried whether, within a gender equal society, the categorical application of the *lex domicilii* of the husband in determining the patrimonial consequences of marriage was still acceptable.). Also see *Nku v. Nku* 1998 B.L.R. 187 (on whether the common law rule that a married woman acquired the domicile of the husband on marriage discriminated against women and should be judicially reformed).

The peremptory character of constitutional and human rights norms makes their intrusion into the resolution of private international law problems both interesting and frightening. It can be argued that constitutional norms are mandatory rules. Indeed, national constitutions often proclaim themselves as the supreme law of the land.[154] As Martinek has observed: 'Being the «Supreme law of the land», the constitution gains prevalence *eo ipso* over all national law including the country's conflicts rules and is supreme also to a country's private international law: conflict rules and their application have to be in accordance with the constitution.'[155] Mandatory rules 'demand to be applied irrespective of the law designated by the choice-of-law rules of the forum.'[156] They restrict parties' right to choose the governing law, and thus undermine a fundamental tenet of common law which is party autonomy. Human rights norms, which aim at protecting individual interests, are also often open to alternative interpretations and care is need in their use in private international law adjudication. Thus, there are inherent risks in an unthinking use of constitutional and human rights norms in solving private international law problems.[157]

With these in mind, we cannot but admit that the influence of constitutional and human rights norms on the development of Africa's private international law regime will grow in the future.[158] Among the areas likely to be affected are the recognition of civil partnerships or marriages,[159] the domicile of married women

[154] See e.g. Malawi Constitution, art. 1(5); Sierra Leone Constitution, art. 171(15); South Africa Constitution, art. 2; Nigeria Constitution, art. 1(3); Gambia Constitution, art. 4; Zambia Constitution, art. 1(3); Kenya Constitution, art. 3; Uganda Constitution, art. 2(2); Tanzania Constitution, art. 64(5); Zimbabwe Constitution, art. 3; Lesotho Constitution, art. 2; Swaziland Constitution, art. 2(1); Eritrea Constitution, art 2(3); Ethiopia Constitution, art. 9(1); Mauritius Constitution, art. 1(2); Seychelles Constitution, art. 5; Rwanda Constitution, art. 200; Sudan Constitution, art. 3.

[155] MARTINEK M. G., 'Look back before you Leap? Fateful Tendencies of Materialization and of Parallelism in Modern Private International Law Theory', in: *Journal of South African Law* 2007, p. 282.

[156] BONOMI A., 'Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment', in: this *Yearbook* 1999, p. 218.

[157] See e.g. *Papco Industries Ltd. v. Eastern and Southern African Trade and Development Bank* [2006] eK.L.R. (it was successfully argued that because the contract at issue was governed by English law the court had no jurisdiction. The court reasoned that 'the courts of Kenya are obligated to uphold the Constitution of Kenya. It would therefore follow that this court cannot construe the law of England').

[158] Already their full impact on a 'sister subject,' internal conflict of laws, has been felt and a number of common law and customary law principles have been found wanting. See recently *Frans v. Paschke* [2007] Namibia High Court 49 declaring unconstitutional the Roman-Dutch rule that an illegitimate child cannot inherit intestate from his father.

[159] South Africa recently enacted the Civil Union Act of 2006 which legalises civil partnerships.

and children,[160] the rules governing the ordering of security for costs against foreign plaintiffs, the rules governing the proprietary consequences of marriage, the attachment of assets of foreigners to found or confirm jurisdiction,[161] the doctrine of *forum non conveniens*, the enforcement of choice of law and forum agreements, the enforcement of foreign judgments and sovereign and diplomatic immunity from jurisdiction and execution.

E. National Courts and African Private International Law

As far as private international law issues are concerned, the legal systems of most African states are under-developed. National laws (both statutory and case-law) have not developed to provide solutions to many important issues. For example, in the area of international civil procedure, the existing laws are often very dated, and most African countries have not taken advantage of international developments in the area. Indeed, the cases examined suggest it is a difficult area.[162]

African academics have a crucial role to play in this state of affairs. I have articulated our role in the development of private international law in Africa elsewhere and will not rehearse it here.[163] What I am concerned about here is the issue of which course to take outside the academy. Should national legislatures and Law

[160] See e.g. Kenya, Law of Domicil Act Cap 37, section 7, 'A woman shall, on marriage, acquire the domicile of her husband'. However under Section 8(3) of the Act, 'an adult married woman shall not, by reason of being married, be incapable of acquiring an independent domicile of choice'. Also, under Section 8(4), 'the acquisition of a domicile of choice by a married man shall not, of itself, change the domicile of his adult wife or wives, but the fact that a wife is present with her husband in the country of his domicile of choice at the time when he acquires that domicile or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicile.'

[161] In *Bid Industrial Holding Ltd. v. Strang* 2008 (3) S.A. 355 at [38], the court held that attachment ordinarily involves no infringement of constitutional rights (absent, for example, seizure of the means by which the defendant's livelihood is earned).

[162] Among the areas of difficulty identifiable from the judgments were: procedures for serving documents abroad (*Fonville v. Kelly III* [2002] 1 E.A. 71; *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47); the procedures for taking evidence abroad (*Kells v. Ako Adjei* Case No CA 8/2000 (Supreme Court Ghana)); rules on the formalities and admissibility in court of affidavits taken abroad (*Microsoft Corporation v. Mitsumi Computer Garage Ltd* [2001] K.L.R. 470; *Pastificio Lucio Garofalo SPA v. Security & Fire Equipment Co* [2001] K.L.R. 483); the law regarding the relevance and effect of rules on the authentication of foreign documents (*Blanchard, Krasner & French v. Evans* 2004 (4) S.A. 427; *Lamus Agricultural Services Co. Ltd. v. Gwembe Valley Dev Ltd* [1999] Zambia L.R. 1; *Slyvanus Juxon-Smith v. KLM Royal Dutch Airline* Civil Appeal No. J4/19/2005 (Supreme Court of Ghana)); deposit of security for costs by foreign plaintiffs (*Fasco Trading Co Ltd. v. Goodearth Ltd* [2000] L.L.R. 1236; *Noble Builders (U) Ltd v. Sandhu* [2004] 2 E.A. 228; *B & W Industrial Technology (Pty) Ltd v. Baroutsos* 2006 (2) S.A. 135).

[163] OPPONG R.F., 'Private International Law in Africa: The Past, Present and Future', in: *American Journal of Comparative Law* 2007, p. 699.

Reform Commissions intervene and develop for their respective legal system's rules on issues over which their law is currently inadequate? Or should it be left to the courts to do it incrementally through case law? Both courses are fraught with difficulties. They also raise a broader constitutional question on the proper role of the legislature and the judiciary in the development of law.

In a number of the cases examined, judges encountered issues on which the law was inadequate or outright unfair, but they chose to defer to the legislature for reform.[164] There were other cases, mainly from the South African Supreme Court of Appeal, where courts developed the law without reference to the legislature.[165] In *Bid Industrial Holding*, the court abolished the rule that a foreign *peregrinus* can be arrested to found or confirm jurisdiction in a claim sounding in money. It also sanctioned another basis on jurisdiction in international matters hitherto unknown to South African law. It held:

> 'It would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court.'[166]

Jurisdictional issues can be controversial. Policy, pragmatic and political/diplomatic considerations are often at stake. Accordingly, notwithstanding South African courts constitutionally mandated jurisdiction to develop the common law, we may query the propriety of their bold judicial interventions in the law.[167] In the

---

[164] In *Drive Control Services (Pty) Ltd. v. Troycom Systems (Pty) Ltd.* 2000 (2) S.A. 722 (where the South African court found as unfair the principle that an order for costs, given in favour of a *peregrinus* who successfully took steps to set aside an unmeritorious order for attachment, could be attached, but did not judicially reform the rule; in *Nku v. Nku*, 1998 B.L.R. 187 (where the court refused to reform the rule that a married woman acquired the domicile of the husband on marriage). *Raytheon Aircraft* [2005] 2 K.L.R 47 (where the court found the absence of rules of court on how a defendant, who had been sued in Kenya in breach of a choice of forum agreement, could challenge the court's jurisdiction, but did not fashion a rule to fill that vacuum).

[165] See e.g. *Bid Industrial Holding v. Strang* 2008 (3) S.A. 355 and *Richman v. Ben-Tovim* 2007 (2) S.A. 283. Under Article 173 of the South African Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Court have an inherent jurisdiction to develop the common law.

[166] 2008 (3) S.A. 355 at [56]. The court added that appropriateness and convenience are elastic concepts which can be developed case by case and the strongest connection would be provided by the cause of action arising within that jurisdiction.

[167] For example, some academics, including myself, have been highly critical of the *Richman* decision. See SCHULZE C., 'International Jurisdiction in Claims Sounding in Money: Is *Richman v. Ben-Tovim* the last Word?', in: *South African Mercantile Law Journal* 2008, p. 61-73; OPPONG R.F., 'Mere Presence and International Competence in Private International Law', in: *Journal of Private International Law* 2007, p. 321-332. But see

English case of *Siskina (Cargo Owners) v. Distos S.A*,[168] Lord Diplock saw merits in Lord Denning's proposals for extending jurisdiction over foreign defendants. He held however that such an extension required legislation and it was not for the court to exercise that legislative function.[169] The constitutional dynamics and the state of the law in England, South Africa, and many other African countries may not be the same. It is, however, an open question whether African judges should not reflect on this counsel more soberly as they approach specifically issues of jurisdiction, and generally their role in the development of private international law.

An additional issue flowing from the preceding is that of the proper balance between legislated and judicially decreed responses to private international law problems. So far, it appears that, in Africa, the subject has not suffered much from the 'paralysing hand of the Parliamentary draftsman.'[170] Africa has not enthusiastically embraced international conventions on the subject.[171] However, international conventions can be useful starting points for introducing national private international law legislation. Thus, it may be time to take a more comprehensive look at the role statutes and international conventions can play in the development of Africa's private international law regime. International business thrives on knowing the law beforehand and fashioning one's transactions in accordance with its demands; certainty is a great virtue here. It does not serve the cause of promoting international business in Africa if parties are left with unsettled legal frameworks and having to trust the future 'prophecies' of the courts. It may be that, with the present state of the subject, there is no time to wait for the incremental (often necessarily slow) judicial development and legislative action that is needed.

Judicial development of private international law should be conscious of peculiar national demands or contexts. But, at the same time, it should not be na-

---

EISELEN S., 'International Jurisdiction in Claims Sounding in Money', in: *South African Mercantile Law Journal* 2006, p. 45.

[168] [1979] A.C. 210 at 260.

[169] See also [1979] A.C. 210 at 262 per Lord Hailsham.

[170] Preface to *Cheshire's Private International Law* (1st ed., 1935). The only exception is in the enforcement of foreign judgments. All the countries surveyed have statutes regulating the enforcement of foreign judgments in addition to the common law regime.

[171] The most popular of these conventions appears to be the United Nations Convention on the Enforcement of Foreign Arbitral Awards. The following countries are parties to it: Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Senegal, South Africa, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (last visited 3 February 2008). See generally OPPONG R.F., 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation', in: this *Yearbook* 2006, p. 189-212.

tionalistic, discriminatory or protectionist.[172] There may be instances where judges will have to depart from prevailing principles to take account of the national context. Indeed, in some instances, national statutes may compel outcomes that depart from established principles. For example, in *WS v. LS*,[173] the court held that in child abduction cases, the high test of intolerability set by English courts was not required in South African law given South Africa's Bill of Rights. Similarly, in *Sonderup v. Tondelli*,[174] it was held that given the Bill of Rights special care needs to be taken when applying dicta of foreign courts as regards the interpretation and application of The Hague Child Abduction Convention. In *Grindal v. Grindal*,[175] it was held that by virtue of the Domicile Act 3 of 1992, the common law doctrine of revival of domicile was not part of South African law, and that to revert to one's domicile of origin one had to be lawfully present within the jurisdiction with an intention to settle there permanently.[176] The fact that one has to be lawfully present also runs counter to a recently affirmed common law principle that a domicile of choice can be acquired by an illegal resident.[177]

F. Internationalist Consciousness in African Private International Law

'Internationalist policy consciousness'[178] in adjudicating private international law disputes refers to an approach to resolving problems on the basis of internationalist visions or goals. The objects of promoting international trade and commerce, aiding international uniformity or harmonization of rules and fostering harmonious inter-state relations are examples of these goals. Internationalist consciousness is a source of reform in private international law through two media. These are the adoption of international conventions and judicial decisions informed by its goals. Given that African states are parties to a minimal number of private international

[172] See *Adel Kamel Barsoum v. Clemessy International* [1999] 12 N.W.L.R. 516 at 526 where it was held that 'the courts do not adopt or rely on pure sentimental approach in assuming jurisdiction merely because a person of its nationality is involved.'

[173] 2000 (4) S.A. 104.

[174] 2001 (1) S.A.1171 at 1185.

[175] 1997 (4) S.A. 137.

[176] *Toumbis v. Antoniou* 1999 (1) S.A. 636 suggests that once lawfully present it does not matter if the residence is precarious or that the applicant does something unlawful. In this instance, he was conducting business inconsistent with his temporary resident status.

[177] *Mark v. Mark* [2006] 1 A.C. 98; FORSYTH C.F., 'Domicile of the Illegal Resident', in: *Journal of Private International Law* 2005, p. 335-343.

[178] WAI R., 'International Trade Agreements, Internationalist Policy Consciousness, and the Reform of Canadian Private International Law', in: *The Measure of International Law: Effectiveness, Fairness and Validity* The Hague 2004, p. 123; WAI R., 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law', in: *Canadian Yearbook of International Law* 2001, p. 117-209.

law conventions,[179] they have not been a significant source of reform in Africa. Thus, it is to case law that we have to turn to for traces of reform informed by the objects of internationalist consciousness.

A number of judgments have reflected internationalist policy consciousness. The objects of this consciousness also provided the rationale for reform in some cases. But, it must be admitted that the way the courts approached these objects was often superficial, and did not suggest any detailed assessment of the relevant object.[180] The radical changes in South African law introduced by *Richman* and *Bid Industrial Holding* were also in part justified by internationalist goals. In *Richman v. Ben-Tovim*,[181] the court found 'compelling reasons why … in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen.' In *Bid Industrial Holding*, the fact that neither counsel nor the court was able to identify any other countries which required arrest as a prerequisite for civil jurisdiction over foreign defendants[182] might have influenced the court's decision to abolish arrest as a basis of jurisdiction.

---

[179] See generally OPPONG R.F., 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation', in: this *Yearbook* 2006, p. 189-212.

[180] See e.g. *Barclays Bank of Swaziland v. Koch* 1997 B.L.R. 1294 at 1297 ('the comity of nations and international commerce required that foreign judgments be recognised and enforced in each other's countries as far as possible.'); *Sunrise Travel and Tours Ltd. v. Wanjigi* [2002] L.L.R. 5933 at [12] (the court suggested that in an 'era of increased globalisation' it would be a good thing for defendants to be sued where they are domiciled); *Metlika Trading Ltd. v. Commissioner, South African Revenue Service* 2005 (3) S.A. 1 at 18 (the court observed that the problems caused by rapidly growing commercial and financial sophistication are universal and courts dealing with them should be mindful of how other jurisdictions have dealt with them); *Society of Lloyd's v. Price* 2006 (5) S.A. 393 and *Coutts v. Ford* 1997 (1) Z.L.R. 440 (considerations of 'international harmony of decisions' and 'international comity and justice' influenced the courts' adoption of the *via media* approach to the resolution of the problem of gap in the characterization process as to substance and procedure).

[181] 2007 (2) S.A. 283 at 289.

[182] 2008 (3) S.A. 355 at [46]. The fact that the court accepted this is unfortunate; a cursory look at the law of its neighbours would have revealed that some also required arrest as a basis of jurisdiction over foreign defendants. See e.g. Zimbabwe: High Court Act Chapter 7.06 section 15: 'In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process.' Lesotho: High Court Rules, 1980, Rule 6(8) 'On the application of an incola of Lesotho, the court may order the arrest of a peregrines, who is temporarily within the jurisdiction of the court' subject to a number of conditions.

But, perhaps, the most significant reform informed by an internationalist vision was in the Ugandan case of *Shah v. Manurama Ltd*[183] in which it was held that given the re-establishment of the East African Community, there could no longer be an automatic and inflexible presumption for the courts to order security for costs with regard to plaintiffs resident in the East African Community when they bring claims against Ugandan residents. In *Shah*, we witnessed for the first time the potential influence of regional economic integration on Africa's private international law regime. This is an isolated, but refreshing development. Indeed, the interaction between private international law and economic integration in Africa is an area which has not yet received any systematic academic attention.

We may legitimately question the scope for internationalist goals and the legitimacy of basing private international law decisions on them. Internationalist goals can sometimes unfairly subject the interests of the parties to systemic and state interest in the form of uniformity, comity and certainty. In the words of Wai:[184]

> 'Private international law in the Commonwealth traditions ... has traditionally focused on the conflicts between the interests and preferences of individual parties. A significant danger in promoting international system objectives is that the interests and values of individual parties are dealt with unfairly.'

I have, for example, argued that the *Richman* decision potentially undermines defendants' right to a fair hearing and defeats their legitimate expectations as to the trial venue.[185] Admittedly, we cannot be inattentive to internationalist goals in solving private international problems in Africa. The very foundation of the subject is in some of these goals.[186] We should, however, appreciate that multiple interests are often at stake in the resolution of private international law problems: the interests of the parties, third parties, the state and even the international community.[187] We

---

[183] [2003] E.A. 294.

[184] WAI R., 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law', in: *Canadian Yearbook of International Law* 2001, p. 187.

[185] OPPONG R.F., 'Mere Presence and International Competence in Private International Law', in: *Journal of Private International Law* 2007, p. 321-332.

[186] '...yet nothing could be more inconvenient to the commerce and general intercourse of nations than that which is valid by the law of one place should be rendered invalid elsewhere owing to a difference in the law.' DAVIES D.J.L., 'Influence of Huber's De Conflictu Legum on English Private International Law', in: *British Yearbook of International Law* 1924, p. 66. A well entrenched rule in favour of international commerce is the commercial activity exception to the principle of sovereign immunity from jurisdiction. For an application of this exception see *African Reinsurance Corp. v. Aim Consultants Ltd*. [2004] 11 N.W.L.R. 223.

[187] See generally WAI R., 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', in: *Columbia Journal of Transnational Law* 2002, p. 209-274.

should be mindful of these interests as we invoke, defend and apply internationalist goals.

G. A Decalogue of Essential Regime Values

So can it be said of the cases that an African private international law regime has emerged or is emerging. My immediate reaction is that the continent appears to be years away from developing a 'genuinely African-based and African-influenced' private international law regime to rival those of the European Union, the Organization of American States or the Common Market of the Southern Cone. Presently, the cases reveal an emerging judicially-led, academically unexplored, and politically inactive regime that provides adequate, appropriate and fair solutions to many private international law problems. It is also receptive to the influence of external values such as human rights, constitutionalism, internationalism and the use of comparative foreign materials. Like all developing regimes, it is currently riddled with difficult, unsettled and under-developed areas.

To an extent, the full development of the regime is inextricably linked with the progress of regional economic integration in Africa.[188] There is also the need to complement national courts' roles with legislative and academic institution driven initiatives. In this regard, the goals of the Institute for Private International Law in Africa[189] to draft a code of private international law of contract for the Southern African Development Community and/or the African Union, that of the Institute of Foreign and Comparative Law of the University of South Africa to maintain and develop a database of private international law, particularly in the area of family law,[190] and the work of the Hague Conference on Private International Law which has established an Information Center at the University of Johannesburg, with another planned for in the Republic of Benin, are worth mentioning.

In moving forward in developing Africa's private international law regime, I propose that consideration be given to the following values. An African private international law regime:

- Should not be isolationist. It should be sensitive to and participate in international processes in the field;

- Should emphasise the importance of harmonizing and/or unifying private international law rules across Africa. This can be done through the adoption of international conventions and the active use of comparative foreign materials in resolving private international law problems;

---

[188] See OPPONG R.F., 'Private International Law and the African Economic Community: A Plea for Greater Attention', in: *International and Comparative Law Quarterly* 2005, p. 911-928.

[189] http://general.rau.ac.za/law/English/ipr/ipr.htm

[190] www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=675

- Should recognize the multiple interests at stake in the resolution of private international law problems and, as far as possible, prioritize the interests of the disputing parties;
- Should not be overtly discriminatory, but should also be sensitive to the interests of African residents and domiciliaries when deciding private international law cases or adopting rules;
- Should ensure a proper balance between judicial development of the subject and legislative interventions in areas where the law is undeveloped, underdeveloped or uncertain;
- Should have rules that are sensitive to the demands of international human rights laws;
- Should aim at making Africa an attractive place for the resolutions of international commercial disputes by adopting and providing rules conducive to that goal;
- Should be responsive and receptive to alternative modes of settling disputes, such as international arbitration, by providing rules which facilitate their processes including, supportive judicial remedies;
- Should respect party autonomy in international transactions and uphold parties' rights to regulate their transactions through choice of law and forum agreements and;
- Should pay attention to the institutional development of the subject by acknowledging, supporting and facilitating the work of academics and academic institutions working in the field.

IV. Conclusion

The past decade has witnessed significant private international law jurisprudence from African courts. The cases do not suggest that an African private international law regime has emerged. There are areas of convergence and divergence of the law both among the African countries and with the outside world, areas where the law is unsettled, and areas where the law seems ill-suited to the needs of Africans engaging in transnational business and litigation.

English law continues to be the main source of comparative jurisprudence for these countries; their jurisprudence is largely consistent with the English common law rules on private international law. In the Roman-Dutch law jurisdictions of Southern Africa, South African cases are routinely used. The common law jurisdictions, however, appear unaware of each other's jurisprudence. There were instances where courts in geographically proximate countries dealt with similar issues without reference to existing precedents in the other country. The jurisprudence of the countries examined also revealed an awareness of existing private international law conventions. There were instances where international conventions were relied on by the courts even though they had not been incorporated into national law.

It is unfortunate that these cases have gone unnoticed in the outside world. This paper, appropriately appearing in the volume of this Yearbook marking a decade of its publication, has provided an account of some of them in the hope of inspiring academic interest and research in this virgin area of the law.

THE NEW INTERNATIONAL ADOPTION SYSTEM IN SPAIN

Santiago ALVAREZ GONZALEZ*

I. Introduction

The International Adoption Act (Law 54/2007, of December 28, hereinafter the IAA), is the first special Private International Law (PIL) act issued in Spain. It appears at a time when the Spanish scientific community, with the support of the public authorities, has started to assess the convenience of a global modernisation of the Spanish PIL system.[1] This system is characterised by being dispersed, both formally and, worse still, time wise; there are numerous regulations found in multiple legislative texts, spread out over time: from 1881 (State legislation currently in

* Professor of Private International Law at the University of Santiago de Compostela.

[1] See PALAO MORENO G., 'Jornada sobre la Reforma del sistema español de Derecho internacional privado', in: *REDI* 2002, at 520-522; *id.*, 'II Jornadas sobre la Reforma del sistema español de Derecho internacional privado', in: *REDI* 2005, at 536-538; and subsequent information published in *Revista Electrónica de Estudios Internacionales* (<www.reei.org>) since issue No. 11 (2006). The IAA is completely unrelated to this study process.

Yearbook of Private International Law, Volume 10 (2008), pp. 409-429

force concerning the recognition of foreign judgements) till today. Most conflict rules regarding Private Law date from 1974, with partial reforms in the last thirty years. Within this period, the 1978 Constitution represented a judicial revolution for PIL[2] and others followed it, such as the mass transposition of international conventions in the 1980s and Spain's adhesion to the European Communities in 1986. However, there was no global response from the Spanish legislator. The system required (and probably still requires) a complete review. From this general perspective, the IAA can be seen as the legislator's choice to undertake modernisation by partial reforms rather than a global review. Also, as it is the first special act in the Spanish PIL system, its solutions could be conceived as the model to be followed by the legislator. I hope and believe, however, that this will not be the case.

In my opinion, the IAA responds to a merely political situation; the Draft was dated February 2007, and the public outrage about the scandal associated with the French organisation called Zoë's Ark and the attempt to bring 103 minors from Chad to France, in the last few days of October 2007, was the trigger for the urgent approval of a bill which had not been expected to see the light before the 2008 General Poll. Irrespective of this, Spain is clearly one of the countries with the largest number of international adoptions,[3] and the previous law both created, and was incapable of, solving problems requiring legislative intervention.

The IAA, however, contains a heterogeneous, extensive, regulation of international adoption and other measures for protecting persons without legal capacity, possibly the most comprehensive in Comparative Law, with 34 long Sections. Commentators are divided between those who wholeheartedly support the new text[4] and those who criticise it.[5] To determine its specific scope and the originality

---

[2] ÁLVAREZ GONZÁLEZ S., 'Desarrollo y normalización constitucional del DIPr español', in: *Pacis Artes. Obra homenaje al Profesor Julio González Campos*, Madrid 2005, at 1139-1163.

[3] Adoptions of foreign children by Spanish nationals fell by 18.4% in 2007 (3681) relative to 2006 (4472), largely due to the stricter requirements established by the countries of origin. In spite of this, according to the competent authorities, Spain is one of the three countries accrediting the largest number of international adoptions, together with the United States and Sweden. In 2006, the number of adoption applications was 11843 and, in Spain, international adoptions represent 80% of the total (source: Secretary of State for Social Affairs, Ministry of Education and Social Policy, July 22, 2008).

[4] CALVO CARAVACA A.L./CARRASCOSA GONZALEZ J., *La Ley 54/2007 de 28 de diciembre 2007 sobre adopción internacional (Reflexiones y comentarios)*, Granada 2008.

[5] BORRÁS RODRÍGUEZ A, 'Espagne. Nouvelle loi sur l'adoption internationale', in: *Société de Legislation comparée/Section de droit international privé* (<www.slc-dip.com>); ÁLVAREZ GONZALEZ S., 'El Proyecto de ley sobre adopción internacional: una crítica para sobrevivir a su explicación docente', in: *Actualidad civil* 2007, No. 22, at 2597-2618; *id.*, 'Reflexiones sobre la ley 54/2007, de adopción internacional', in: *La Ley. Revista jurídica española de doctrina, jurisprudencia y bibliografía* 2008, No. 6910; *id.*, 'La Ley de adopción internacional. Reflexiones a la luz de su texto, de sus objetivos y de la comunión entre ambos' in: *Anuario español de Derecho internacional privado* 2007, t. VII, at 39-69; CALVO BABIO F., 'Revisión crítica de la nueva Ley de adopción internacional', in: *Iuris.*

of its solutions, it is essential to refer to its background and the problems found in the previous law (II) before focusing on its content (III). My description of the old law only emphasises the most significant aspects for the understanding of the solutions provided by the IAA, ignoring the regulation and practice of the Convention of 29 May 1993 on the Protection of Children and Co-operation in matters of Intercountry Adoption (hereinafter, the Hague Convention). Given the paper's length and purpose, I will merely provide a 'screenshot' of international adoption in Spain; in view of the scope and complexity of the IAA and the large number of situations it governs, I will simply summarise its basic lines, without focusing on detail other than to provide examples. For the same purpose, I will not be considering Comparative Law and I will essentially use Spanish doctrinal references.

II. International Adoption in Spain prior to the International Adoption Act (Law 54/2007)

A. The Regulation Arising from the Reform of the Preliminary Title of the Civil Code: the Omnipresence of National Law

In matters of international adoption, the first regulation containing rules regarding international jurisdiction and conflicts rules dates from 1974. On the occasion of the reform of the Preliminary Title of the Spanish Civil Code (hereinafter, Cc), a Section was added (Sec. 9.5 Cc) which was based on the national law of the adopter and the jurisdiction of the adopter's national authorities, with less importance given to local law and the child's national law.[6] It established a bilateral and practically absolute view of the national law applicable to personal status, for both international jurisdiction and applicable law. In matters of jurisdiction, the origin of the solution, oddly enough, was inspired by a convention which never came into force: the Convention of 15 November 1965 on Jurisdiction, Applicable Law and

Actualidad y práctica del derecho 2008, No. 125, at 56-63; ESPLUGUES MOTA C., 'La nueva ley española de adopción internacional de diciembre de 2007: ¿Una ocasión perdida?', in: *Riv. dir. int. pr. proc*. 2008 2, at 363-380.

[6] 'Adoption, with regards to its effects and the ability to adopt, shall be regulated by the Law of the adopter. [...] In adoption by husband and wife, when there is no common national Law, that of the husband at the time of the adoption shall be applied. [...] The adoptee's personal law shall be observed with regards to his capacity, his consent and the way in which it is contemplated. [...] The authorities of the adopter's nationality shall have jurisdiction to establish the adoption or, when an adoption is made by husband and wife, those of their common nationality or, lacking that, those of the State in which the adopter has his habitual residence or the adopting spouses have their common habitual residence. [...] The formalities of the act shall be according to the Law of the place where the adoption is formalised, without prejudice to Section 11, point 3'.

Recognition of Decrees Relating to Adoptions. Given the priority of national law, it was decided that the authorities associated with the habitual residence would have jurisdiction only in the absence of national law.[7]

To a certain extent, the solution reflected the former practice of the *Dirección General de los Registros y del Notariado* (hereinafter, DGRN), an administrative body with important responsibilities in affairs of civil status, and was soon criticised for the evident discrimination involved in preferring the national law or authorities of the male spouse over those of the female,[8] and for the bilateral nature of the international jurisdiction rule.[9] The priority of the adopter's law with regards to the effects of adoption was also the norm prior to the reform.

Many years after Law 11/1987 derogated therefrom, the archaic solutions of 1974 continued to have effects: DGRN Resolutions of June 9, 1993[10] and December 1, 2004[11] rejected the recognition of two adoptions by application of Sec. 9.5 Cc as drafted in the Reform of the Preliminary Title in 1974. Both cases involved adoptions made abroad by Spanish adopters, and the DGRN concludes that '…validity or effectiveness [...] cannot be recognised for an adoption established by an incompetent authority according to our conflict rules. The fact that these rules have varied is of no import, as is the fact that should the adoption be made in Peru today, it would certainly have met the conditions for international jurisdiction…' (Res. of June 9, 1993); '…the validity of adoption established according to Argentinean legislation and before Argentinean authorities cannot be recognised, as section 9, point 5, of the Civil Code, as drafted by Decree 1836/1974, of May 31, established that 'the authorities of the adopter's nationality shall have jurisdiction for the formalisation of adoption and the Spanish authorities were not involved in this adoption although the adopter was Spanish' (Res. of December 1, 2004).

The solution derived from the 1974 reform was worthy of criticism in itself, but even more so from the perspective of adoptions made by Spaniards abroad. The fact that it still has some effects today is likewise worthy of criticism from the

[7] The prevalence of national law is expressly recognised in the Description of Motives of the 1974 Reform: 'In order to provide a schematic view of the criterion predominantly used in the rules of international private law, the following characteristic notes can be found: [...] 3. Personal law is determined by nationality [...] 4. The traditional and generalised criterion of the prevalence of national law regarding persons and legal relations concerning their inherent rights is maintained.'

[8] AGUILAR BENÍTEZ DE LUGO M., 'Comentarios al art. 9', in: ALBALADEJO GARCÍA M. (Coord.), *Comentarios al Código civil y Compilaciones forales*, Jaén 1978, at 172.

[9] BOUZA VIDAL N., 'Comentario al art. 9.5', in: BERCÓVITZ RODRÍGUEZ CANO R. (Coord.), *Comentarios a las reformas del Código civil*, Madrid 1993, pp. 456-470, at 457-458.

[10] *Boletín de Información del Ministerio de Justicia*, No. 1680-82, 1993, at 4114-4117; see note of FERNÁNDEZ MASIÁ E., in: *REDI* 1995, at 360-362.

[11] *Boletín de Información del Ministerio de Justicia*, No. 1984, at 1071-1073.

perspective of the principles which should govern the control of the original judge's jurisdiction.[12]

B. Change of Model: Law 11/1987, of November 11, and the Judicialisation of the Adoption

1. The Legal Solutions

The Spanish legal system experienced the most important changes of the last century in the period between 1974 and 1987: the transition from dictatorship to democracy upon the solid basis of the 1978 Constitution changed the very concept of family and involved major legislative reforms. International jurisdiction rules in matters of adoption were altered in 1985: the Judiciary Act established that Spanish courts had jurisdiction in matters of 'constitution of adoption' when the adopter or the adoptee were Spanish or habitually resided in Spain. Two years later (thus nine years after the Constitution), the conflict of laws rule (Sec. 9.5 Cc) was changed. It went from a bilateral conflictual model to a judicialised or judicialist[13] model, in which the competent Spanish judge applied Spanish law. It also regulated consular adoption and the recognition of adoptions established by foreign authorities. From the perspective of the practice of the Spanish authorities, application of Spanish law was the norm in the application of Sec. 9.5 Cc (drafted in 1974), according to its derived *forum-ius* relations,[14] although the new rule also made important changes.

According to N. Bouza Vidal, this reform, part of a more comprehensive reform of adoption in its most substantive aspects, had the following characteristics: a) configuration of adoption as an act of voluntary jurisdiction, with a Judge involved in its constitution; b) attribution to the Spanish authorities of some control over international adoptions; c) consideration of adoption as a protective measure for minors, and d) priority of the child's interests above all others.[15] The applicable law was Spanish law plus – eventually – the national law of the child (alternately)

---

[12] ÁLVAREZ GONZÁLEZ S., 'Reconocimiento e inscripción en el *Registro civil* de las adopciones internacionales', in: *REDI* 2006, at 683-710. The few Spanish authors who have discussed this issue focus on the time of recognition: REMIRO BROTÓNS A., *Ejecución de sentencias extranjeras en España: la jurisprudencia del Tribunal Supremo*, Madrid 1974, at 198-199; CALVO CARAVACA A. L., *La sentencia extranjera en España y la competencia del juez de origen*, Madrid 1986, at 82-83.

[13] RODRIGUEZ MATEOS P., 'La nueva orientación de la adopción internacional en la Ley 21/1987 de 11 de noviembre', in: *La Ley. Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía* 1988, pp. 783-790, at 784-785.

[14] ESPINAR VICENTE J. M., 'Filiación y adopción', in: GONZÁLEZ CAMPOS J. D., *Derecho internacional privado. Parte especial, vol. II*, Oviedo 1984, at 218-219.

[15] BOUZA VIDAL N., 'La nueva Ley 21/1987, de 11 de noviembre, sobre adopción y su proyección en el Derecho internacional privado', in: *Revista General de Legislación y Jurisprudencia* 1987, pp. 897-931, at 914; *id.* (note 9), at 460.

or the national laws of the adopter and the child (cumulatively), considering two basic interests: public (national) control of the adoption and its international efficacy.[16] As we shall see, these interests continue to be upheld in the IAA, with a regulation also contemplating the application of several laws in order to guarantee the international efficacy of adoption. The mandatory and conditional application of the child's national law, or those of the adopter's or child's nationality or habitual residence, to guarantee the efficacy of adoption, was not unanimously favoured by doctrine.[17]

Besides a special consular adoption regulation, also generally criticised by Spanish doctrine,[18] the most interesting aspects of the 1987 reform were finally those relating to the effects in Spain of adoptions constituted abroad, as a result of the gradual increase in the number of these adoptions within Spanish society. The first Draft demanded an undefined verification of the foreign jurisdiction and of the law applied to capacity and consent. A clerical error was made upon publication, so it is now stated that this was the 'adopter's law' and not the 'adopted child's law', as had been approved by Parliament.[19]

This regulation underwent different changes until the IAA came into force. The most important took place in 1996, through the Legal Protection of Minors Act (Organic Law 1/1996, of January 15). In Sec. 9.5, this law introduced a specific rule for the recognition of adoptions constituted by foreign authorities in cases where there are Spanish adopters: it would not be recognised as an adoption if the effects were not those established in Spanish legislation, and adoptions by Spanish adopters habitually resident in Spain would not be recognised if the authority had not declared their suitability.

---

[16] BOUZA VIDAL N. (note 15), at 917; *id*. (note 9), at 463.

[17] See, critically, RODRÍGUEZ MATEOS P. (note 13), at 785-786; GONZÁLEZ CAMPOS J. D., 'Filiación y adopción', in: GONZÁLEZ CAMPOS J. D., *Derecho internacional privado. Parte especial*, *vol. II*, Oviedo 1988, at 220; BOUZA VIDAL N. (note 9), at 920.

[18] Initially, RODRÍGUEZ MATEOS P. (note 13), at 688; BOUZA VIDAL N. (note 15), at 923, following the criticism of ESPINAR VICENTE J.Mª., 'La modificación del art. 9.5 del Código Civil en el proyecto de reforma sobre la adopción, in: *La Ley. Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía* 1986, pp. 996-1001, at 999 and GONZÁLEZ CAMPOS J. D. (note 17), at 222. After the Hague Convention became applicable to Spain, criticism of consular adoption has increased: GONZÁLEZ BEILFUSS C., 'La aplicación en España del Convenio de La Haya de 29 de mayo de 1993 relativo a la protección del niño y a la cooperación en materia de adopción internacional', in: *Revista Jurídica de Cataluña* 1996, pp. 313-345, at 343-345.

[19] 'In an adoption established by the competent foreign authority, the *adopter's* law shall govern with regards to capacity and consent. The consent required by such law may be granted before an authority of the country in which the adoption process starts or, subsequently, before any competent authority. For the adoption of a Spanish national, consent is required of the public authority corresponding to the child's last residence in Spain'. The error was corrected three years later by Law 11/1990, of October 15, reforming the Civil Code, in application of the principle of non-discrimination for reason of gender.

The 1996 reform occurred after the Hague Convention became applicable in Spain and, besides regulating legal conflicts, it introduced a specific rule concerning international adoption, regulating certain aspects of the functions of public authorities responsible for international adoption and organisations accredited to mediate in such adoption processes. It also required that communication between the Spanish central authorities and those of other States should be coordinated as established in said Convention.

In this partial reform process, Law 18/1999, of May 19, added a new paragraph concerning revocable adoptions: 'Attribution by foreign law of a right to revoke adoption shall not prevent its recognition if said right is waived in a public deed or before the *Registro civil* (Register of Births, Marriages and Deaths)'. The idea was to accept adoptions other than full adoptions, which differed from adoption as established in Spanish law in that they could be revoked by the adopters. Although it enabled numerous adoptions to be recognised in Spain, the unilateral concept of the provision (the waiver was only valid for Spain) created theoretical problems, which remain unresolved.[20] The IAA maintains this possibility of a unilateral waiver of revocation (Sec. 26).

2. Problems in Practice

This relatively broad regulation, amended several times since 1987, generated different types of problems. Some were not related to the legislation itself, focusing on the registration of international adoptions and autonomous legislation (rules of the Spanish regions or *Comunidades Autónomas*) for the protection of minors. Others were derived from its interpretation, which was not very clear and at some points confusing and dense.

Among the problems not directly related to the specific regulation of international adoption, we must mention the existence of legislation relating to the *Registro civil*, conceived much earlier[21] and poorly adapted to the requirements of modern international adoption in Spain. Unlike that which occurred with the rules on conflicts of law, registration legislation was barely amended.[22] Since 1957, the basic rule has established that '[t]he Register shall contain records of all pertinent facts affecting Spanish nationals and those occurring in Spain, even when they

[20] ÁLVAREZ GONZÁLEZ S., 'Adopción internacional y sociedad multicultural', in: *Cursos de Derecho Internacional de Vitoria Gastéiz-1998*, Madrid 1999, pp. 175-211, at 202; more in agreement with the legal solution, ESPINOSA CALABUIG R., 'Una nueva reforma en materia de adopción internacional en España', in: *Revista General del Derecho* 2000, No. 667, at 1-19.

[21] The *Registro civil* is dated June 8, 1957 and its regulations of application are dated November 14, 1958.

[22] Directly linked to international adoption, Law 15/2005, of June 8 and Law 15/2005, of November 18. *Cf.* MASEDA RODRIGUEZ J., 'Nueva normativa registral sobre adopción internacional. La modificación de los arts. 20.1 y 16 LRC por la Ley 15/2005 y por la Ley 24/2005', in: *REDI* 2005, at 1196-1201.

affect foreign nationals'; this, for example, means that all adoptions formalised outside Spain by foreigners resident in Spain are adoptions not contemplated in, or verified by, the Spanish *Registro civil*, which normally examines the status of adoptions established by foreign authorities. With regards to vital facts relating to civil status, their exhaustive enumeration (Sec. 1 of the *Registro civil* Act) also generates problems regarding adoptions not equivalent to those contemplated in Spanish law.

Additionally, all the Spanish *Comunidades Autónomas* have jurisdiction regarding the protection of minors and have issued their own rules, including administrative aspects and mediation in international adoptions. Each region has its own Central Authority within the framework of the Hague Convention. This has given rise to different practices, in international adoption matters, in different regions. The IAA attempts to solve this problem but, as we shall see, has difficulty in delimiting legislative powers between State and regional authorities.

With regards to the problems derived from the interpretation and application of the PIL system itself, they were mostly related to the recognition of adoptions established abroad. On the one hand, the jurisdiction of the judge of origin was derived from the ill-defined phrase '...in adoptions established by the *competent foreign authority*...'. On the other hand, verification of the applied law was also derived from a poorly drafted sentence: '...in adoptions established by the competent foreign authority, the *child's law shall prevail* with regard to capacity and consent'. However, although the solution to the first problem, consisting of the bilateralisation of jurisdictional criteria applicable to Spanish authorities[23] was generally accepted, the scope of verification over the applied law was questioned.[24]

Also questioned was the possibility of converting a simple foreign adoption into full adoption under Spanish legislation. Different interpretations were given to the following words: '...the consent required by such law may be granted before an authority of the country in which the adoption was started or, subsequently, before any other competent authority...'. Some found here a clear possibility of conversion, whereas others differed.[25]

---

[23] BOUZA VIDAL N. (note 15), at 927; GONZÁLEZ CAMPOS J. D., *Derecho internacional privado. Parte especial*, 6ª ed., Madrid 1995, at 372; RODRÍGUEZ MATEOS P., 'Comentario al art. 9.5 del Cc', in: ALBALADEJO M. / DÍAZ ALABART S. (Coord.) *Comentarios al Código civil y compilaciones forales*, T. I, vol. 2, Madrid 1995, pp. 242-259, at 253; GUZMÁN ZAPATER, M., 'Adopción internacional: ¿Cuánto queda del Derecho Internacional Privado Clásico?', in: *Mundialización y familia*, Madrid 2001, pp. 83-120, at 109. Against, ÁLVAREZ GONZÁLEZ S. (note 20), at 190.

[24] *Cf.* BOUZA VIDAL N. (note 15), at 928 and ESPLUGUES MOTA C., 'El nuevo régimen jurídico de la adopción internacional en España', in: *Riv. dir. int. pr. proc.* 1997, pp. 33-75, at 62, for broad control, including the bilateralisation of Sec. 9.5 Cc; RODRÍGUEZ MATEOS P. (note 23), at 252, for limited control of the capacity and consent to be adopted.

[25] In favour, BOUZA VIDAL N. (note 15), at 929-930; RODRIGUEZ BENOT A., 'La eficacia en España de las adopciones simples constituidas al amparo de un ordenamiento extranjero. Una relectura del art. 9.5 C.c. a la luz del Convenio de La Haya de 29 de mayo de 1993', in: CALVO CARAVACA A. L. / CARRASCOSA GONZALEZ J. (Coord.), *Estatuto personal y multiculturalidad de la familia*, Madrid 2000, at 181-202; ESTEBAN DE LA ROSA

However, the greatest problem derived from legislation prior to the IAA was possibly the practice of the *Registro civil*, which prevented recognition of simple adoptions by Spanish nationals. The limits established for the scope of action of the *Registro civil* did not clarify the status of children subject to simple adoptions by foreigners resident in Spain. The DGRN alleged a solid practice, widely supported by doctrine,[26] according to which simple foreign adoptions could not be recognised and registered as adoptions '...without producing serious doubts concerning their efficacy'. The non-recognition of simple adoption 'as adoption' was directly derived from the law; but it did not seem logical for this to only affect Spanish adopters, and it was not confirmed that a simple foreign adoption could be recognised 'as a simple adoption'. Register practice degraded the foreign institution, which was seen as mere 'fostering', and this solution was not compatible with our own conflict rules.[27] With the same practice, simple adoptions became a means for the *ex novo* establishment of 'Spanish' adoptions, which did not always benefit from all the necessary guarantees regarding the consent of the original family.[28] The situation was paradoxical, considering that the Hague Convention forced our authorities to recognise simple adoptions and their typical effect of establishing a link of filiation between the adopters and the child.

This homogeneous practice included some exceptions, which were either not consolidated or did not have the opportunity to become consolidated because they occurred immediately before the IAA. Among the former, DGRN Resolution of November 13, 1998[29] stated that '…(a)lthough Guatemalan adoption cannot be recognised in Spain as such, that does not prevent it from being recognised in our country with regard to the effects that the Guatemalan legal system attributes to the institution 'The nature and content of filiation, including adoptive filiation and parent-child relations, shall be governed by the personal law of the child' (Sec. 9-4 Cc), and in this case the national Guatemalan law of the child established that parental authority pertained to Spanish nationals. Unlike other cases in which there was not even filiation between the Spanish holders of 'parental authority' and their fostered minor, no reason can be found to reject in Spain, for reasons of public

---

G. (Coord.), *Regulación de la adopción internacional. Nuevos problemas nuevas soluciones*, Madrid 2007, at 245-260; against, RODRÍGUEZ MATEOS P. (note 23), at 254; also, Resolución Circular DGRN de 15 de julio de 2006, in: *Boletín Oficial del Estado*, August 30, 2006.

[26] A minority supported the recognition of simple foreign adoptions which did not go against the Spanish legal system, with its own effects: ÁLVAREZ GONZÁLEZ S. (note 20), at 192; CALVO BABÍO F., *Reconocimiento en España de las adopciones simples realizadas en el extranjero*, Madrid 2003, at 255-256, although through its classification as a 'measure for the protection of minors' and application of the corresponding rule regarding guardianship and other measures for the protection of persons without mental capacity (Sec. 9.6 Cc).

[27] ESPINAR VICENTE J. Mª., 'La adopción de menores constituida en el extranjero y el reconocimiento de la patria potestad en España (algunas reflexiones en torno a la heterodoxa doctrina de la DGRN)', in: *Actualidad civil* 1997, at 757-771.

[28] GONZÁLEZ BEILFUSS C., in: *Anuario Español de Derecho Internacional Privado* 2006, at 1067.

[29] *Boletín de Información del Ministerio de Justicia*, No. 1851-52, at 2550-2553.

order… a parental authority relationship based on a true adoption, although it can be classified as simple or not full. This Directorate has agreed… to order registration of the birth of… and marginally the option of Spanish nationality by reason of parental authority…'.

Among the latter, we find DGRN Resolution of November 23, 2006.[30] This case did not involve the recognition of the effects of a simple adoption established abroad, but a change of its classification. After a detailed analysis of Ethiopian legislation and a comparison with Spanish law, the DGRN amended its previous practice and concluded that the effects of adoption in Ethiopian law were as established in Spanish law, in spite of the continuing links between the child and his biological family, and the possibility of revoking the adoption. The rationale applied by the DGRN was intended to favour recognition, thus not hesitating to be flexible when approaching the demands of Ethiopian law as closely as possible to those of the Spanish legal system.

3. The Immediate Predecessor of the IAA: DGRN Circular Resolution of July 15, 2006

A few months before the preparation of the International Adoption Draft (February, 2007), and a year and a half before it was passed, the DGRN issued an extensive Resolution to '…bring more light to the increasingly complex general legal system applicable to the registration of adoptions established by foreign authorities in the Spanish *Registro civil*'.[31] The importance of this Resolution lies not only in the fact that it was binding for those responsible for the Spanish Register, but also in the fact that many of the interpretative proposals for this former legislation have become part of the IAA. This shows how important exclusively register-related aspects have been for the new text, even though the efficacy of adoption established abroad does not depend on its inclusion in the Spanish *Registro civil* (as this inclusion is not constitutive). In any case, as I mentioned earlier, not all foreign adoptions can be included in the Register, such as when Spanish nationals are not affected.

The main traits of this important Resolution which, for the DGRN, represented the correct interpretation of the system prior to the IAA, can be described as follows, in relation to the recognition of adoptions established by foreign authorities not affected by the Hague Convention or another international agreement: a) verification of the jurisdiction of the foreign authority is pursuant to the forum established by the foreign system, subject to the Spanish international *ordre public*, for cases where there is no reasonable link between the adoption and the authority of the country in which it is established; b) verification of the law applied by the foreign authority extends to the consent, assent or hearings required for the adoption, of both the child and the prospective parents; it also extends to capacity and

[30] *Boletín de Información del Ministerio de Justicia*, No. 2056, at 769-779.

[31] DGRN Circular Resolution of July 15, 2006 (note 25).

prohibitions to adopt; this verification is intended to ensure that the foreign authority applies 'the State law referred to by the rules of conflict of the foreign country in question'; c) the formal aspects of the adoption shall be pursuant to the general rule established in Sec. 11 Cc, regarding 'the forms and solemnities of contracts, wills and other legal acts', consecrating the traditional *locus regit actum* rule alternative to other several connections; d) the difference between Spanish and foreign adopters in relation to the demand for equivalent effects between foreign adoptions and those regulated by Spanish law is justified – according to the DGRN – by the existence of 'registry conflict of laws (*Derecho conflictual registral*)', according to which only foreign adoptions affecting Spanish nationals are registered; e) absence in the Spanish system of a mechanism to convert a simple into a full adoption; f) simple adoptions are neither recognised as adoptions nor included in the *Registro civil*, but the 'existence, validity and effects of such simple adoptions, including parental authority' shall be determined by the child's national law (material recognition); g) simple adoptions shall be legally classified as 'fostering' for the sole effects of the *ex novo* establishment in Spain of a full adoption pursuant to Spanish material law.[32]

III. The International Adoption Act (Law 54/2007, of December 28)

A. Objectives and Methodological Options of the IAA

The IAA, like most recent legislation, makes every effort to describe its aims and goals and the means by which it intends to achieve them. These goals are varied; together with the wish to put an 'end to the regulatory dispersion characteristic of the previous legislation', we find the ever-present 'interests of the minor' as a guide to all adoption processes. As we shall see, these 'interests of the minor' are identified, in some cases exclusively, with the idea of an internationally valid adoption, which is effective in several States; these 'interests of the minor' would justify a new 'international harmony of solutions'.

The first organisational goal (to put an end to regulatory dispersion) was – and is – difficult to accomplish, considering the limits of the Spanish State legislator. As I mentioned earlier, the Autonomous Regions have responsibilities in matters concerning the protection of minors and various aspects of administrative dossiers relating to international adoptions: the involvement of minor-protection agencies, intermediation in international adoptions, accreditation, monitoring and verification of International Adoption Collaborating Agencies, the relationship between the latter and people wanting to adopt, the suitability of prospective parents, the post-adoptive obligations of adopters, etc., are all aspects regulated by

[32] *Cf.* a critical discussion of this Resolution in ÁLVAREZ GONZÁLEZ S. (note 12), *passim*.

the Autonomous Regions, usually in more detail and more precisely than the IAA itself. In my opinion, most of Title I of the IAA, which regulates these same aspects, is not constitutional, as it invades the jurisdiction of regional legislators.[33] These rules, however, are usually drafted in a flexible manner, and most of them represent calls for collaboration between the different regional agencies; they are rules the breach of which is not sanctioned, using a postmodern language more typical of a speech than of a law: '*every attempt shall be made to ensure* regional coordination'; '...the competent public agencies *shall promote measures to achieve maximum coordination... shall attempt to ensure* homogeneous procedures'; '...[c]ollaborating International Adoption Organisations *may* establish agreements...'; '...the competent public agencies *shall make every effort to ensure* the greatest possible homogeneity...'.

Obviously, the State legislator was unable to alter international treaties applicable to matters of adoption. The rest of the legislation was hardly changed, and where there were amendments (not directly linked to international adoption), they were made within the same legal text (*Registro civil* Act, Civil Procedure Act, Cc), so the formal dispersion remains. The IAA even forgot to derogate from the Law of the Judiciary System with regards to the international jurisdiction of Spanish judges to establish adoption.[34]

The second, obvious, objective – i.e. the interests of the adopted minor – has given rise to a complex legislation which fits poorly into an orthodox model: there are calls for cooperation between authorities as a cornerstone of international adoption; there is also a clear option for the conflict of laws in matters concerning the establishment of adoption, its modification and its declaration of nullity; a strange mixture of unilateralism and bilateral conflict rules for the conversion of adoption; a difference between the recognition of simple adoption, through the national law of the child, and the recognition of other adoptions by establishing unilateral conditions, which appeal to the conflict and international jurisdiction rules of the foreign authority.

This is a truly strange methodological puzzle, even more so if we consider some of the proposed interpretations discussed later. I would just like to show what was, possibly, a missed opportunity to escape from the traditional problems relating to the recognition of adoptions established by foreign authorities. When Sec. 3 of the IAA refers to the *Informing principles of international adoption*, it says that:

> 'The international adoption of minors shall respect the principles inspiring the Convention on the Rights of the Child, of November 20, 1989 and the Hague Convention, of May 29, 1993, relating to the protection of children's rights and cooperation in matters of interna-

[33] I fully develop this opinion in ÁLVAREZ GONZÁLEZ S., 'La Ley de adopción…' (note 5), at 43-47.

[34] A problem of minor importance, as the *lex posterior* can be considered to derogate there from. There should not be a problem due to the organic nature of the Law of the Judiciary System, which is not necessary for international jurisdiction rules.

> tional adoption. [...] To that end, the competent Public Agency, shall include the standards and safeguards of the Hague Convention, of May 29, 1993, in the agreements relating to international adoption signed with non-adherent States.'

This declaration is in agreement with the recommendation of the Hague Conference on International Private Law in its Special Commission of September, 2005, where it repeated Recommendation No. 11 of the special Commission of November/December 2000[35]; and it is implemented by the IAA with mandates such as that specified in Sec. 4, which establishes that an international adoption process shall not be possible when '...the country [of origin] does not provide appropriate guarantees for the adoption and adoption practices and procedures do not respect the interest of the minor or comply with the international ethical and legal principles to which Section 3 refers'. The IAA, then, aims to make practices not relating to the Hague Convention fit the cooperation model it initiated. The necessary step regarding recognition is, however, not made. In this respect, the IAA does not take its own assumptions to their logical conclusion: if the adoption process is completely verified from the very beginning and the authorities of the State of origin provide the same guarantees as Spain (otherwise, Sec. 4 would prevent the procedure from going forward), this trust could have generated a less complex system, not as strict with regards to verifying the activities of the foreign authority, at least in cases in which the adoption procedure started in Spain.

As for the objective of guaranteeing the interests of the minor through the establishment of internationally strong adoptions, the specific solutions in the three sectors regulated by Title II of the IAA (jurisdiction of the authorities, applicable law and recognition of adoptions established abroad) add a note of unnecessary complexity without even guaranteeing the objective:

a) The international jurisdictional criteria for adoption are the same as under the former legislation: the adopter or child must either be of Spanish nationality or habitually resident in Spain. At least in theory, this allows adoptions without a reasonable link with Spain, so the objective of internationally strong adoption runs a serious risk of not being met. Doctrine, which is clearly in favour of the IAA, states that the law has a *'disconnection clause'* for cases in which there is no such link, as the Law's explanatory report (*Exposición de Motivos*) is sending a 'very clear mandate to Spanish judges and courts. They should not establish an international adoption if there are absolutely no ties to Spain'.[36] Unfortunately, the IAA does not contain such flexibility and explanatory reports are not legally binding.

---

[35] See <www.hcch.net>. *Cf.* BORRÁS RODRÍGUEZ A., 'La Conferencia de La Haya de Derecho internacional privado (2005)' in: *Anuario Español de Derecho Internacional Privado* 2005, pp. 1199-1216, at 1210-1215.

[36] CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ, J. (note 4), at 85-90. Although the Explanatory Statement does say that '...a Spanish authority should not proceed to establish, amend or declare null and void an international adoption if the case has absolutely no ties to Spain'.

b) With regards to applicable law, we find the technical paradigm of the establishment of internationally strong adoptions by the imperative or facultative concourse of several applicable laws. The basic system is the application of Spanish or a foreign law, together with the possibility of several more laws concurring in the establishment of an adoption. This possibility was previously present in the former Sec. 9.5 Cc, and criticised precisely from the perspective of the 'interests of the minor'.[37] The national law of the child may be applied together with Spanish law '...only when the competent Spanish authority believes that it will facilitate the validity of the adoption in the country of the child's nationality' (Sec. 19); at the request of the adopter or the *Ministerio Fiscal* (State Counsel's Office), it is also possible to demand the consent, hearings or authorisations required by national law or the law of the habitual residence of the adopter or the child, providing said consent, hearings or authorisations are in the interests of the child: '...It shall particularly be considered to be 'in the interests of the child' if, in the court's opinion, considering foreign laws facilitates the validity of the adoption in other countries connected to the case, *and only in as much as that is the case*' (Sec. 20).[38] The basic idea is also repeated concerning adoptions regulated by a foreign law (Sec. 21).

c) To conclude with the solutions aimed at ensuring the 'interests of the minor', identified with the international validity of adoption, the conditions for the recognition of foreign adoptions include the verification of the jurisdiction of the authority of origin and of the law applied by the same, similar to the DGRN requirements under the previous legislation: Sec. 26 of the IAA establishes that:

> '... adoption established by foreign authorities shall be recognised in Spain as adoption if the following requirements are met:
>
> 1. It has been established by a competent foreign authority.
>
> The foreign authority in question is classified as internationally competent if the adoption process respected the forum specified in its own Law.
>
> Notwithstanding the above, should the adoption present no reasonable ties of origin, family history or other similar links, with the country of the authority establishing the adoption, the foreign authority in question shall be classified as lacking in international jurisdiction.
>
> 2. It has been established pursuant to State laws designated by the conflict rules of the country from which the foreign authority establishing the adoption depends.'

This legal definition of the DGRN's interpretation of the previous system is also supported by the idea that only an adoption, which is valid in the country of origin,

[37] *Supra* (note 17).

[38] Italics are mine.

may be subject to recognition. This is a logical goal. What we now need is to identify the best technical mechanisms to attain it. The IAA's fails to do so.[39]

B. Major Innovations

The time spent here on the situation prior to the IAA is now justified by our affirmation that most of the interpretations given by the DGRN to the former Sec. 9.5 Cc[40] is now positive legislation. At least with regards to the basic structure of international jurisdiction, applicable law and the recognition of adoptions established by foreign authorities, the continuum is more than evident: identical broad international jurisdiction criteria with the excessive presence of Spanish nationality; priority of application of Spanish law together with the possibility of also applying the national law of the child or, in some cases, the law of the habitual residence or nationality of the adopter or child; establishment of a recognition system in which there inexplicably continue to be differences between Spanish and foreign adopters (even though they live in Spain); these differences have spread to cases in which the adopted child is Spanish and there has been an attempt to justify them by pointing out that 'the legislator believes that an adoption «*not linked to Spain*» (= foreign parents and foreign child) is not part of Spanish society but subject to '*mere transit*' through Spanish society. The recognition of such an adoption does not therefore directly affect Spanish society'.[41] I am evidently unable to share such a simplistic viewpoint.

Therefore, and having spent some time describing the old system, I will be focusing on the innovations, which have a more than merely decorative value. They are clearly identified in the Explanatory Statement:

> 'The Law – it states – also includes a regulation previously absent from our positive Law, relating to the effects in Spain of simple or less than full adoption established by a foreign authority, and the possibility of its conversion into full adoption, establishing the factors required in each case for the competent Spanish authority to agree on said conversion'.

In my opinion, these are the two most important novel aspects of the IAA. As I mentioned earlier, I believe that the first was also defensible in the previous system, although I was clearly in the minority. Sec. 30 of the IAA simply states that:

> 'Simple or less than full adoption established by a foreign authority shall be effective in Spain, as simple or less than full adoption, if it

[39] *Cf.* the development of this idea in ÁLVAREZ GONZÁLEZ S., 'La ley de adopción…' (note 5), at 63-66.

[40] *Supra* II.B.3.

[41] CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ J. (note 4), at 203. The italics are in the original text.

> complies with the child's national law pursuant to Section 9.4 of the Civil Code.
> 2. The child's national law, in the simple or less than full form, shall determine the existence, validity and effects of such adoptions, together with the attribution of parental authority.'

I fail to see why there should be a different technical solution for full and simple adoptions. The option of a conflictual solution for simple adoption is not justified either from a procedural perspective or from the viewpoint of the guarantees involved in the two types of adoption, which often differ merely in a legal option concerning a specific effect of the adoption. Actually, under the previous legal regime I had already supported the application of the same recognition system (that of Sec. 9.5 Cc) to both full and simple adoption.[42] But, of course, conflictual recognition is certainly better than no recognition.

With regards to the possibility of converting a simple into a full adoption, the IAA appears to solve the doctrinal controversy relating to the previous system by treating the issue as novel, although this creates new interpretative problems. The conversion of a simple into a full adoption is regulated by a conflict rule referring to an applicable law (Sec. 22 IAA)[43] and a substantive rule which establishes the possibility of, and requirements for, converting simple adoption *into the adoption governed by Spanish law*; these requirements are directly and substantially listed, but also include a reference to applicable law.[44]

---

[42] See with further arguments ÁLVAREZ GONZÁLEZ S. (note 12), at 696-697.

[43] 'Sec. 22. *Law applicable to the conversion, nullity and review of adoption.* The previous criteria concerning the determination of the law applicable to the establishment of adoptions shall likewise be applicable to determine the law applicable to the *conversion*, nullity and review of adoptions.' The previous criteria refer to the law applicable to the *establishment* of the adoption.

[44] Sec. 30 IAA: '...4. Simple or less than full adoptions established by competent foreign authorities may be transformed into adoption governed by Spanish law when the necessary requirements are met. Said conversion shall be governed by the law determined according to the provisions herein. Simple or less than full adoption shall be classified as fostering. A prior proposal by the competent public agency shall not be necessary to open the respective judicial file. In any event, to convert simple or less than full adoption into full adoption, the competent Spanish authority shall examine the concurrence of the following circumstances: a) The persons, institutions and authorities, whose consent is required for the adoption, have been duly advised and informed about the consequences of their consent, about the effects of the adoption and, specifically, about the elimination of the legal ties between the child and his or her family of origin. b) Said persons have freely granted their consent in the legally established manner and said consent has been granted in writing. c) Said consent has not been obtained in exchange for payment or compensation of any kind and has not been revoked. d) The mother's consent, when required, has been granted after the child's birth. e) Considering the child's age and degree of maturity, he or she has been duly advised or informed about the effects of the adoption and, when required, has granted his or her consent to the same. f) Considering the child's age and degree of maturity, he or she has been heard. g) When the minor's consent is required for the adoption, it has been

In my first study of the issue, a systematic reading of Sec. 15, points 2, 4,[45] 22 and 30.4, led me to argue that the conversion foreseen by the IAA was the conversion into full adoption, as contemplated by Spanish law. I continue to believe that this is the most appropriate interpretation, although the possibility of converting a simple adoption into *full adoption as foreseen by a foreign law*, as proposed by some authors,[46] can certainly not be ruled out. Those who propose the two possibilities (conversion into full Spanish adoption and conversion into full adoption as foreseen by a foreign law) agree that the law applicable to the conversion of a simple adoption into an adoption governed by Spanish law could only determine the *admissibility* of said conversion.[47] Although, as I mentioned, the strict letter of the law does not exclude the two possibilities, I believe that there are reasons for doing so; initially, and this is no minor issue, because this distinction is not made by the IAA. Secondly, the interpretation supporting the two possibilities is backed by another distinction not made by the IAA: in this case, the law applicable to the conversion of a simple adoption into a full Spanish adoption (this being the law which *permits* or *admits* said conversion) is the 'foreign law «already applied» to the establishment of the simple adoption',[48] whereas the law applicable to the conversion in the remaining cases (conversion of a simple adoption into a full adoption pursuant to a foreign law) is determined by the rule of conflict of Sec. 22, that is an *applicable* and not an *applied* law. This distinction is not made by the IAA, where Sec. 30 merely refers to Sec. 22.[49]

---

ensured that it has been freely granted in the legally established manner, without payment or compensation of any kind.'

[45] Sec. 15. '...2. If the law applied to the adoption foresees the possibility of simple adoption, the Spanish courts shall have jurisdiction to convert simple into full adoption in the cases described above. 3. The Spanish courts shall also have jurisdiction for the amendment or review of an adoption in the cases described in the first Section and also when the adoption has also been established by a foreign authority, providing that said adoption has been recognised in Spain.'

[46] CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ J. (note 4), at 153-154.

[47] *Ibid.* at 154; the same opinion in ÁLVAREZ GONZÁLEZ S., 'El Proyecto…' (note 5), p. 2611; *id*., 'Reflexiones…' (note 5), n. 17.

[48] CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ J. (note 4), at 154.

[49] An explanation is provided by the authors later, based on Sec. 15.2 'If the law applied to the adoption foresees the possibility of simple adoption, the Spanish courts shall have jurisdiction...': CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ J. (note 4), at 306-307. This argument is not convincing. It would be, for example, if the Section were to state 'If the law applied to simple adoption *foresees its possible conversion into full*....'; but this is not the case. Even more confusing is the alternative proposed by the authors when Sec. 22 leads to the application of Spanish law; in this case, it is claimed that conversion shall be into full adoption as foreseen in Spanish law, pursuant to Sec. 30.4 (*ibid.* at 154, number 101.3). This proposal appears to consist of an alternative connection of some kind: simple adoption could be converted into full Spanish adoption when so permitted by the 'law applied' to the simple adoption or when the law designated by Sec. 22 is Spanish.

Allowing the possibility of converting a simple into a full adoption is a legislative policy decision, which could be supported by more or less arguments based on safeguarding or optimising the interests of the child. If a decision is made to admit this possibility, I see little sense in admitting it *conditional* upon one applicable law or another.

From my point of view, the law applied in the country of origin should not even be taken into account; to do otherwise would be to considerably reduce the operability of the conversion in practice, as it is evident that if a simple adoption has been established in the first place, it is because the concerned foreign system limits the possibility of a full adoption procedure.

Before I conclude, I would like to refer to another novel aspect, outside classic PIL rules, to which I partially referred in the previous Section: for the first time, the IAA establishes a series of circumstances in which adoption applications shall not be processed: '…a) When the country in which the child habitually resides is involved in a war or affected by a natural disaster, b) If the country has no specific authority which verifies and guarantees adoption, and c) When the country is lacking in appropriate guarantees for adoption and its adoption practices and procedures do not respect the interests of the minor or meet the international ethical and legal principles defined in Section 3'. This is a highly positive precept, in spite of some technical deficiencies.[50]

C. Non-regulated Aspects

Title II of the IAA is simply structured, regulating the international jurisdiction of the Spanish authorities for the establishment, amendment, review, nullity or conversion of adoptions (having progressed from the previous regulation which only referred to 'establishment of adoptions'); the law applicable by Spanish authorities for the establishment, conversion, nullity and review of adoptions (oddly enough, with regards to the applicable law, nothing is said of the 'amendment' of adoption); and the conditions for the recognition of full and simple adoptions established by a foreign authority. The IAA, however, does not regulate the law applicable *by Spanish authorities* to adoptions established by foreign authorities, which represent the majority of cases in Spain. This shortcoming is inherited from the old system; this oversight is even more shocking since, after the Hague Convention came into force, it was soon detected and denounced by doctrine.[51] The innate tendency (which is even unconsciously ratified on official agency websites) is the applica-

[50] In this case, again, there is no consensus: CALVO CARAVACA A. L. / CARRASCOSA GONZÁLEZ J. (note 4), at 56-61 *versus* ÁLVAREZ GONZÁLEZ S., 'El Proyecto…' (note 5), at 2612-2613; *id.*, 'La ley de adopción…' (note 5), at 47-48. This same rule also refers to mediation as follows: 'The mediation function in international adoption shall only be performed by Public Organisations for the Protection of Minors, duly authorised collaborating organisations and the pertinent authority of the country of origin of the minor. No other person or organisation may be involved in mediation functions for international adoptions'.

[51] GONZÁLEZ BEILFUSS C. (note 18), at 320-321.

tion of the *lex fori*: that is, Spanish law or, to be more precise, different Spanish laws depending on the *Comunidad Autónoma* concerned. In practice, this means that an adoption by two French nationals residing in Barcelona follows the same procedure and will be governed by the same law as one by a French man and Spanish woman residing in Barcelona, or two Chinese nationals residing in the same city: aspects such as the minimum age for adoptive parents, the age difference between the adoptive parent and the child, the possibility of adoption by spouses or stable partners of different or the same gender, are in practice unrelated to the international aspects of the situation, unless they are classified as pertaining to capacity, in which case they fall under the rules of national law.[52]

In practice, the typically administrative nature of this first phase of international adoption and the territorial scope of rules concerning the protection of minors in the *Comunidades Autónomas* make it possible to avoid conflicts because of the legal conditions of adoptive parents. It also solves another typical problem caused by the plurality of Spanish law, that of inter-regional or inter-local law: what are the legal conditions of two adoptive parents, one from Navarre and the other from Catalonia (these regions not only have their own international adoption laws but also their own civil law systems), who initiate proceedings in Madrid to adopt a child in China? This problem has not yet arisen, but might do so in the future; nevertheless there is no *ad hoc* solution in the IAA, which was created with the idea of covering all possible cases.

Oddly enough, the aspects of international adoption relating to registration remain unaltered. Indeed, in Sec. 30.3, the IAA states that simple adoptions are not to be included in the *Registro civil*. This is, at the very least, questionable, considering that most of these adoptions create parental ties and attribute parental authority; moreover, although simple adoption by Spanish nationals does not automatically give the child Spanish nationality, he or she has the right to opt for Spanish nationality under the terms of Sec. 20.1.a) of the Cc: 'Persons who are or have been subject to the parental authority of a Spanish national [...] are entitled to opt for Spanish nationality'.[53] Nevertheless, the changing structure of the Spanish population, with a strong and fully integrated immigrant component (the opposite was the case in the 1950s, when the legislation applicable to the *Registro civil* was published) probably requires a more global reform: I fail to see why the adoption of a Chinese child by two French nationals residing in Spain can be included in the register when it is established by a Spanish judge and not when it is established in China but is effective in Spain. But this is a legislative policy issue, which, as I say, transcends international adoption itself.

[52] DGRN Resolution Circular of July 15, 2006; critically, ÁLVAREZ GONZÁLEZ S. (note 12), at 703-705; evidently, these are not 'capacity' issues: see ESTEBAN DE LA ROSA G. (note 25), at 174.

[53] *Cf.* DGRN Resolution of November 13, 1998 (note 29), obviously recognising the importance of the law of the foreign State of origin.

IV. Conclusions

In the last twenty years there have been important developments in international adoption in Spain. It is now one of the three countries welcoming the largest number of foreign children within the framework of adoption. The legislation governing international adoption in Spain is shared between the State legislator, who is exclusively responsible for rules 'regarding conflicts of law', and the regional legislators, who are responsible for defining rules regarding the protection of minors and, in application of the Hague Convention, have their own central authorities.

State legislation on jurisdiction, applicable law and recognition of foreign adoptions has evolved through partial reforms since 1987. In my opinion, the DGRN, the administrative agency responsible for the *Registro civil*, has interpreted the legislation literally, without making use of all the system's potential. Nonetheless, some of the problems arising in practice, such as those affecting the status of simple adoptions, were due to the legislation itself and not to the way in which it was interpreted.

The latest major milestone is the IAA. It is not only important as international adoption legislation, but also as the first special PIL statute in Spain. Though the IAA was intended to provide full regulation of international adoption, this is not the case; partly because the State legislator was not competent to do so, and partly because the IAA pays too much attention to formal and theoretical issues. I have briefly described the law's lack of a regulatory model; there is too little model and too much bombastic adjectivising. The authors, who defend it to the hilt, do not hesitate to applaud the 'social nature' of its conflict rules, its 'creative expressions', the existence of conflict rules combating 'market reflexiveness', or the 'polyphony of valued messages' of these rules.[54] There is also no shortage of artificial elements open to scientific debate, and a good dose of theoretical complexity, although it lacks the technical precision required to clearly identify its solutions. Objectively, the IAA contains no explicit element intended to make the system flexible, other than those of a generic nature in the legal system. The fact that, a few months after its publication, its supporters are defending more references to 'judicial development' and 'teleological reductions' than evident interpretations of concise, clear, and complete rules is a sign that something is wrong; in other words, that '... instead of seeking simplicity, effectiveness and consistence in the response, ... an assumed, and always formal, doctrinal logic appears to prevail'.[55]

As we have seen, the IAA has barely altered the *status quo*; this means that in practice nothing is going to change overly much. The IAA does not appear to have triggered massive legislative movements in the *Comunidades Autónomas*.

[54] CALVO CARAVACA A. L. / CARRASCOSA GONZALEZ J., 'Constitución de la adopción internacional en la Ley 54/2007 de 28 de diciembre: aplicación de la ley española', in: *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía* 2008, No. 6953, May 26, 2008.

[55] ESPLUGUES MOTA C. (note 5), at 365.

The functions of the regional public agencies responsible for international adoption will not be undergoing major changes. The work of the *Registro civil* will be more complicated and we will start to see simple adoptions, and particularly conversions of simple into full adoptions therein. The IAA includes interesting novel aspects and, especially, transmits a message of commitment to the countries of origin of adopted minors, thus showing the interest of the Spanish authorities in clear-cut international adoptions. From a technical perspective, however, in relation to PIL, I believe that the IAA has 'missed its opportunity'[56] to consistently regulate international adoption. I can only hope that this is not an indication of the basic lines to be followed when modernising Spanish PIL.

[56] As indicated in the graphic title of the paper by ESPLUGUES MOTA C. (note 5).

INTERNATIONAL COMMERCIAL ARBITRATION: THE ISRAELI PERSPECTIVE

A PLEA FOR A MORE CONSISTENT APPLICATION OF THE 1958 NEW YORK CONVENTION

Daphna KAPELIUK*

I. Introduction

The use of international commercial arbitration has grown dramatically over the past decades. The propensity of international business actors to opt for arbitration as a method for resolving their disputes has been encouraged by legislatures enacting statutes that promote the use of arbitration in their territories.[1] Over the past several years, a growing number of countries have joined the marketing competition over prospective consumers of arbitration services by signaling, through their legislation, that their legal environment and the quality of services that they provide make them an attractive and suitable venue for arbitration. While more and more venues join the race to become part of this lucrative global business, the State of Israel has not yet claimed its share of this major economic activity.

* Lecturer, Radzyner School of Law, Interdisciplinary Center, Israel. Thanks to Offer Vallach for his research assistance. All translations from Hebrew are mine unless otherwise noted.

[1] Since the 1980's various countries, such as France, the Netherlands, Switzerland and England, have enacted new arbitration laws or amended their existing legislation in order to respond to the needs of the international business communities. In addition, almost 60 countries have adopted the UNCITRAL Model Law on International Commercial Arbitration. A list of the members is available at U.N. Commission on International Trade Law, Status: 1985 – UNCITRAL Model Law on International Commercial Arbitration. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (last visited April 1, 2008).

Yearbook of Private International Law, Volume 10 (2008), pp. 431-439

This contribution aims to present a critical investigation into the approach taken by Israeli legislators and judges towards international commercial arbitration. Part I provides an overview of the legal framework governing international arbitration in Israel; Part II analyses the approach taken by the Israeli courts towards the enforcement of international arbitration agreements; Part III offers an account of the perspective taken by the Israeli courts towards the enforcement of foreign arbitration awards; Part IV concludes.

II. Israeli Arbitration Legislation – A Brief Overview

In 1926, the Arbitration Ordinance of 1926[2] was passed into law in Palestine, which was then under the British Mandate. The Ordinance mirrored the English Arbitration Act of 1889[3] and remained in force after the establishment of the State of Israel in 1948, never incorporating changes to the English arbitration statutes in 1934[4] and in 1950.[5] The main difficulty of the Ordinance was the extent to which the courts could interfere in the arbitral process and control the award. The Ordinance was rooted in the nineteenth-century English perception that arbitration might diminish the courts' jurisdiction.[6] Courts controlled the process mainly through the case stated procedure, which allowed them, amongst other things, to direct the arbitrator to submit a question of law to be decided by the court.

In 1963, a special committee was established in order to propose recommendations for the enactment of a new arbitration law in Israel. Two years later, the committee submitted suggestions, which aimed at promoting arbitration, increasing its efficiency, and limiting court intervention in the arbitral process:

> 'The purpose is to equalize, as much as possible, between the powers of the arbitrator with respect to the parties and the powers of the court in the same matter and thus, to prevent unnecessary applications to the court.'[7]

The Arbitration Bill of 1967[8] adopted the committee's suggestions and set out the principles upon which the Bill was based. Among these principles were: expediting

[2] 1 Laws of Palestine 40 (1933).

[3] Arbitration Act 1889, 52 & 53 Vict., c. 49.

[4] Arbitration Act 1934, 24 & 25 Geo. 5., c. 14.

[5] Arbitration Act 1950, 14 Geo. 6., c. 27.

[6] *See, e.g.*, HOLDSWORTH W.S. *A History of English Law*, 7th London 1956, vol. I, at 254-255; MURRAY J.S. & RAU A.S. & SHERMAN E.F., *Processes of Dispute Resolution – The Role of Lawyers*, New York 1989, at 435.

[7] Report of the Advisory Committee for the Enactment of a New Arbitration Law, 1966, 7.

[8] Arbitration Bill, 1967, 717.

the arbitral process, endowing the arbitrator with powers equivalent to those of the court, limiting the court's intervention, and simplifying the process for the enforcement and for the setting aside of awards.

In 1968, the State of Israel enacted the Arbitration Law.[9] The Law aspired to remedy the weaknesses of the Arbitration Ordinance of 1926 by strengthening the contractual freedom of the parties and the powers of the arbitrator, by improving the efficiency of the arbitral process and by limiting judicial intervention in this process. In keeping with the spirit of allowing parties who opt for arbitration a wide degree of autonomy in deciding how their dispute shall be resolved, the Arbitration Law includes few mandatory rules, leaving the parties the freedom to agree on the procedure to be followed by the arbitral tribunal deciding their dispute.

Arbitration has since been embraced by the Israeli judiciary and is now considered a viable method of dispute resolution. Justice Procaccia of the Supreme Court of the State of Israel expressed the importance of arbitration in these words:

> 'Generally speaking, arbitration exists alongside the judicial system as a method for the resolution of disputes. It exists in a defined framework of rules that combines elements emanating from the will of the parties and from basic principles embodied in the legislation, which include judicial control over the arbitral process. Referral to arbitration as a method of resolving disputes is desirable and important for both public and private interests. On the one hand, the use of arbitration assists in reducing the caseload of the courts; on the other hand, the parties can opt for an efficient and expeditious alternative method for the resolution of disputes, in which the arbitrator can award a fair decision without necessarily being bound by the rules of procedure and evidence.'[10]

Unlike a number of countries that have adopted separate legislations for domestic and international arbitration,[11] the State of Israel did not envisage the possibility of enacting a distinct act on international arbitration. Thus, the only statutory element at issue is the Arbitration Law. While the Law does not define the term 'international arbitration', it does define the term 'foreign arbitral award' as an award rendered outside of Israel. One can therefore infer that 'international arbitration' is arbitration that has its seat outside of Israel.[12] Hence, the international character of

[9] Arbitration Law, 5728-1968, 22 LSI 210 (1967-1968).

[10] CA 5114/05 Israel Lands Administration v. Han Manoli Ltd [2005] (unpublished).

[11] *See, e.g.*, France, Switzerland and Canada.

[12] On the place of arbitration *see e.g.*, STORME M. & DE LY F. (eds.), *The Place of Arbitration*, Ghent 1992; DERAINS Y., 'Le choix du lieu de l'arbitrage / The Choice of the Place of Arbitration', in: *Int'l Bus. L.J.* 1986, at 109; SAMUEL A., 'The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate', in: *Arb. Int'l* 1992, at 257; PARK W., 'The Lex Loci Arbitri and International Commercial Arbitration', in: *I.C.L.Q.* 1983, at 21; DE LY F., 'Symposium: Current Issues in Internal Commercial Arbitration: The

arbitration is characterized by the place of arbitration and not by other criteria, such as the nature of the dispute, the nationality of the parties or their place of residence.[13]

Israel was one of the first countries to accede to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, frequently referred to as the New York Convention.[14] The Convention, which has been adopted by more than 140 Nation-States, including all major trading ones, has been the most significant achievement in the promotion and the development of international commercial arbitration.[15] As a young State striving for international recognition, Israel considered any participation in the international arena to be of paramount importance. By ratifying the Convention, Israel expressed its recognition of the importance of international commercial arbitration and of the need to establish, with other nation States, a uniform regime that facilitates the enforcement of international arbitration agreements and awards. The State was not, however, so quick in incorporating the Convention into domestic law.

Incorporation was necessary because international conventions are not self-executing within the Israeli legal system. The system's approach to international conventions conforms to the dualistic doctrine on the relation between domestic and international law.[16] According to this doctrine, rules of international law and of domestic law exist separately in two quite distinct systems of law and do not override each other. International conventions are, therefore, not self-executing in Israeli law and do not have any effect within the domestic jurisdiction upon their ratification by the State. They are not part of Israeli law unless and until they have been transformed into domestic law by legislation in order to become enforceable.

Israel incorporated the New York Convention into domestic law in two stages. In 1968, Section 6 of the Arbitration Law incorporated the Convention's provisions on the enforcement of international arbitration agreements. In 1974, an amendment to the Arbitration Law incorporated provisions of the Convention on the recognition and enforcement of foreign arbitral awards in Section 29A. In

---

Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An exercise in Arbitration Planning', in: *NW. J. Int'l. L. & Bus.* 1991, at 48.

[13] For the different criteria *see e.g.,* REDFERN A. & HUNTER M. & BLACKABY N. & PARTASIDES C., *Law and Practice of International Commercial Arbitration,* 4th ed., London 2004, at 12-17.

[14] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3. signed in New York in 1958.

[15] *See e.g.*, PARK W., YANOS A., 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration', in: *Hastings L.J.* 2006, 251, at 257; CRAIG W.L, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration', in: *Tex. Int'l L.J.* 1995, 1, esp. at 11.

[16] On this matter, *see, e.g.*, BROWNLIE I., *Principles of Public International Law* 45 (6th ed., 2003); SHAW M.N., *International Law,* 5th ed., London 2003, 120-124; GAJA G., *Dualism – a Review*, in NIJMAN J. & NOLLKAEMPER A. (eds.), *New Perspectives on the Divide Between National & International Law*, Oxford 2007, at 52.

1978, the Minister of Justice issued Regulations for the Implementation of the New York Convention (Foreign Arbitration), 1978.[17]

III. Enforcement of International Arbitration Agreements

The jurisdiction of the courts to enforce arbitration agreements is set in the Arbitration Law in two separate arrangements: general and specific. The general arrangement is set forth in Section 5 and applies to domestic arbitrations, i.e. arbitrations that have their seat in Israel. The arrangement endows the courts with wide discretionary power to refuse to enforce arbitration agreements if they consider that there is a special reason that justifies such a refusal.[18]

The specific arrangement, which applies to the enforcement of international arbitration agreements, is set forth in Section 6 of the Arbitration Law and incorporates the enforcement provision of Section II(3) of the New York Convention. Section II(3) provides that when a court of a contracting State is seized of an action governed by an arbitration agreement, it 'shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.' Thus, under the terms of the Section, the courts lack discretionary power when faced with an application to enforce an arbitration agreement, and they may reject the application only if they find that one of the narrowly enumerated exceptions exist. The lack of discretionary power is at the heart of the Section, which aims at assuring international business actors of predictability and security.

A close scrutiny of the Israeli courts' decisions on the enforcement of international arbitration agreements reveals that the courts are not easily prepared to relinquish the discretionary power they are so used to wielding. As will be shown, while a scant number of decisions have followed the literal wording of Section II(3) of the Convention and refrained from using discretionary power when asked

[17] Regulations for Procedure in Matters of Arbitration, 1968, KT, 556.

[18] The Section provides: (a)Where an action is brought in court in a dispute which it had been agreed to refer to arbitration, and a party to the action who is a party to the arbitration agreement applies for a stay of proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the applicant has been and still is prepared to do everything required for the institution and continuation of the arbitration. (b) An application for stay of proceedings may be submitted in the statement of defense or otherwise, but not later than the day on which the applicant first pleads to the substance of the action. (c) The court may refrain from staying proceedings if it sees a special reason why the dispute should not be dealt with by arbitration.

to enforce arbitration agreements,[19] the majority of the courts have failed to follow the New York Convention principle of mandatory referral to arbitration.

In fact, the Supreme Court of the State of Israel has recently clearly held that although the need for legal certainty requires the courts to stick to a literal application of Section II(3) of the Convention, the Court *may* deviate from a strict application of the Convention in exceptional cases and deny an application to enforce an arbitration agreement pursuant to the Convention.[20] While the court did not specify what these exceptional cases are, it clearly empowered itself with discretion to expand the list of exceptions provided in the Section.

An analysis of courts' decisions reveals that the courts have used various techniques to reclaim the discretionary power, which has been denied them under the Section. One method used by the courts is to subject the application for the enforcement of arbitration agreements to the Israeli doctrine of good faith.[21] By employing this doctrine, which runs throughout the Israeli legal system,[22] the courts have endowed themselves with discretion to reject applications that do not stand up to the standard of behavior set by the doctrine.

Another technique is to import into the application of Section II(3) of the Convention conditions, which apply in the general arrangement. For example, in one instance the District Court of Haifa required the applicant to submit evidence as to its readiness to pursue arbitration.[23] This requirement, which applies to the enforcement of domestic arbitration agreements, endows the courts with wide discretion to refuse an application for enforcement. The court justified its decision by holding that it was necessary to ensure that the applicant did not apply for enforcement without truly wishing to have the dispute arbitrated. Courts have also refrained from enforcing arbitration agreements pursuant to the Convention by referring to the special reasons, which apply in the general arrangement. Two of these reasons were the risk of multiplicity of proceedings in arbitration and in the

[19] *See, e.g.*, CC (Jer) 1729/05 Can West Global Communications Corp. v. Azur [2005] (unpublished); CC (Hai) 13048/05 Mond Shipping & Trading Ltd. v. Dor Shipping & Trading Ltd. [2005] (unpublished); CC (TA) 25977/03 Banco Modular Approaches Ltd v. Libert HIROS Italia S.R.L. [2004] (unpublished); CC (TA) 192601/04 GE Medical System S.A. v. Medtechnique Ltd. [2005] (unpublished).

[20] AC 4716/04 Hotels.com. v. Zuz Tourism Ltd., [2005] (unpublished).

[21] CA 1407/94 Mediterranean Shipping Co. S.A. v. Crédit Lyonnais (Suisse) S.A. [1994] IsrSC 48(5) 122; CC (Jer) 3184/98 IDG – International Development Group N.V. v. Danzig Securities Ltd. [1998] (unpublished).

[22] The doctrine of good faith is embodied in the Contracts (General Part) Law, 1973. It has been applied to substantive law as well as to procedural law. For its application in procedural law, *see, e.g.*, CA 305/80 Shilo v. Razkabski [1981] IsrSC 35(3) 449, 461-462.

[23] CC (Hai) 26972/97 Thyssen Aufzuge GmbH v. G.Y. Rom Entrepreneurs Ltd. [2001] (unpublished). *See, also* CC (TA) 1856/00 Zisser v. Neot Oasis Ltd. [2001] (unpublished).

court,[24] and the existence of a public interest to have the dispute decided in court and not in arbitration.[25]

The most extreme method used by the courts is to disregard outright the specific language of the Section, which mandates the courts to refer the parties to arbitration, and to state simply that courts have discretionary power to refuse an application for the enforcement of arbitration agreements pursuant to the Convention.[26]

Some courts have also added conditions to the applicability of the Convention with no legal basis to do so. As explained above, Israeli law views international arbitration as arbitration that has its seat outside of Israel. Therefore, the Convention applies to the enforcement of arbitration agreements that provide for a place of arbitration outside Israel.[27] In a number of cases, the courts not only considered whether the seat of arbitration was outside of Israel, but went on to examine whether the parties to the arbitration agreement were nationals or residents of countries that have ratified the Convention.[28] By adding conditions to the applicability of the Convention, these courts have further expanded their power to refuse an application for the enforcement of arbitration agreements.

In conclusion, while in some cases the courts recognized at least theoretically that they lack discretionary power in the application of Section II(3) of the Convention, in the majority of cases they have failed to do so, leaving themselves leeway to refuse to enforce arbitration agreements for reasons that they deem justified. The cases show that the Convention is not being consistently respected by the Israeli courts.

---

[24] AC (TA) 3060/03 University of Leicester v. Cohen [2004] (unpublished); CC (TA) 1856/00 Zisser v. Neot Oasis Ltd. [2001] (unpublished).

[25] CC (TA) 10870/07 Teva Pharm. Indus. v. Proeuron Biotech. Inc. [2007] (unpublished).

[26] CC (Hai) 26972/97 Thyssen Aufzuge GmbH v. G.Y. Rom Entrepreneurs Ltd. [2001] (unpublished); CC (TA) 842/87 General Electric Corp. v. Migdal Insurance Company Ltd. [1991] (unpublished); CC (Jer) 1929/02 Zuz Tourism Ltd. v. Hotels Online Ltd. [2004] (unpublished).

[27] It should be noted that Israel has never declared, in accordance with Section I(3) of the Convention, that it would apply the Convention on the basis of reciprocity.

[28] CC (TA) 153793/04 Crestar (Overseas) Ltd. v. Iskar Metals and Steel Ltd. [2004] (unpublished); CC (TA) 32914/99 Midatlantic International Inc. v. U.P.S. [1999] (unpublished); CC (TA) 192601/04 GE Medical System S.A. v. Medtechnique Ltd. [2005] (unpublished); CC (Hai) 4933/07 Tradall S.A. v. Nitzan Food and Drinks Brands Ltd [2007] (unpublished); CC (TA) 15284/06 B.S.R. Europe Ltd v. Yosha [2006] (unpublished); CC (TA) 16748/05 Electra Ltd. v. Turbo Engineering and Marketing Ltd [2006] (unpublished); CC (TA) 58217/04 GE Medical Systems Ltd. v. Medtechnique Ltd. [2005] (unpublished); CC (TA) 17047/95 Swissa v. Arieli [1995] (unpublished).

IV. Enforcement of Foreign Arbitral Awards

The Arbitration Law gave effect to the foreign arbitral award enforcement obligations that Israel assumed when it acceded to the New York Convention. Section 29A of the Law deals with the enforcement of Convention awards and provides that an application for the 'confirmation or setting aside of a foreign arbitral award' subject to an international convention shall be made and dealt with in accordance with the Convention. It should be noted that the legislature chose to employ the misleading terms 'confirmation' and 'setting aside' instead of the terms 'enforcement' and 'refusal to enforce' provided in the Convention.

The use of these terms has engendered a debate as to whether the court has jurisdiction to set aside foreign arbitral awards in the same manner as it does with respect to domestic awards.[29] In rejecting this proposition, one court ruled that applying the grounds for setting aside applicable to domestic awards would undermine the Convention's provisions on the enforcement of foreign arbitral awards.[30] In contrast to the handling of the enforcement of international arbitration agreements, where the courts have in many cases deviated from the literal application of the Conventions' provisions, courts have generally adhered to the provisions of the Convention regarding the enforcement of arbitral awards.[31] The courts have recognized that the grounds for refusal to enforce the awards are exhaustive and should be construed narrowly,[32] and stressed that in no case do they sit as appeal courts on the award.[33]

Nevertheless, the wording of Section 29A and other aspects of Israeli law pertaining to the enforcement of arbitral awards continue to raise questions. For example, while the courts have recognized that only the court of the seat of arbitration can set aside an award made in its territory,[34] the Minister of Justice does not seem to fully accept that. By an amendment to the Civil Procedure Regulations,[35] the Minister of Justice added to the Regulations, in 1999, Section 500(8a) stipulating that the court is empowered to issue the service of proceedings outside

[29] Section 24 of the Law provides for an exhaustive list of grounds for setting aside the award.

[30] CC (PT) 4413/02 Estate of Zion Shabtai v. Fulteck Service Ltd [2003] (unpublished).

[31] CC (TA) 16763/04 Chian Shipping Ltd v. Leman Commodities S.A. [2004] (unpublished); CC 6248/07 (Jer) Atura Industries Ltd. v. Mirabu Chemical Industries Ltd [2008] (unpublished); CC (Jer) EPIS S.A. v. MEDIBAR Ltd.[2004] (unpublished); CC (Jer) 2180/03 TMR Energy Ltd v. The State Property Fund of Ukraine [2004] (unpublished).

[32] CC (Hi) 17013/04 BIP CHEMICALS LTD v. G.D. Chemicals Ltd [2005] (unpublished).

[33] CC (Jer) 2180/03 TMR Energy Limited v. The State Property Fund of Ukraine [2004] (unpublished).

[34] CC (Jer) 10060/03 P.D. v. A.A.M. [2003] (unpublished).

[35] Civil Procedure Regulations, K.T. 1984 4685.

Israel upon an application for setting aside a foreign arbitral award made against an Israeli resident, if the court is convinced that the applicant has no opportunity to have a fair trial in the courts of the country in which, or under the law of which, the award was made. In other words, the Section allegedly empowers the courts to order the service outside Israel of an application to set aside a foreign arbitral award when the court finds it necessary to protect Israeli residents. The exclusive jurisdiction of the court of the seat of arbitration to set aside the award is ostensibly denied through this Section.

It should be noted further that the Arbitration Law purports to empower the court in Section 39A, to set aside foreign awards that are not subject to international Conventions. In reality, this Section is of no effect, as Israel did not declare upon its accession to the New York Convention that it would apply the Convention on the basis of reciprocity.[36] Therefore, there can be no instances in which the Convention would not apply to the enforcement of foreign arbitral awards. Thus, it seems that Section 500(8a) was probably added for political reasons and is not supported by any legal basis to empower the courts to set aside foreign awards.

V. Conclusion

The State of Israel has not yet joined the lucrative economic competition for the creation of an attractive legal environment for the resolution of international business disputes through arbitration within its territory. However, by acceding to the New York Convention, Israel has signaled its willingness to become part of the global trend of nation States to acknowledge the importance of international commercial arbitration through the enforcement of international arbitration agreements and awards. While one expects that international commercial arbitration should be encouraged by the courts, an analysis of the decisions granted by the courts on the enforcement of international arbitration agreements shows that the courts have failed to offer a consistent stance on the matter. The record of the courts' decision on the enforcement of arbitral awards is more promising, yet uncertainty still remains. It is to be hoped that the courts will change their approach on the matter and adhere to the strict application of the Convention in order to provide predictability and certainty in its application.

[36] *See,* Section 1(3) of the Convention.

THE NEW MACEDONIAN PRIVATE INTERNATIONAL LAW ACT OF 2007

Toni DESKOSKI*

I. Introduction

The Republic of Macedonia is one of the states that emerged from the Former Socialist Federative Republic of Yugoslavia's dissolution in 1991. The former Yugoslav Federation was one of the few countries that had adopted a Private International Law Act in the early 1980s. That act was the Federal Act on Resolution of Conflict of Laws with other Countries in Certain Relations (hereinafter: Federal Conflict of Laws Act) of 23 July 1982[1], which went into force on 1 January 1983.

* Assistant professor (Docent) of Private International Law at the Faculty of Law 'Iustinianus Primus' at the University 'SS Cyril and Methodius', Skopje.

[1] '*Official Gazette of SFRY*' (Službeni list SFRJ) Nos. 43/82 and 72/82.

Yearbook of Private International Law, Volume 10 (2008), pp. 441-458

Printed in Germany

This Act was considered to be one of the most advanced enactments of Private International Law at the time, both in the field of the conflict of laws and international civil procedure.

Since proclaiming its independence, the Republic of Macedonia has kept the Federal Conflict of Laws Act in force, as well as a certain number of other Federal Acts.[2]

In 2006, the Macedonian Ministry of Justice decided to reform the Federal Conflict of Laws Act, with the primary goal of modernizing it. This modernization was to be achieved in two ways: (1) by introducing new rules to cover issues that were not regulated in the 1982 Federal Conflict of Laws Act and (2) by replacing some of the existing solutions with new ones, following the contemporary development of comparative Private International Law, especially in the EU.

On July 4, 2007, the Macedonian Parliament adopted the Private International Law Act (PIL Act),[3] which went into force on July 19, 2008.

II. Contents of the 2007 PIL Act

The Macedonian PIL Act leans heavily on the Federal Conflict of Laws Act of 1982. It can be said that the PIL Act is not a new statute but a reform of its 1982 predecessor. Therefore, this article will focus on the major solutions of the new act and the differences from its predecessor.

The PIL Act contains 124 Articles divided into 6 Chapters.

Chapter I (arts. 1-14) contains General Provisions. Chapter II (arts. 15-51) regulates Conflict of Laws. Chapter III (arts. 52-98) governs International Jurisdiction and Procedure. Chapter IV (arts. 99-116) is devoted to the Recognition and Enforcement of Foreign Judgments. Chapter V (arts. 117-121) regulates special provisions, and Chapter VI (arts. 122-124) contains the final and transitory provisions.

The PIL Act's first major departure from the 1982 Act is the replacement of its awkward title (Act on Resolution of Conflict of Laws with other Countries in Certain Relations). The new act is simply called the Private International Law Act, following the examples of Austria,[4] Switzerland,[5] Belgium,[6] Hungary,[7] and other

[2] The Constitutional basis for that was created in Paragraph 1 of Article 5 of The Constitutional Law on the implementation of the Constitution of the Republic of Macedonia of 1991 ('*Official Gazette of the Republic of Macedonia*' [Služben vesnik na Republika Makedonija], no. 52/1991).

[3] '*Official Gazette of the Republic of Macedonia*' (Služben vesnik na Republika Makedonija) no. 87/2007.

[4] The Federal Private International Law Act of 15 June 1978.

[5] Federal Private International Law Act of 18 December 1987

[6] Private International Law Act of 16 July 2004.

[7] Regulation on Private International Law of 31 May 1979.

States in their contemporary codifications of Private International Law. Slovenia, which was the first of the former Yugoslav Republics to reform the Federal Conflict of Laws Act of 1982, has also simplified its title to the 'Private International Law and Procedure Act.'[8]

A. General Provisions

The first chapter of the PIL Act, which is titled General Provisions (arts. 1-14), contains provisions that define its scope of application, the priority of international treaties, the method for filling gaps, public policy, *renvoi*, characterization, a reference to the law of a state that consists of two or more systems of law, and a general provision on mandatory rules and exception clauses.

1. Exception Clause (clause d'exception)

Article 3 introduces the 'exception clause' (*clause d'exception*) into Macedonian Private International Law, following similar provisions of the Swiss PIL Code of 1987,[9] the Slovenian PIL Act of 1999,[10] and the Belgian PIL Code of 2004.[11] According to this clause, the law determined by the PIL Act will not apply in exceptional cases where it is evident from the circumstances of the case that there is no significant connection with that law, but there is a manifestly closer connection with the law of another state. Paragraph 2 of this Article excludes the application of the exception clause in situations where the parties have made a choice of law.

2. Public Policy (ordre public)

Article 5 of the PIL Act contains a provision on public policy that replaces the explanatory definition[12] contained in the 1982 Act with the commonly accepted general term 'public policy.' According to this rule, the foreign substantive law which is determined as applicable by the conflict of the PIL Act will not apply if application of that law would produce results that are contrary to the Republic of Macedonia's public policy. This rule does not allow courts to perform an abstract

[8] 'Zakon o mednarodnom zasebnom pravu i postopku', in: *Official Gazette of Republic of Slovenia ('Uradni list Republike Slovenije')*, no. 56/1999.

[9] Art. 15.

[10] Art. 3.

[11] Art. 19.

[12] The explanatory definition used in Art. 4 of the Federal Conflict of Laws Act of 1982 was as follows: '*the basis of the social regulation provided in the Constitution of SFRY*'.

evaluation of the foreign law's substantive rules, but instead instructs them to examine whether the application of those rules in the specific case leads to consequences that are incompatible with Macedonian ordre public.

3. Renvoi

Article 6 covers 'renvoi.' However, renvoi is excluded where the parties have the right to choose the applicable law (para. 3). The parties need not have actually made a choice of law, it is sufficient that the conflict rules merely give them the right to make such a choice. The exclusion clause generally applies in any case where the applicable law is being determined, either by the PIL Act or any other Act containing choice of law rules. Thus, renvoi is excluded not only with respect to contractual relations but also with respect to any other area where the PIL or any other Act gives parties the right to choose the applicable law. For example, the PIL Act gives parties the right to choose the applicable law for non-contractual liability for damages (art. 33, para. 3).

4. Application of Foreign Law

The Macedonian PIL Act has maintained the rule allowing courts to determine and apply the foreign applicable law *ex officio*. The contents of the foreign law may be determined in several different ways. First, information may be obtained from the Ministry of Justice. Second, the parties may also produce a statement on the foreign law's content issued by a competent foreign authority or institution. Finally, the PIL Act introduces a new solution that offers an option for reverting to the *lex fori*. This applies in cases where the foreign law's content cannot be determined in one of the manners described above. Needless to say, this provision must be applied only exceptionally, in situations where the court's attempts to determine the foreign law have failed due to reasons that are beyond its control. However, it is worth mentioning that the Macedonian courts also have a number of international conventions at their disposal that provide efficient instruments for ascertaining foreign law. Macedonia is member of the European Convention on Information on Foreign Law of 1968 (with the Additional Protocol) since the year 2002,[13] and has concluded numerous Bilateral Agreements for legal assistance, covering the providing of information on foreign laws.

The PIL Act preserved the 1982 Acts solutions on both the Applicability of the Law of states with more than one legal system (art. 10) and Characterization (art. 9).

[13] *Official Gazette of the Republic of Macedonia, International Contracts* ('*Služben vesnik na Republika Makedonija, Megjunarodni dogovori*'), No. 13/2002.

5. Doctrine of Fraus legis (fraude à la loi)

The former Federal Conflict of Laws Act of 1982 expressly adhered to the doctrine of *fraus legis*.[14] Moreover, the Private International Law doctrine of Macedonia considered this doctrine to be a special form of abuse of rights.[15] *Fraus legis* was applicable only in the field of conflict of laws. However, according to the information that is available, the *fraus legis* provision has never been applied by Macedonian courts. The drafting group for the new PIL Act faced two proposals on this provision: (1) to abandon the concept of *fraus legis*[16] or (2) to modify the existing definition.[17] In the end, the first approach was adopted,[18] considering that there is no need to sanction parties' fraudulent creation of connecting factor points in order to evade domestic substantive rules.[19]

6. Mandatory Rules

Article 14 allows for the application of the mandatory rules (*lois d'application immédiate* or *lois de police*) of the forum. There are many definitions of mandatory rules in legal doctrine. T.C. Hartley speaks of '*internationally mandatory rules*' that '*are applicable in the situation described by their unilateral choice-of-law rule, irrespective of the normal rules of private international law*.'[20] Another comprehensive definition describes mandatory rules as '*cogent substantive rules which are determining their scope of obligatory application in an explicit or im-*

[14] Article 5 of the Federal Conflict of Laws Act of 1982 provided: '*Foreign Law is not to be applied if the purpose of its application would be to evade the application of the law of the SFRY.*'

[15] See ŽIVKOVIĆ M./STANIVUKOVIĆ M., in: 'Serbia and Montenegro', *International Encyclopaedia of Laws – Private International Law*, The Hague, London, New York, 2001, p. 95.

[16] See the Draft Version of the Private International Law Act, Skopje, September 2006.

[17] In his Expertise on the Draft Version of the PIL Act of September 2006, Prof. Rajko Knez has proposed implementing a new definition of fraus legis that uses the solution in article 18 of the Belgian PIL Act of 2004 – see KNEZ R., 'Ekspertiza o zakonu za medjunarodno privatno pravo (radna verzija zakona iz septembra 2006)' [Expertise on the Private International Law Act (Draft version of September 2006)], Maribor, November 15, 2006, p. 6.

[18] See DESKOSKI T., 'Zakonot za megjunarodno privatno pravo – Pregled na Rešenijata' ('On the Private International Law Act – An Overview'), in: *Pravnik*, July-August, 2007, Skopje, p. 10.

[19] The same solutions were adopted in several of the recent PIL Codifications: the Swiss Private International Law Act of 1987, Austrian Federal Private International Law Act of 1978, and the Italian Private International Law Act of 1995.

[20] HARTLEY T.C., 'Mandatory rules in international contracts: the common law approach', in: *Recueil des Cours* 1997, vol. 268, p. 348.

plicit manner, e.g. they are imposing their applicability without the mediation of the forum's conflict rules.'[21]

The provision incorporated into Macedonian Private International Law is identical to the one in Article 7 Paragraph 2 of the Rome Convention on the Law Applicable to Contractual Obligations of 1980.[22] But although the PIL Act explicitly provides that the Macedonian court's must apply the *lex fori's* rules of immediate application[23] (mandatory rules) in any situation falling within those rules' scope regardless of the law otherwise applicable to the contract, the Act is silent on the possibility of applying the mandatory rules of a third country. The PIL Act also fails to define mandatory rules. Therefore, it is recommended that the Macedonian legislator amends Article 14 of the PIL Act in the near future, following the solutions adopted in Article 9 of the final text of the Regulation on the law applicable to contractual obligations (Rome I) of 2007.

B. Rules on Conflict of Laws

The Macedonian PIL Act's conflict rules are mostly bilateral. They determine the applicable law on the basis of criterion selected in advance, without taking into account the contents of the designated governing law. The bilateral method of resolving conflicts of laws was also dominant in the Federal Conflict of Laws Act of 1982.

1. Legal Status of Natural Persons

The use of *lex nationalis* as connecting factor for determining the legal status of natural persons has a long tradition in Macedonian Private International Law. It has also been strongly supported in Macedonian legal doctrine.[24] Therefore, nationality remains the main connecting factor with regard to the legal status of natural persons (art. 15). The PIL Act has kept the *lex loci actus* rule which supplements the *lex nationalis* for determining the legal capacity of natural persons to conclude contracts or make deeds (art. 15, para. 2). The Macedonian PIL Act (arts. 11 and 12) has also stayed consistent with the 1982 Act's rules for determining the nation-

[21] BORDAŠ B., *Sukob zakona kod ugovora o transferu tehnologije sa elementom inostranosti* (*Conflict of Laws on the Contract for transfer of technology with foreign element*), *Doctoral Dissertation,* Novi Sad 1989, p. 145.

[22] *OJ*, L 266/1 of 1980. It came into force on April 1, 1991.

[23] The PIL Act refers to the 'rules of immediate application,' which is consistent with the term used for the first time by the French author Ph. Franceskakis in 1958 – see FRANCESKAKIS P., *La théorie du renvoi et des conflits de systèmes en droit international privé*, Paris 1958. p. 11 *et seq.*

[24] See GAVROSKA P., *Megjunarodno privatno pravo – Sudir na zakonite* (*Private International Law – Conflict of Laws),* Skopje 2002, p. 80.

ality of persons with dual nationality (art. 11).[25] According to those rules, Macedonian nationals that have dual nationality are regarded as being nationals of only the Republic of Macedonia. Foreigners with two or more foreign nationalities are considered to be nationals of the State where they have both nationality and domicile. However, if such a person is not domiciled in either of the states of which he is a national, the closest connection with one of the States of which he is national becomes relevant.

Nationality is replaced with domicile for determining the personal status of stateless persons. If a stateless person is not domiciled in any state, his temporary residence prevails. Finally, when neither the domicile nor the temporary residence of a stateless person can be determined, Macedonian law applies (art. 12).

The Macedonian legislator followed the example of the Slovenian PILP Act of 1999[26] by introducing a new conflict rule that determines the law applicable to the name of a natural person (art. 19). The *lex nationalis* applies to this question as well.

2. Legal Status of Legal Persons

The Federal Conflict of Laws Act of 1982 did not contain a conflict rule on the status of legal persons. It had only the rule for determining the nationality of legal persons by using the place of incorporation as the primary criterion. This led to prevailing interpretation in the doctrine that the law of the country where the legal person is incorporated should apply to determine the law applicable to the status of that legal person.[27]

Article 16 of the PIL Act introduces a new conflict rule for determining the legal status of legal persons. According to this rule, the legal status of a legal person is governed by the law of the State of which the legal person has the nationality (para. 1).[28] The criterion for determining the nationality of a legal person has remained the same as it was in the abrogated rule; it is primarily determined by the legal person's place of incorporation (art. 16, para. 2). But the place of incorpora-

[25] On Article 11 of the Federal Conflict of Laws Act of 1982 see: ILEŠIĆ M./POLAJNAR-PAVČNIK A./WEDAM-LUKIĆ D., *Mednarodno zasebno pravo, Komentar zakona' (Private International Law, Commentary of the Law)*, 2nd ed., Ljubljana 1992, p. 35-36; VARADI T., *Medjunarodno privatno pravo (Private International Law)*, 3rd ed., amended and supplemented edition, Novi Sad 1990, p. 184.

[26] Art. 14 od Slovenian PILP Act.

[27] DJUNOV T., *Megjunarodno privatno pravo (Private International Law)*, Skopje 1995, p. 109; BENDEVSKI T., *Megjunarodno privatno pravo (Private International Law)*, Skopje 2001, p. 117; VARADI T. (note 25), p. 188; DIKA M./KNEŽEVIĆ G./STOJANOVIĆ S., *Komentar zakona o medjunarodnom privatnom i procesnom pravu* (*Commentary of the Statute on Private International Law and Procedure)*, Belgrade 1991, p. 63; ILEŠIĆ M./POLAJNAR-PAVČNIK A./WEDAM-LUKIĆ D. (note 25) p. 43.

[28] On different opinions on the concept of 'nationality' of legal persons see: BATIFFOL H./LAGARDE P., *Droit international privé*, Tome 1, 8th ed., Paris 1993, p. 329.

tion is not used as the sole criterion for determining the legal person's nationality. If a legal person has its head office in a State other than the one where it was incorporated, and if under the law of that other State it has the nationality of that State, the legal person shall be regarded as having the nationality of that other State (art. 16, para. 3). So, it may be concluded that the PIL Act uses combined criteria for determining the nationality of a legal person: the place of incorporation is the primary connecting factor and the place of the head office is the secondary connecting factor.[29]

3. Property Rights and Rights on Intellectual Property

The PIL Acts' conflict rules on property rights are identical to those contained in the Federal Conflict of Laws Act of 1982. The *Lex rei sitae* remains the general conflict rule for property rights (art. 20, para. 1). Special conflict rules for transported objects (para. 2) and the means of transport (para. 3) have also seen no changes.

Both doctrine and judicial practice are unanimous on the interpretation of the questions that are governed by the *lex situs*: (1) the classification of a right as a real right; (2) the classification of a thing as immovable or movable; (3) the things that can be object of real rights; (4) the manner of acquisition, transfer, and termination of real rights; (5) the necessary publicity measures, scope, and content of authority conferred on the holder; (6) the protection and hierarchy of real rights; (7) possession; and (8) the effects of real rights in relation to third parties.[30]

4. Contractual Obligations

The PIL Act contains a comprehensive set of choice of law rules governing contractual obligations. The solutions adopted are modeled on the Rome Convention on the Law Applicable to Contractual Obligations of 1980. In the near future, after the entry into force of the Rome I Regulation scheduled for December 2009, it will be necessary to amend the PIL Act in order to implement the adaptations made by the Regulation in order to modernise the Rome Convention rules.

In modern policy terms, party autonomy provides the certainty and predictability that are essential in commercial matters.[31] Party autonomy is traditionally considered as one of the fundamental principles of Macedonian Private International Law. Furthermore, the conflictual understanding of party autonomy pre-

[29] Identical solution was adopted in Art. 17 of the Slovenian PILP Act of 1999.

[30] ŽIVKOVIĆ M./STANIVUKOVIĆ M. (note 15), p. 143; ILEŠIĆ M./POLAJNAR-PAVČNIK A./WEDAM-LUKIĆ D. (note 25), p. 44 ; DJUNOV T. (note 27), p. 209; GAVROSKA P. (note 24), p. 96-97.

[31] G.C. CHESHIRE, P. NORTH, *Private International Law*, 12th ed., London 1992, p. 476.

vailed in the legal doctrine.[32] Article 21 of the PIL Act maintained party autonomy as the primary connecting factor for determining the applicable law for contracts, providing that a contract shall be governed by the law chosen by the contracting parties unless otherwise provided by the Act or by an international agreement (para. 1).

The following paragraphs of Article 21 introduce several new rules on party autonomy. A choice of law by the parties can be made either explicitly or implicitly. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or by other circumstances (para. 2). Unlike the Federal Conflict of Laws Act of 1982, which was silent on the right of parties to choose different laws for different parts of a contract, *dépeçage* is now expressly allowed. The parties are given the freedom to choose the law applicable to the whole contract or to only a part of it (para. 3). Finally, the existence and validity of the choice of law agreement is subjected to the chosen law (para. 4).

In the absence of a choice of law, Article 22 establishes as a secondary connecting factor the closest connection principle. The doctrine emphasizes that the determination of the system of law or country with which the contract is most closely connected gives the court freedom to select almost whatever law it pleases.[33] However, following the example of Article 4 Paragraph 2 of the Rome Convention, the PIL Act provides that the Contract is presumed to be most closely connected with the state in which the party who is to carry out the characteristic performance of the contract has its domicile (if it is a natural person) or head office (if it is a legal person). This presumption however can be rebutted, if some special circumstances of the case show that the contract is more closely connected with another country (art. 22, para. 1).

Contracts for the carriage of goods are presumed to be most closely connected with the country in which the carrier has its head office (if he is a legal person) or domicile (if he is a natural person) only if the place of loading or discharge or the domicile of the consignor is also located in that country (art. 22, para. 3).

Article 20, Paragraph 1 of the 1982 Act provided an extensive list of contracts for which the place of characteristic performance was determined. The Swiss PIL Act also contains such solution.[34] The Macedonian PIL Act does not contain such provision, leaving the forum to determine the characteristic performance. But it is beyond any doubt that the characteristic performance will be the performance for which the payment is due, as provided in the Giuliano and Lagarde Report on the Rome Convention.[35]

Following the solutions from the Rome Convention, the PIL Act introduces specific choice of law rules for consumer and employment contracts (Articles 24

[32] DJUNOV T. (note 27), p. 215; GAVROSKA P. (note 24), p. 114-115.

[33] See COLLIER J.G., *Conflict of Laws*, 2nd ed., Cambridge 1994, p. 193.

[34] Art. 117, para. 3.

[35] GIULIANO M./LAGARDE P., 'Report on The Convention on the Law Applicable to contractual obligations', in: *OJ* C 282, 1980, p. 20.

and 25). These rules fully comply with provisions of Articles 5 and 6 of the Rome Convention.

Article 23 contains a specific choice of law rule for contracts on immovable property, providing for exclusive applicability of the *lex rei sitae*. This rule differs from the one in Article 4 Paragraph 3 of the Rome Convention, which provides only a presumption that the contracts on immovable property are most closely connected with the country where the immovable property is situated. Article 23 applies to that extent that the subject matter of the contract is a right in immovable property or a right to use immovable property.

5. Non-Contractual Obligations

The PIL Act preserved the Federal Conflict of Laws Act of 1982's provisions on unjust enrichment (art. 31), *negotiorum gestio*, obligations arising from the unauthorized use of property, and other non-contractual obligations other than torts (art. 32). The place where the events causing the claims occurred is used as the connecting factor for all of those categories, without exception.

Article 33 contains a general conflict rule for non-contractual liability for damages. The primary connecting factor remains the same as it was in the previous Act: *lex loci delicti commissi*. However, the further connecting factors adopted by this rule are completely new. First, the injured party can request that the law of the place where the act was committed be replaced by the law of the place where the consequences occured, so long as the tortfeasor could and should have foreseen the consequences (para. 1). Paragraph 2 provides that if the relationship is not closely connected with the law determined in paragraph 1 (either the place where the event occurred or the place where the consequences occurred) but is manifestly more closely connected with some other law, that other law shall apply. This solution is clearly inspired by the doctrine of the proper law of the tort.[36] Finally, Paragraph 3 of this Article follows the similar rule in Article 132 of the Swiss PIL Act, providing for party autonomy on non-contractual relations. The parties are free to determine the applicable law for their non-contractual relations once the event has occurred. Choice of law by the parties implies choice of the substantive law, since Article 6 Paragraph 3 of the PIL Act excludes *renvoi* in cases where the parties have the right to choose the applicable law.

The Republic of Macedonia is a member of the Hague Convention on the Law Applicable to Traffic Accidents of May 4 1971 and the Hague Convention on the Law Applicable to product liability of 2 October 1973. So, Article 33 of the PIL Act does not apply to the cases falling under the scope of these two Conventions. On 11 July 2007 the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations was adopted (Rome II). Therefore, in the near future, a reform of the PIL Act will have to be done, in order to implement the solutions of the Rome II Regulation.

[36] See WEINTRAUB R. J., *Commentary on the Conflict of Laws*, 4th ed., New York 2001, p. 368-394.

6. Succession Law

The PIL Act's conflict rules for successions are the same as they were under the 1982 Act. The law governing a succession is determined on the basis of the nationality of the deceased (art. 35). This rule comprises all substantive issues of succession regardless of whether it is testate or intestate.[37] However, there are two specific questions that are governed by separate choice of law rules: first, the capacity of the testator to make a will is governed by the law of the state of the testator's nationality at the time when the will was made (art. 36); second, the form of the will (art. 37, para 1) is governed by the solutions of the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions of 1961, of which the Republic of Macedonia is also a member, with only two minor modifications.[38] The revocation of a will is valid as to form if it is valid under any of the laws under which a will could be validly made (art. 37, para. 2).

7. Family Law

Most of the choice of law rules on family matters have not been altered. The substantive requirements of marriage are governed by the national law of each spouse at the time of marriage (art. 38, para. 1). However, if the marriage is to be concluded in Macedonia, it is expressly provided that certain impediments provided by Macedonian substantive family law must be applied (art. 38, para. 2); They are (1) the existence of an earlier marriage, (2) consanguinity, and (3) mental incapacity. Certain authors are of opinion that this provision specifies Macedonian public policy in the field of substantive conditions for marriage.[39] But it is clear that the role of public policy is not limited to only the application of these three impediments; it is much broader. The prohibition against minors under the age of 16 from marrying and the requirement that spouses be from opposite sexes are some of the rules of public policy that are not included in Paragraph 2 of Article 38.

The form of marriage is governed by the *lex loci celebrationis* (art. 39).

The invalidity of marriage is governed by any of the laws under which the marriage was concluded according to Article 38 of the PIL Act.

The conflict rules for divorce have been slightly reformed. The common *lex patriae* of the spouses at the time of filing is still the primary conflict rule (art. 41, para. 1). But, a major change has been introduced in the conflict rule that determines the applicable law for divorce when the spouses have different nationalities at the time the divorce petition is filed. The 1982 Act provided for the cumulative applicability of the *lex nationalis* of the spouses in such situations. The new rule contained in Paragraph 2 of Article 41 provides for application of the law of last

[37] See ŽIVKOVIĆ M./STANIVUKOVIĆ M. (note 15), p. 192.

[38] The first modification concerns the addition of the *lex fori* as an alternative for formal validity of a will. The second modification is the use of the term 'residence' instead of 'habitual residence,' which is used in Article 1 paragraph 1 of the Convention.

[39] GAVROSKA P. (note 24), p. 170.

common domicile of the spouses or, if there has never been a common domicile, the *lex fori* applies as last resort. There is an exemption to this rule: where one of the spouses is a Macedonian national, the divorce must be governed by Macedonian substantive law (para. 3).

The provision of the Federal Conflict of Laws Act of 1982 that required applying Macedonian law when a divorce could not be obtained by cumulative application of the national law of the spouses has been abrogated.

The personal and property effects of marriage are primarily governed by the common national law of the spouses. There are three subsidiary connecting factors that apply as alternatives. First, if the spouses do not have a common nationality, the law of the country where they have common domicile applies. Second, if the spouses have neither common citizenship nor common domicile, the law of the State of their last common domicile shall apply. Finally, if the applicable law cannot be determined by virtue of previous three rules, Macedonian substantive law will apply (art. 42).

The spouses may choose the law applicable to their contractual relations (marital contracts and other contracts concluded between the spouses). The choice is limited to one of the following laws: the law of the state of at least one of the spouse's nationality; or the law of the state where at least one of the spouses is domiciled; and, for real property, the law of the state where the property is located.

The former 1982 Act was one of the rare statutory texts in the world that contained a special conflict rule for pecuniary relations of persons living together in an extra-marital union. The new PIL Act maintained this provision, which determines the common nationality of cohabitants as the primary connecting factor, and if they are nationals of different countries, their common domicile is used secondarily (art. 45, para. 1 and 2). The same conflict rules apply to cohabitation agreements (art. 45, para. 3)

Article 46 provides several connecting factors for determining the law applicable to relations between parents and children, including the obligation of support. The common *lex nationalis* of the parents and the children is primary connecting factor (para. 1). But if the parents and the child are nationals of different States, the law of the state of their common domicile applies (para. 2). The third alternative connecting factor differs from the one contained in the 1982 Act. This rule is in favor of the child. So, if the parents and the child have no common nationality or domicile, the *lex nationalis* of the child applies.

The Republic of Macedonia is member of the Hague Convention on Civil Aspects of the Child Abduction of 1980, which supersedes the rules of the PIL Act.

Article 47 of the PIL Act governs the applicable law for the judicial establishment and contestation of paternity and maternity. It confirms the general status of the *lex nationalis* as the primary connecting factor for family relations.

The PIL Act's conflict rules on judicially establishing and contesting paternity and maternity (art. 47), the obligation of support between blood relatives (art. 48), and legitimization (art. 49) have maintained the same solutions that were contained in the 1982 Act.

Article 50 governs the law applicable to the conditions for the creation and termination of an adoption. The primary connecting factor is the common *lex na-*

tionalis of the adoptive parent and the adopted child. If they are nationals of different states, the laws of those states apply on a cumulative basis (para. 2). If a couple is adopting a child, in addition to the law of the State of the adopted child's nationality, the adoption is also governed by the laws of each state where the spouses are nationals (para. 3). The form of adoption is governed by the law of the State where the adoption takes place (para. 4).

C. International Civil Proceedings

1. Jurisdiction

The new PIL Act maintained most of the rules on international jurisdiction of the courts of the Republic of Macedonia, with some slight changes that concern mostly the avoidance of exorbitant jurisdiction.

The international jurisdiction of the court of the Republic of Macedonia shall be assessed based on the facts existing at the time the proceedings are instituted (article 94).

The PIL Act has kept domicile as the basic connecting factor for determining the international jurisdiction of Macedonian Courts (*actor sequitur forum rei*). Articles 52 and 53 provide that the domicile of the defendant (if the defendant is a natural person) is a ground of general jurisdiction, i.e. jurisdiction of the Macedonian court to entertain any case regardless of its type (litigious or non-litigious). If the defendant is a legal person, its head office is relevant for determining general jurisdiction.

The Federal Conflict of Laws Act of 1982 contained a provision (art. 54) that based international jurisdiction of domestic courts on solely whether the defendant possessed some property within the territory of the state, notwithstanding that property's connection to the claim or its value (*forum patrimonii*).[40] The PIL Act has maintained the provision on *forum patrimonii*, but this forum is restricted to only those cases where the plaintiff has its domicile (if it is a natural person) or its head office (if it is a legal person) in the Republic of Macedonia, provided that the plaintiff proves that it is probable that the decision can be enforced against this property.[41]

The specific jurisdiction of the Macedonian Courts to hear and determine issues in cases with international elements, even when the defendant is not domiciled in Macedonia, is governed by articles 58-91 of the PIL Act. All of these rules concern situations where the dispute has some substantial connection with Macedonia. None of those rules extends the jurisdiction of Macedonian Courts over certain types of disputes solely on basis of the plaintiff's nationality, which is sufficient to prevent the appearance of exorbitant jurisdiction.

[40] This provision is identical with the one in Article 23 of the German Code of Civil Procedure (ZPO).

[41] The same restrictions on the '*forum patrimonii*' rule were imposed by Article 58 Paragraph 2 of the Slovenian PILP Act of 1999.

The Macedonian courts have exclusive jurisdiction only when expressly provided by law (art. 54). The commonly accepted rule that provides for the Macedonian courts' exclusive jurisdiction over disputes relating to the property rights and lease or rent of immovable property located in Macedonia was maintained (art. 69). However, the PIL Act introduced several new rules that give the Macedonian courts exclusive jurisdiction over the following disputes: 1) the establishment, dissolution, and changes in the legal status of a company, another legal person, or an association of natural or legal persons, as well as in disputes relating to validity of resolutions passed by the bodies thereof if such company, legal person or association has its head office in the Republic of Macedonia (art. 65); 2) those relating to the entries in the public registers kept in Macedonia (art. 66); and 3) those relating to the application for and validity of industrial property rights, if the application was filed in Macedonia (art. 67). The Macedonian courts also have exclusive jurisdiction over permitting and carrying out of executions if the execution is performed in the territory of Macedonia (art. 68).

Prorogation of a jurisdiction of a foreign court by the parties is allowed if (1) at least one of the parties is a foreign citizen or a legal person with its head office abroad, and (2) the dispute does not fall under the Macedonian courts' exclusive jurisdiction (art. 56, para. 1). However, the parties cannot agree on the jurisdiction of a foreign court for disputes arising from consumer relationships or insurance relationships, if the consumer or the insured person, who is a natural person, has his permanent residence in the Republic of Macedonia; parties also cannot agree to a foreign court's jurisdiction in family law disputes (art. 56, para. 2 and 4). Parties are however allowed to agree to the jurisdiction of a court of the Republic of Macedonia if at least one of them is a Macedonian national or a legal person with its head office in Macedonia (art. 56, para. 3). The PIL Act, as well as its predecessor, contains no provision governing the form of a choice of law agreement. The doctrine assumed that the Civil Procedure Act applies to choice of law agreements by analogy, specifically the rules concerning agreements on local jurisdiction (venue), which require written form.[42] It would be advisable in the near future to amend Article 56 to follow article 23 of EU Regulation No. 44/2001 on the jurisdiction and the Recognition and enforcement of judgments in civil and commercial matters (Brussels I).

The possibility for tacit consent to Macedonian court jurisdiction is provided in Article 57 of the PIL Act, but only if the defendant formally answers a complaint or begins to discuss the merits of the case without contesting the court's jurisdiction.

[42] ILEŠIĆ M./POLAJNAR-PAVČNIK A./WEDAM-LUKIĆ D. (note 25), p. 91-92; GEČ-KOROŠEC M., *Mednarodno zasebno pravo, Druga knjiga-posebni del' (Private International Law, Book Two – Special Part)*, Ljubljana 2002, p. 212.

2. Procedure

Civil proceedings in Macedonia with an international element are conducted according to the domestic rules on civil procedure. The *lex fori* applies even if a foreign law applies to the substance of the dispute. The PIL Act provides several rules that govern certain situations that appear only in cases with an international element. These rules distinguish purely domestic proceedings from those with a foreign element.

Article 92 Paragraph 1 states that a natural person's capacity to be a party before the Macedonian courts and the capacity to act independently in the procedure is governed by the law of the state of which he is a national (*lex nationalis*). If a foreign national does not have capacity to act independently under his national law, he could still act independently if he would have such capacity under Macedonian law (Para 2). In such cases, the legal representative of a foreign national can act on his behalf in the proceedings only until the moment the foreign person states that he will take over the proceedings himself (para. 3).

The capacity of a legal person to be a party in a case before the Macedonian court however is governed by the law of the country to which the legal person belongs pursuant to Article 17 of the PIL Act (art. 92, para. 4).

The substantive conditions for recognizing foreign *lis pendens* have been liberalized. A later suit filed in a Macedonian court between the same parties and based on the same grounds shall be stayed if it does not concern a situation where the PIL Act provides for exclusive jurisdiction of Macedonian Courts (art. 93). The reciprocity requirement has been repealed.

The rules on security for costs (*cautio iudicatum solvi*) and free legal aid for foreigners are contained in articles 95-98 of the PIL Act. *Cautio iudicatum solvi* is provided only for natural persons – foreign nationals or stateless persons who are not domiciled in Macedonia. Unfortunately, the same rule that was contained in art. 82 of 1982 Act has been interpreted by the courts (Macedonian courts as well as courts of other Republics of former Yugoslavia) to also include foreign legal persons.[43] However, the scope of application of *cautio iudicatum solvi* to foreign plaintiffs in Macedonia has been substantially narrowed, since the country is a member of the Hague Conventions relating to civil procedure (1954 and 1905) and the Hague Convention on International Access to Justice (1980) as well as of a number of other multilateral and bilateral conventions that abolish this institution.

Foreign nationals and stateless persons who are not domiciled in Macedonia are entitled to an exemption from having to pay legal costs, subject to the principle of reciprocity. When there is doubt with respect to reciprocity, the explanation on exemption from payment of legal costs shall be given by the ministry competent for justice (art. 98).

[43] See the Decision of The Court of First instance in Kavadarci (Republic of Macedonia), Ps.br/210/01 from 7 March 2002.

3. Recognition and Enforcement of Foreign Judgments

The Federal Conflict of Laws Act of 1982 had a very liberal attitude towards the recognition and enforcement of foreign judgments. And this is considered by some authors as 'one of the main reasons why this act received so much attention when it was adopted in 1982 and why it was considered as one of the most advanced at that time.'[44]

The new PIL Act of 2007 lays down provisions on the recognition and enforcement of foreign judgments in Chapter IV. Those rules govern the substantial conditions and procedure for obtaining recognition and enforcement of foreign judgments. The 1982 Act's provisions on the substantial conditions for recognition and enforcement of foreign arbitral awards (art. 97-100) have already been repealed by the Law on International Commercial Arbitration of the Republic of Macedonia (International Commercial Arbitration Act).[45] Article 37 Paragraph 3 of the International Commercial Arbitration Act provides for the direct application of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

The new Macedonian PIL of 2007 delivers two major changes in the field of recognition and enforcement of foreign judgments: (1) the substantial conditions for recognition are further liberalized, and (2) a complete non-litigious procedure for recognition is proscribed.

As far as the substantial conditions for recognition and enforcement of foreign judgments are concerned, the most important novelty is the abolishment of the reciprocity requirement. Article 92 of the 1982 Act required factual reciprocity but created a presumption in favor of the proponent. It was the person opposing the judgment's recognition who had the burden of proving that there was no reciprocity between Macedonia and the state where the judgment was issued. However, the Supreme Court of Macedonia has recently interpreted this condition in a manner that has made recognition practically impossible, stating that '*whenever there is no reciprocity established by a treaty, there is a presumption in favour of the existence of the factual reciprocity*.'[46] In order to overcome this difficulty that has emerged in the judicial practice, in the First Draft of the New PIL Code of September 2006 the provision on reciprocity was amended with an explanatory rule on the application of this requirement.[47] However, the Drafting Committee later agreed to

[44] GALIČ A., 'A possible reform of international private law in the Western Balkans Region – international jurisdiction and enforcement of foreign judgments' – Paper presented at the workshop on *Regional technical assistance in approximation of the legislation regarding the jurisdiction, recognition and enforcement of judgments in civil and commercial matters*, 25-28 September, Milocer (Montenegro), 2006, p. 23-24.

[45] *Official Gazette of the Republic of Macedonia (Služben vesnik na Republika Makedonija)* no. 39/2006.

[46] See the decision of the Supreme Court reversing the decision of the Court of First instance in Skopje which concerned the recognition of a foreign judgment delivered in the State of New York, USA, Gzz.br. 14/02 from 7 March 2002.

[47] See Art. 103 of the Draft version of the PIL Act of September 2006.

adopt the proposal for complete abolishment of this substantial condition,[48] following the solutions adopted in some other contemporary PIL Codifications, such as the Venezuelan Act on Private International Law of 1998[49] and the new Bulgarian Private International Law Code of 2005.[50]

The other substantive conditions for recognition are mostly of a procedural character. Some are reviewed *ex officio*: (1) the finality of the foreign judgment (art. 101-102); (2) the absence of exclusive jurisdiction of Macedonian courts (art. 104); (3) the absence of domestic *res iudicata* or domestic *lis pendens* (art. 106); and (4) the absence of a violation of public policy (art. 107). The other substantial conditions are examined only upon an objection by the opposing party: (1) the absence of a violation of the right to be heard (art. 103); (2) the lack of the foreign court's jurisdiction based exclusively on the plaintiff's nationality (art. 105, para. 1); (3) the lack of a violation of the parties' agreement on prorogation of the Macedonian courts' jurisdiction (art. 105, para. 2).

The court may examine only whether the substantial conditions set out in the provisions of the PIL Act are fulfilled, and no review on the merits of the foreign judgment is allowed (art. 113, para. 1). A decision on recognition is declaratory in character and has *erga omnes* effect.[51]

The new PIL Act thoroughly regulates the non-litigious procedure for recognition and enforcement of foreign judgments (arts. 111 to 116). This same procedure applies to the recognition and enforcement of foreign arbitral awards (art. 116). The procedure is similar (but not identical) to the one provided by the Brussels I Regulation. The court of first instance decides requests for recognition in a non-contradictory procedure. In this phase, the court examines only the substantial conditions, which are to be examined *ex officio*. After a decision on recognition is issued, the defendant is entitled to file an objection to that decision with the same court. It is only then that the unsuccessful party can file an appeal with the Appellate Court. The most important difference between the PIL Act and the Brussels I Regulation is that in the PIL Act there is no automatic recognition in the first instance; the court only examines *ex officio* some of the substantial conditions in this phase, even before the opposing party has objected or appealed the decision on recognition.

Once the foreign judgment has been recognized, it is equated with a judgment of a Macedonian court. Judgments that may be the subject of compulsory execution need to be declared enforceable in the same procedure as provided for recognition. The 2005 reform of Macedonian Judiciary has limited the possibilities for incidental recognition of foreign judgments. This is due to the fact that only

[48] The proposal was made by Professor Rajko Knez, who provided the Expertise on the Draft version of the PIL Act – see KNEZ R. (note 17), p. 11.

[49] See PARRA-ARANGUREN G. E., 'The Venezuelan Act on Private International Law of 1998', in: this *Yearbook* 1999, p. 116.

[50] See JESSEL-HOLST C., The Bulgarian Private International Law Code of 2005, in: this *Yearbook* 2007, p. 383.

[51] See GEČ-KOROŠEC M. (note 42), p. 206.

courts can decide on the recognition of foreign judgments. And the new 2005 Law on execution[52] transferred the power of compulsory execution from courts to private bodies – executioners. So, since the procedure of compulsory execution is no longer a procedure before a court, the competent authority that performs execution cannot decide on the recognition of foreign judgments. The party who wants to enforce a foreign judgment in Macedonia has no other choice than to initiate a special non-litigious procedure for recognition, and after obtaining a court decision declaring the judgment recognized and enforceable, he will be able to institute non-judicial procedure for compulsory enforcement. The only possibility for incidental recognition of foreign judgments that is still available after 2005 concerns civil litigation where one of the parties uses the foreign judgment to raise a *res iudicata* objection.

III. Conclusion

The Macedonian PIL Act of 2007 made significant improvements to the Federal PIL Act of 1982, such as the laying down of a general exception clause as well as of a general rule on mandatory rules. Furthermore, the 2007 Act contains new conflict rules protecting weaker parties, such as consumers and employees, that fully comply with the relevant EU rules of Private International Law. As far as rules on international jurisdiction are concerned, the PIL Act limits the possibilities for exorbitant jurisdiction of Macedonian Courts. Additionally, substantive preconditions for recognition and enforcement of foreign judgments have been liberalized, especially through the abolition of the reciprocity requirement. However, the PIL Act will necessarily be the subject of further revision before Macedonia becomes a Member of the EU.

[52] *Official Gazette of the Republic of Macedonia (Služben vesnik na Republika Makedonija)* no. 35/2005.

THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN ESTONIA

Karin SEIN*

I. The Development of Private International Law in Estonia Through 2002

The Baltic Private Law Code can be considered the first code in Estonia that contained private international law rules. The Code entered into force in 1865 and was similar to the old Common Prussian Land Law.[1] After the Republic of Estonia's declaration of independence in 1918, the preparation of an Estonian Civil Code began. In 1940 a draft was completed that was largely based on the Baltic Private

* Dr iur; Lecturer of Private International Law, Faculty of Law of the University of Tartu, Estonia.

[1] *Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II.* St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei, 1864. See KITSING J., 'Uue Tsiviilseadustiku ruumiline kehtivus', in: *Õigus* 1936, no. 5, p. 227 (in Estonian).

Yearbook of Private International Law, Volume 10 (2008), pp. 459-472

Law Code and the German and Swiss Civil Codes. However, that draft never went into effect because in 1940 Estonia was occupied by the Soviet Union. During the Soviet occupation most of the conflict-of-law rules were contained in the Civil Code of the Estonian Soviet Socialist Republic.[2]

When Estonia regained its independence in August of 1991, the Estonian civil law experts got a chance to draft a new Estonian civil law. In 1992, the Supreme Council of the Republic of Estonia mandated that 'the preparation of the legal system had to be guided by the principles applicable in Estonia before the Soviet occupation.' As Estonian private law has always been a part of Baltic-German law, the principles characteristic to the Germanic legal family were to be followed.[3] In 1994, a General Part of the Civil Code Act – which also included conflict of laws provisions – was adopted.[4] At the same time, Estonia also began to ratify and adopt international conventions, such as the private-international-law conventions of the Hague Conference and the Vienna Convention on Contracts for the International Sale of Goods.[5]

Private international law also became and has continued to be a compulsory discipline for the University of Tartu's Faculty of Law. The discipline includes the classical topic of conflict of laws as well as international civil procedure.[6]

II. The Private International Law Act of 2002

A. Models and Principal Solutions

The Part of the Civil Code Act of 1994 that contained conflict of laws provisions has largely been a transitional regulation. The need to modernise the 1994 Act arose while other parts of the Estonian civil law were being drafted and implemented. Therefore it was decided that the conflict of laws rules should be gathered into a separate act, and in 1997 a Ministry of Justice working group began to draft a new private international law act. Because Estonia traditionally belongs to the Germanic family of law, German, Austrian, and Swiss private international law regulations were the primary models for the new draft Private International Law Act.

---

[2] Adopted on 12.06.1964; entered into force on 1.01.1965.

[3] VARUL P., 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia', in: *Juridica International* 2000, p. 110.

[4] RT (the State Gazette of the Republic of Estonia) I 1994, 53, 889.

[5] RT II 1993, 21/22, 93. The importance of CISG in Estonian law and case-law is discussed in KULL I./SEIN K., 'Die Bedeutung des Wiener Übereinkommens von 1980 über den internationalen Warenverkauf im estnischen Recht', in: *Internationales Handelsrecht* 2005, pp. 138-142.

[6] NURMELA I./PISUKE H./SEIN K., 'The present situation of private international law in Estonia', in: *The European Legal Forum* 2005, pp. 273-274.

Initially, the working group considered following the Swiss example, i.e. including the conflict of laws rules and the rules of international jurisdiction and enforcement of foreign judgments into the same act. In the end, however, the classical German and Austrian view was adopted. The new Private International Law Act (PILA), made up of only the conflict of laws rules, entered into force in 01.07.2002.[7] International civil procedure issues are mainly regulated in the Estonian Code of Civil Procedure,[8] bilateral and multilateral treaties, and European Union regulations.

Nevertheless, Estonian legal doctrine questions whether the private international law in Estonia includes only the conflict of laws rules or whether it also includes the rules of international civil procedure.[9] Indeed, some procedural rules can also be found in the PILA: for example, subsection 2 (1) stipulates that if a foreign law is to be applied, the court shall apply that law regardless of whether or not the application of that law is expressly requested by the parties.[10]

B. General Provisions

The Private International Law Act's scope of application is determined in section 1: the act applies when a legal relationship is connected to the law of more than one state.

Section 4 regulates how the content of a foreign law is determined. The court can request the assistance of the parties, the Ministry of Justice, or the Ministry of Foreign Affairs of the Republic of Estonia. The court has also the possibility to resort to foreign law experts. If the content of a foreign law cannot be ascertained within a reasonable period of time despite all efforts, Estonian law applies. The Estonian Supreme Court has also stated that section 4 is procedural in nature and therefore retroactive.[11]

As a general rule, Estonian private international law accepts *renvoi* (subsection 6 (1) of PILA). But if a foreign law would apply the law of a third state, the law of that third state is not taken into consideration (subsection 6 (2) of PILA). Instead, Estonian substantive law will apply.[12] In certain areas, mostly in interna-

[7] RT I 2002, 35, 217. English translation of the Act can be found at <www.legaltext.ee/text/en/X30075.htm>.

[8] RT I 2005, 26, 197, entered into force 01.01.2006. English translation of the Code can be found at <www.legaltext.ee/text/en/X90041.htm>.

[9] See NURMELA I./ALMANN L./PUNISON B./PÕLDVERE P-M./TUULAS V./VAINOMAA M., *Rahvusvaheline eraõigus*, Tallinn 2008, pp. 25-26 (in Estonian).

[10] The principle that foreign law has to be applied *ex officio* is not absolute. In certain cases, for example in contract law, parties are free to agree that Estonian law, instead of a foreign law, shall apply, and such an agreement can also be during during the court proceedings. See the Estonian Supreme Court decision no. 3-2-1-165-04 from 16.02.2005.

[11] The Estonian Supreme Court decision no. 3-2-1-165-04 from 16.02.2005.

[12] NURMELA I./ALMANN L./PUNISON B./PÕLDVERE P-M./TUULAS V./VAINOMAA M. (note 9), p. 64.

tional contract law, *renvoi* is rejected and only the substantive law of a foreign state is applied (subsection 6 (3) of PILA).

The *ordre public* restriction is stipulated in section 7. It states that a foreign law shall not be applied if it is manifestly contrary to the essential principles of Estonian law (public policy). In such cases Estonian law applies. To date there has been no case where this provision has been invoked. Although there is no general 'mandatory rules clause' in the PILA, such a clause is contained in the contract law portion of the Act (section 31 of PILA).

The general provisions also contain rules governing formal validity of transaction and transactional representation. When determining the formal requirements for a transaction, the classical *lex loci actum* principle applies (section 8 of PILA). Nevertheless, because there are special formal validity rules for contracts (section 37 of PILA) and testamentary dispositions (section 27 of PILA), the practical scope of the provision is rather narrow.

The preconditions for an agent to bind his principal to a third party are governed by the law of the state where the agent acted (subsection 9 (1) of PILA). There is also a special provision that determines when a principal can authorize an agent to dispose of a real right in immovable property: such an authorization must comply with the formal requirements of the *lex rei sitae* (subsection 9 (3) of PILA).

C. Persons

1. Natural Persons

Looking back at history, it can be said that the principle of domicile has almost always been favored in Estonia. The principle of *lex domicilii* rather than the principle of nationality was used in the Baltic Private Law Code of 1865. The principle survived in the draft Civil Code of 1940 and in sections 130 and 131 of the General Part of the Civil Code Act that was in force from 1994-2002. The only period of time in which — clearly for political reasons — the principle of nationality has even been at partially in force in Estonia was the Soviet period.

The abundance of foreign citizens residing in Estonia was the reason for keeping the principle of *lex domicilii* in the draft Civil Code of 1940 and was also the main argument for keeping it in the Private International Law Act. It is therefore firmly established that the law of a person's state of domicile is and will be the basis for determining a natural person's status in Estonia (subsection 12 (1) of PILA). The basis for determining a natural person's domicile is the definition of domicile provided in Estonian law (section 10 of PILA) and not in the law of the presumable state of domicile. The notion of a person's domicile can be found in section 14 of the General Part of the Civil Code Act.[13]

[13] RT I 2002, 35, 216. English translation of the Act can be found at <www.legaltext.ee/text/en/X30082K2.htm>.

A different approach is used to determine a person's nationality, in which case the definition of nationality under *lex causae,* i.e. the law of the presumable state of nationality, is decisive. Because on some occasions the connecting factor in the PILA is the nationality of a natural person (e.g. in subsections 25, 57 (2)), the principle of *lex causae* is expressly established in section 11. Pursuant to this section, the nationality of a natural person is determined by the law of the state whose nationality is being decided; in the case of persons with several nationalities, the decisive nationality is that of the state to which the person has the closest connection, including if one of the nationalities is the Estonian one.

2. Legal Persons

The law applicable to legal persons[14] is a topic that was heavily discussed during the preparation of the draft.[15] The theory of incorporation was finally chosen on the grounds that it was the established practice of the law in force and also with a view to pursuing simplicity in determining the applicable law as well as legal certainty. Pursuant to subsection 14 (1) of the PILA, a legal person is subject to the law of the state in which it has been created and registered. This law determines the legal person's legal nature, creation, termination, passive legal capacity, name or business name, bodies and internal relations, liability for the debts, and legal representation (section 15 of PILA).

Nevertheless, if the legal person is administered from Estonia, Estonian law applies (subsection 14 (2) of PILA). The model for this principle was article 25 of the Italian Private International Law Act. Thus, the Estonian private international law combines the theory of incorporation with the theory of 'real seat' ('*Sitztheorie*'). When the legal person is managed from Estonia, it can be claimed that a legal person created in a foreign country but having its place of actual administration in Estonia does not actually have any passive legal capacity.[16] This result has also been reached by the Estonian Supreme Court.[17]

---

[14] The provisions concerning legal persons are also applied to other organized associations of persons or property units (subsection 17 (1) of PILA). The law applicable to contracts is applied to contractual associations that have no organizational structure and passive legal capacity (subsection 17 (2)). It is the task of the court to draw a distinction between a company with passive legal capacity and a contractual association in each specific case.

[15] See further SEIN K., 'Law Applicable to Persons Pursuant to Draft Private International Law Act', in: *Juridica International* 2001, pp. 136-141.

[16] ALAVER A., 'Societas shopping ja piiriüleselt asukohta vahetava äriühingu tunnustamise ulatus Euroopa Liidus', in: *Juridica* 2007, p. 403 (in Estonian); VUTT A., 'Äriühingute vastastikune tunnustamine ja asukohavahetus Euroopa Liidus', in: *Juridica* 2007, pp. 101-102 (in Estonian); dissenting opinion can be found in NURMELA I./ALMANN L./PUNISON B./PÕLDVERE P-M./TUULAS V./VAINOMAA M., (note 9), p. 114.

[17] See the Estonian Supreme Court decision no 3-2-1-4-01 from 18.01.2001 and a recent decision no 3-2-1-104-08 from 05.11.2008. In this event, it is possible to resort to

The consistency between the theory of location and the freedom of establishment, articles 43-48 of the EC Treaty, has long been discussed in European Union law. For Estonia, the principles deduced from the *Centros, Überseering* and *Inspire Art* judgments[18] show that the theory of location's permissibility within the European Union has become extremely doubtful. Thus, Estonia should either abandon the principle provided in subsection 14 (2) of PILA, with regard to companies founded in the Member States of the European Union, or at least apply it in accordance with the European Court of Justice's rulings.[19]

D. Property

The most important model for drafting the Estonian international property law was the German draft for international property and extra-contractual obligations law (now the articles 38-46 of EGBGB[20]). The starting point is the traditional principle of *lex rei sitae:* according to subsection 18 (1) of the PILA, the creation and termination of a real right is determined by the law of the state in which the thing was situated at the time it was created or terminated. If a movable is taken into Estonia and a real right has not yet been created or terminated abroad, the events which may contribute to create or terminate a right, although they have occurred abroad, are deemed to have occurred in Estonia. Similar to the German rule in article 43 (2) of EGBGB, subsection 18 (2) of PILA stresses that a real right shall not be exercised in conflict with the essential principles of the law of the state where the thing is located.

A special regime applies to certain means of transport: section 22 of the PILA stipulates that aircrafts, ships, and rail vehicles are governed by the law of their state of origin, not the *lex rei sitae*. The state of origin is deemed to be the

---

subsection 130 (4) of the General Part of the Civil Code Act that provides for the liability of a person without the right of representation also if the transaction was concluded on behalf of a non-existent person**.** That provision is based on German court practice regarding § 179 BGB, according to which '§ 179 BGB ist auch dann entsprechend anzuwenden, wenn der angeblich Vertretene nicht existiert'. The Estonian Supreme Court has stated in the aforementioned judgments that subsection 130 (4) of the General Part of the Civil Code Act can be applicable in cases where the foreign legal person has no passive legal capacity, i.e when the legal person does not exist. Consequently, there is the possibility to invoke the personal liability of the person who concluded the transaction on behalf of a legal person, and in some cases, there is the further possibility to regard the company as having no passive legal capacity as a civil law partnership.

[18] *Centros* (Judgment of the Court of 9 March 1999 in Case C-212/97, Centros v. Erhvervs-og Selskabsstyrelsen), *Überseering* (Judgment of the Court of 5 November 2002 in Case C-208/00, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)), *Inspire Art* (Judgment of the Court of 30 September 2003 in Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam vs. Inspire Art Ltd.).

[19] SEIN K. (note 15), pp. 140-141, VUTT A. (note 16), p. 107.

[20] *Einführungsgesetz zum Bürgerlichen Gesetzbuche*. The provisions of international property and extra-contractual obligations law are codified in EGBGB since 01.06.1999.

state of nationality (in the case of aircrafts), the state of registration, or, in the absence thereof, the state of home port (in the case of ships) or (for rail vehicles) the state that has given permission to use the vehicle. This regulation corresponds to article 45 (1) of the German EGBGB.

Restricted party autonomy is allowed only in cases of *res in transitu*. According to section 20 of the PILA, a contractual creation or termination of real rights in goods in transit is governed by the law of the state where the goods are destined. But the parties may also agree to apply the law of the state of origin or the law applicable to the contract. Nevertheless, the choice of law is effective between the contracting parties only: subsection 20 (3) points out that agreements concerning the applicable law will not affect the rights of third parties.

For intellectual property, section 23 of the PILA employs the widely used principle that the creation, content, termination, and protection of intellectual property is governed by the law of the state where a person has applied for protection.

In 2004, a new regulation concerning book-entry security was added in order to harmonize the PILA with the EU directive 2002/47/EC on financial collateral arrangements.[21] According to section 23^1 of the PILA, shares, debt obligations, and other rights that are expressed through a registry entry (book-entry security) are governed by the law of the state where the register is maintained. If a book-entry security is administered in the interest of a person other than the one in the register, the security held by an administrator is governed by the law of the state where the corresponding register of securities held by an administrator is maintained. That law determines (1) the legal nature of the security; (2) the content, creation, and termination of a real right with respect to the security; (3) the consequences of the disposal of the security upon the rights arising from the security; (4) the conditions for the exercise of rights arising from the security; (5) provision of the security as collateral, including creation and exercise of the right of sale; (6) the ranking of the rights encumbering a security; and (7) the rights and obligations of the administrator regarding the security held by the administrator.

Unlike the German rule in article 46 of EGBGB, there is no 'closer connection clause' in the Estonian international property law. Therefore, in absence of special provisions, the classical *lex rei sitae* rule applies.

E. Succession

When drafting the conflict of laws rules for successions, the old principle that distinguished between the succession to movable and immovable property was abandoned. Instead, the principle of unity of succession was adopted: according to section 24 of the PILA, a succession is governed by the law of the last state of residence of the decedent. Limited party autonomy is also accepted. A person may state in his or her will or succession contract that the law of the state of his or her citizenship applies to his or her estate. Such a disposition will be invalid if the

[21] *OJ* L 168, 27.06.2002, p. 43–50.

person is no longer a citizen of the chosen state at the moment of his or her death (section 25 of PILA). The courts have yet to decide whether choice of law is allowed with respect to only the entire estate or also to a part of it.

Pursuant to section 26 of the PILA, the *lex successionis* determines the methods and effects of testamentary dispositions, succession capacity, unworthiness to succeed, the extent of the estate, the successors, and the relationships between successors and the liability for the deceased's debts. Testamentary capacity is governed by the law of the person's state of residence at the time of making, amending, or revoking a testamentary disposition. Alternatively, if a person lacks capacity under the law of his or her residence, he or she may still make, amend, or revoke a will if he or she is has capacity under the law of the state of his or her citizenship at the time the will is made, amended, or revoked (section 28 of PILA).

The formal validity of wills is governed by the Hague Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

Unlike some European countries, Estonia allows not only the 'usual' wills but also succession contracts and reciprocal wills. Therefore, it was considered necessary to provide for a conflict of laws rule for those types of testamentary dispositions. A model for such a rule was found in article 95 of the Swiss Private International Law Act. Subsection 29 (1) of the PILA stipulates that succession contracts are governed by the law of the state of residence of the *de cujus* at the time the contract was made or, at the choice of the parties to the contract, the law of the state of the citizenship of the *de cujus*. The applicable law determines the admissibility, validity, content, consequences, and binding force of a succession contract under the law of succession. If the validity of a reciprocal will is in dispute, it is necessary to determine whether the will complied with the laws of states of residence of both the testators or with the law of the state of residence of one of them jointly chosen by both (subsection 29 (2) of PILA). The formal validity of the succession contracts is governed by the Hague Convention of 1961 on Testamentary Dispositions (section 27 of PILA).

F. Contractual Relationships

Although Estonia was not a member of the European Union at the time the new PILA was drafted, the Convention on the law applicable to contractual obligations (the Rome Convention of 1980) served as the main model for Estonia's international contract law rules. Therefore the principles of the Rome Convention have been applied in Estonia since the new PILA entered into force on 01.07.2002. When Estonia became a member of the European Union on 01.05.2004, it became possible for the Estonian Parliament to ratify the Rome Convention,[22] which as a result went into effect in Estonia on 28.05.2006. Because the Rome Convention is a *loi uniforme* type of convention, it now applies to all contracts concluded after 28.05.2006. The Estonian Constitution also establishes the supremacy of interna-

[22] Estonia ratified the Convention on 19.04.2006; RT II, 18.05.2006, 10, 25.

tional treaties over national regulation in article 123 (2); hence the equivalent provisions of the PILA should not apply to those cases.

A special division of the PILA (sections 40-47) is dedicated to European Insurance Contract Law. In that division, the conflict of laws rules of several European Union directives are harmonized. Those rules apply if the insurance contract (other than reinsurance) insures risks situated in the territory of a Member State of the European Union (section 40).

When the Rome I Regulation[23] becomes effective, all contracts concluded after 17.12.2009 will be governed by the law specified by the Rome I Regulation (which replaces the present Rome Convention). The European Insurance Contract Law provisions in the PILA will also be superseded by the Regulation, as it contains special rules for EU-connected insurance contracts in article 7.

Some private international law rules can also be found in the Estonia's new Law of Obligations Act (LOA).[24] Those provisions stem for the EU consumer directives and regulate the applicability of the EU consumer contract law. For example, subsection 36 (2) of LOA stipulates that if the other party to a standard form contract is a consumer who resides in Estonia or a Member State of the European Union and the contract was entered into as a result of a public offer, advertisement or other such activity in Estonia or the contract is essentially related to the territory of Estonia for any other reason, the standard term provisions of the LOA apply. Those provisions apply even if the place of business of the party supplying the terms or, if no place of business exists, the residence or seat of such party is not in Estonia, regardless of which state's law is applicable to the contract. Subsection 36 (3) of the LOA further states that if the parties to a standard form contract act for purposes relating to their economic or professional activities and their places of business related to the contract or the performance thereof are in Estonia, the standard term provisions of the LOA apply to the contracts entered into between them regardless of which state's law is applicable to the contract. Analogous principles apply to house-door contracts (section 47 of the LOA, consumer sales contracts (subsection 237 (2) of LOA), time-share contracts (section 386 of LOA), consumer credit contracts (subsection 403 (6) of LOA), and package travel contracts (subsection 880 (2) of LOA).

G. Non-contractual Relationships

The conflict of law rules of unjust enrichment, *negotiorum gestio*, and delicts in the Estonian PILA are almost identical to the equivalent provisions of the German EGBGB (articles 38-42), the draft of which served as the basis for the Estonian regulation.

[23] 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 L 177, 4.7.2008, pp. 6–16.

[24] RT I 2002, 53, 336. Entered into force 01.07.2002. The English translation (stand: 01.05.2004) of the Act can be found at <www.legaltext.ee/text/en/X30085K2.htm>.

Thus the PILA differentiates between three types of unjust enrichment claims. Unjust enrichment claims arising from the performance of an obligation are governed by the law of the state that governs the actual or presumed legal relationship on the basis of which the obligation was performed (subsection 48 (1) of PILA). Claims arising from the violation of another person's rights are governed by the law of the state in which the violation occurred (subsection 48 (2) of PILA). And in all other unjust enrichment cases, the law of the state where the unjust enrichment occurred applies.

According to section 49 of the PILA, a claim arising from *negotiorum gestio* is governed by the law of the state where the *negotiorum gestor* performed the act. A special provision governs claims arising from the performance of the obligations of another person: those claims are governed by the law applicable to the obligation itself.

For claims arising from delicts, the principle *lex loci delicti* is the basis for determining the applicable law (subsection 50 (1) of PILA). Nevertheless, if the consequences of the delict do not become evident in the state where the harmful act or event occurred, the law of the state where they do become evident apply at the request of the injured party (subsection 50 (2) of PILA). In any case, if a claim arising from a delict is governed by foreign law, the compensation ordered in Estonia can not be significantly greater than the compensation prescribed for similar damages by Estonian law (section 52); this provision should guarantee that no exemplary or punitive damages are awarded in Estonia.

In addition to the conflict of laws rules for delicts, the PILA also contains a provision regulating the right to bring a direct claim against an insurer. According to section 51 of the PILA, an injured party may bring a claim directly against the insurer of the person required to compensate him or her for damage if such an action is allowed by the law governing the compensation for damage or the insurance contract.

The provisions concerning the choice of applicable law (section 54 of PILA) and closer connection (subsection 53 of PILA) also follow the German rules in articles 41-42 of EGBGB. Thus, if a non-contractual obligation has a closer connection with a state other than the one determined by the PILA, the law of that other state applies. Also, after the event or act creating the non-contractual obligation occurs, the parties may agree that Estonian law shall apply.

Those provisions of the PILA will lose most of their importance on 11.01.2009, when the so-called Rome II Regulation[25] will enter into force in the EU member states (except for Denmark). Nevertheless, the rules of the PILA will still govern areas that fall outside of the scope of Rome II (for example, defamation, see art. 1 (2) of the Regulation) and non-contractual relationships that arose prior to Rome II's effectivity (see art. 31 of the Regulation).

[25] 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. OJ L 199, 31.7.2007, pp. 40–49.

H. Family Relationships

1. Marriage

a) Validity and Legal Consequences of Marriage

According to section 55 of the PILA, marriage procedure is governed by the *lex loci celebrationis.* The material prerequisites, impediments, and consequences of marriage are, in principle, governed by the law of the prospective spouses' state of residence (subsection 56 (1) of PILA). However, if an Estonian citizen who resides in another state is getting married, Estonian law will apply if the law of the citizen's residence does not contain the same prerequisites as Estonia. Also, a prospective spouses' prior marriage will not hinder a new marriage if the previous marriage has been terminated by a decision made or recognized in Estonia, even if the decision does not comply with the law of prospective spouses' state of residence (subsections 56 (2) and (3) of PILA).

When determining the validity of a marriage contracted in a foreign state two verifications must be made, i.e. whether the marriage was contracted pursuant to the procedures used by the state of celebration and if the material prerequisites for marriage comply with the laws of the states of both spouses' residences (subsection 55 (2) of PILA).

The general legal consequences of marriage are governed by the law of spouses' common residence or, if the spouses have no common residence, by the law of the spouses' common citizenship (section 57 of the PILA). If the spouses reside in different countries and have different citizenships, the general legal consequences of their marriage are determined on the basis of the law of the state of their last common residence if one of the spouses still resides in that state. As last resort, the law of the state with which the spouses are otherwise most closely connected applies.

The property rights of the spouses are governed by the law applicable to the general legal consequences of the marriage at the time the marriage is contracted. Limited party autonomy is also accepted: the spouses may choose the law of the state of residence or the state of citizenship of one of the spouses as the law applicable to their property rights (subsection 58 (1) of PILA). Such a choice of applicable law shall be notarized, or, if made outside of Estonia, the choice of law must comply with the formal requirements prescribed for marital property contracts by the chosen law. For example, the Estonian Supreme Court accepted the choice of German law as the applicable law. The Supreme Court also stressed that the marital property contract is valid whether or not it is registered in the Estonian Marital Property Contract Register.[26] However, the law must also protect third parties who are unaware of the choice of applicable law and are entitled to presume that the Estonian marital law applies. As a result, section 59 of the PILA stipulates that if the residence of at least one of the spouses is in Estonia, or at least one of the spouses engages in economic or professional activity in Estonia, the spouses can

[26] The Estonian Supreme Court case no 3-2-1-125-03 from 10.12.2003.

rely on property rights other than those prescribed by Estonian law with regard to third parties only if the third party concerned was or should have been aware of such rights at the time the legal relationship was created.

b) Divorce and Nullity of Marriage

The law applicable to divorce and nullity of marriage is regulated by subsection 60 (1) of the PILA. This section states that divorce and nullity are governed by the law applicable to the general legal consequences of the marriage at the time of commencement of the divorce proceedings. If a divorce is not allowed by the law applicable to the general legal consequences of marriage or is permissible only under extremely strict conditions but one of the spouses either resides in Estonia or has Estonian citizenship or else resided in Estonia at the time the marriage was contracted or finally had Estonian citizenship at the time the marriage was contracted, the marriage may be terminated pursuant to Estonian law (subsection 60 (2) of PILA.

Annulment is not a widely used procedure in Estonian family law practice. The annulment of a marriage can be decided only by the court and only for the exhaustive grounds listed in the Estonian Family Law Act. Nullity of marriage is not mentioned in the Estonian Family Law Act but in the draft Family Law Act, which is currently pending in the Estonian Parliament;[27] since its inception nullity of marriage has been allowed in certain cases. The institution of legal separation is also unknown in Estonian law.[28]

When determining the law applicable to divorce, it must be admitted that for marriages containing a foreign element, the courts have not always determined the applicable law in accordance with the Estonian conflict of laws rules but, rather, have terminated marriages pursuant to the *lex fori*.[29]

2. Relationships between Parent and Child

According to section 65 of the PILA, the relationships between a parent and a child are governed by the law of the child's residence. However, this norm is a 'dead norm' since Estonia acceded to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

[27] The conceptual bases of the current Family Law Act largely originate from the Soviet Marriage and Family Code, and the implementation of that Act has brought up many shortcomings in the Act. A working group of the Ministry of Justice has prepared a new draft Family Law Act, which is now being heard by the Estonian parliament.

[28] PARKEL K./SEIN K., 'The Impact and Application of the Brussels II Regulation in Estonia', in: BOELE-WOELKI K./GONZALES BEILFUSS C. (eds), *Brussels II bis: Its Impact and Application in the Member States*, Antwerp 2007, p. 85.

[29] PARKEL K./SEIN K. (note 28), p. 86.

Thus, as of 01.06.2003, the law applicable by Estonian courts in parental responsibility cases is determined by the aforementioned Convention or the legal assistance agreements concluded with Latvia, Lithuania, Russia, the Ukraine, and Poland.

It is important to note that current Estonian family law does not know the institute of joint or sole custody that separates the duty of care for child's person and the duty of care for child's property. The Estonian law provides general references to the parent's right and duty to raise the child, care for the child, and protect the child's rights and interests. Today, the only method to restrict parental rights is the complete deprivation of parental rights, which presupposes particularly severe faults in the fulfilment of parental duties.[30] The absence of a custody system may lead to problems related to conflict of laws rules where a child governed by a custody arrangement unknown to Estonian law moves to the country. One should probably take the view that Estonian law is applicable only to the extent that it does not conflict with the foreign court judgment that must be recognised.[31]

The maintenance obligations arising from family relationships are governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (see section 61 of PILA).

Adoption is governed by the law of adoptive parent's state of residence, or, in case of adoption by both spouses, by the law applicable to the general legal consequences of the marriage at the time of adoption (subsection 63 (1) of PILA). In such a situation, if the law of the child's residence requires parental consent or the consent of the child for the adoption, the law of the child's residence applies (subsection 63 (2) of PILA). Special protection is established for children living in Estonia: if a child residing in Estonia is adopted, all Estonian adoption requirements must be met (subsection 63 (3) of PILA). In practice, this is supervised by the Ministry of Social Affairs, as a person who does not reside in Estonia may adopt an Estonian citizen residing in Estonia only with its consent.[32]

Section 66 of the PILA, which states that guardianship and curatorship are governed by the law of the state where the guardianship or curatorship is established, today applies only to adults, as the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children has supremacy with respect to children.

[30] In case the parents are divorced, the court can only decide which parent the child will live with and give orders on how the right of access to the child is to be carried out. In other respects, parental rights cannot be restricted, which includes the retention of the right to represent the child by both parents. For further details see KULLERKUPP K., 'Family Law in Estonia', in: *International Survey of Family Law* 2001, pp. 105-107. This situation will change when the draft Family Law Act is adopted.

[31] PARKEL K./SEIN K. (note 28), pp. 87-88.

[32] Section 82 of Family Law Act.

III. Conclusions

In legal practice, the Private International Law Act of Estonia has rarely been resorted to, and only a few cases have reached the Estonian Supreme Court. This is probably because for most lawyers private international law is still a relatively unfamiliar discipline. For example, in several divorce cases judges have applied Estonian law despite the fact that the Estonian conflict of laws rules required the application of another state's law. International procedure rules are applied more frequently and correctly: for example, the number of court cases where the Brussels I and Brussels II bis regulations are applied vastly outweighs the number of cases where foreign law is used.

In the global world the importance of our internal conflict of laws rules is constantly diminishing. This is due, on the one hand, to the harmonization of material law and, on the other hand, to the harmonization of private international law rules in the European Union regulations – the best examples are the Rome I and Rome II regulations that will enter into force in 2009 and the Hague Conventions that supersede the equivalent norms in the Estonian Private International Law Act. Nevertheless, as the amount of economic and private relationships with persons from foreign countries constantly rises, it is expected that the conflict of laws provisions, will gain significantly more relevance in Estonia in the near future.

CURRENT STATUS OF INTERNATIONAL ARBITRATION IN ROMANIA

Radu BOGDAN BOBEI*

* PhD in private international law, Attorney-at-law; Arbitrator with the Romanian Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania; Lecturer at the University of Bucharest, Faculty of Law. For contributions with similar titles but in Romanian language, see SEVERIN A., 'Arbitrajul comercial în România' [Commercial Arbitration in Romania], in: *Elemente fundamentale de drept al comerţului* internaţional (Key Elements of International Trade Law), Bucharest 2004, at 403-416, BABIUC V., 'Starea actuală a arbitrajului comercial în România' [Current Status of Commercial Arbitration in Romania], in: *Revista Română de Arbitraj* 2007 (*Romanian Review of Arbitration* 2007), at 1-8, 1-6.

Yearbook of Private International Law, Volume 10 (2008), pp. 473-491

Printed in Germany

I. Preliminary Remarks

Arbitration is no longer an alternative method of settling domestic and international disputes. In a period of global and interdependent business life, arbitration has become a normal and preferred method of settling disputes. This article aims to highlight some features of arbitration[1] in Romania, especially characteristics of arbitration managed by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (*Curtea de Arbitraj Comercial Internaţional de pe lângă Camera de Comerţ şi Industrie a României*),[2] hereinafter called 'Court of Arbitration.'

II. Court of International Commercial Arbitration

A. Historical Background

The Court of Arbitration is the most renowned arbitration institution in Romania and one of the most important arbitration courts in Eastern Europe. It was created in 1953[3] under the name 'Arbitration Commission attached to the Chamber of Commerce of Romania.'

---

[1] For previous contributions of Romanian arbitrators related to the main characteristics of commercial arbitration, see SEVERIN A. (note 1), at 369-402, POPESCU T. R., *Dreptul comerţului internaţional (International Trade Law)*, 2th, Bucharest 1983, at 351-371, BABIUC V. (note 1), at 171-173, CĂPĂŢÂNĂ, *Litigiul arbitral de comerţ exterior (International Arbitral Litigation)*, Bucharest 1978, at 20, BĂCANU I., 'Noua reglementare a arbitrajului potrivit Codului de procedură civilă' [New regulation of arbitration under Procedure Civil Code], in: *Revista Dreptul* 1994, at 13-25, BOBEI R.B., *Calificarea şi conflictul de calificări în dreptul internaţional privat* [*Characterization and Conflict of Characterization in Private International Law*], Bucharest 2005, at 356-360.

[2] Bucharest Stock Exchange S.A. has set up a permanent arbitration body, namely Arbitration Court of Bucharest Stock Exchange S.A. (the 'BSA Arbitration Court'). BSA Arbitration Court is governed by Procedural Rules adopted by the BSE Committee, as approved by the regulatory authority, i.e. the National Securities Commission, through decision no 372 of 31 January 2006. See METEA C. / POPA C., 'Arbitrajul Bursei de valori din România' [Arbitration of capital market matters in Romania], in: *Newsletter Arbitration* 2008, at 33-35.

[3] Before 1953, arbitration, as a private method of settling disputes, was not unknown in Romania. For instance, laws issued by DONICI (1814), Calimah (1817), Caragea (1818) contained relevant provisions related to arbitration. In 1865, the Civil Procedure Code, containing, at the beginning, provisions related to *ad hoc* arbitration in civil matters (Fourth Book of Procedure Civil Code), was adopted. The latter Book was amended in 1900, 1948, and 1993. Before 1993, the Civil Procedure Code, as adopted in 1865, did not contain special provisions related institutionalized arbitration. In 1929, however, the Chamber of Arbitration attached to the Romanian Stock Exchange was created. See, for historical

B. Organization

The Court of Arbitration is a permanent non-governmental, non-corporate body which exercises its powers independently.[4] The Court of Arbitration is organized and operates in conformity with the Law on Romanian Chambers of Commerce no. 335/2007 (*Legea nr. 335/2007 a camerelor de comerţ din România*)and with its own Regulation. The Regulation has been issued in compliance with Art. 28(2) and Art. 29 of the Romanian Law on Chambers of Commerce no. 335/2007 (*Legea nr. 335/2007 a camerelor de comerţ din România*) which were approved by the Governing Board of the National Chamber in its session of 15 January 2008, as modified in its session of 27 February 2008.

The activities of the Court of Arbitration are coordinated by a Leading Board conducted by the President. The Leading Board is composed of a President, a Vice-President and three members included in the list of arbitrators. The Court of Arbitration has a Secretariat composed of assistant arbitrators and other employees hired by the Chamber of Commerce and Industry of Romania. The arbitrators included in the list of arbitrators constitute the Plenum of the Court of Arbitration.[5] The main task of the Court of Arbitration is to organize and settle by arbitration domestic and international, commercial and civil disputes. Thus, the mission of the Court of Arbitration is not only to promote and develop commercial arbitration, but civil arbitration as well.[6] In order to accomplish its mission, the Court of Arbitration is entitled to exercise some tasks, such us assisting parties, upon their request, in organising *ad hoc* arbitration, drafting model arbitral agreements,[7] promoting arbitration in the business community, debating specific problems of arbitration and promoting

---

background of Romanian arbitration, BABIUC V. (note 1), at 1-2, BĂCANU I., 'Renaşterea arbitrajului ad hoc'[Re-birth of *ad hoc* arbitration], in: *Revista Dreptul* 1991, at 2.

[4] This principle is not new in the history of Romanian arbitration. In exercising its jurisdictional prerogatives and within the limits of its competence, the Court of Arbitration acts independently, free from any subordination to the Chamber of Commerce and Industry of Romania, even though it is 'attached' to the Chamber. See arbitral award no. 9/28 January 1974, in: BABIUC.V / CĂPĂŢÂNĂ.O, *Jurisprudenţă comercială arbitrală 1953-2000* [*Arbitral Commercial Jurisprudence Case Law 1953-2000*], Bucharest 2000, at 1.

[5] The arbitrators are appointed for a three-year term by the Leading Board of the National Chamber of Commerce and Industry. Any natural person, Romanian or foreign citizen, having full capacity to exercise his/her rights, having good professional recognition and high expertise in private law and international law, may be eligible to accomplish an arbitrator's mission.

[6] Art. 2 of the Regulation of Court of Arbitration on organization and function.

[7] The arbitration clause recommended by the Chamber of Commerce and Industry of Romania to be included in contracts is the following: 'All disputes arising out of or in connection with this contract, or regarding its conclusion, execution or termination, shall be settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in accordance with the Rules of Arbitration of this Court. The award shall be final and binding.'

new regulations in the arbitration field, making possible effective cooperation with other arbitration boards all over Romania and other countries, as well as keeping records of arbitral jurisprudence.

C. Current Activity

Under the auspices of the Court of Arbitration, almost 30.000 cases were resolved by Arbitral Tribunals, their jurisprudence being quoted in Romanian and foreign literature. Between first January 2007 and first September 2008, 706 requests for arbitration (607 for domestic arbitration, 99 for international arbitration) were registered at the Court of Arbitration. International arbitrations managed by the Court of Arbitration in the previously cited period involved foreign entities from all over the world, such as: Israel (1), Saudi Arabia (1), Austria (7), Azerbaijan (1), Belize (1), Bulgaria (1), Canada (2), Cyprus (5), Switzerland (3), France (1), Germany (12), Great Britain (3), Spain (1), Slovenia (2), Holland (3), and Malta (1).

The Court of Arbitration holds conferences concerning new trends in domestic and international arbitration. For instance, in 2006 it organized a conference on *public policy* in arbitration practice. In 2009, the Court of Arbitration will be the host of the European Working Group of Arbitration. Since 2007, the Court of Arbitration has published quarterly the *Revista Română de Arbitraj* (*Romanian Review of Arbitration).* Practitioners all over the world (Singapore, Chile, France, Sweden, Slovenia, Russia, Austria) have published contributions. The activity of the Romanian National Committee within the Commission of International Arbitration of ICC of Paris is manyfold. The Court of Arbitration has appointed representatives to participate actively in the meetings organized by the International Arbitration Commission on task forces on the fields of law and commercial practice, drafting national rules of procedure on recognition and enforcement of foreign arbitral award in accordance with the Convention of New York 1958, as well as being involved in the drafting of papers of task forces.

III. Rules of Arbitration

A. General Principles

The Rules of Arbitration[8] in the Fourth Book (On Arbitration) of the Civil Procedure Code (hereinafter called Rules), as amended in 1993 as well as, more recently, by the Leading Board of the Court of Arbitration, and by international

[8] These Rules have been issued in compliance with Art. 29(5) of the Law of Romanian Chambers of Commerce no. 335/2007 and were approved by the Leading Board of the Court of Arbitration by Decision No.1, 18 April 2007 and came into force on the same date.

instruments[9] ratified by Romania represent the basis for arbitration managed by the Court of Arbitration. Patrimonial disputes,[10] except for disputes concerning rights which cannot be altered by agreement under the law, can be subject to settlement managed by the Court of Arbitration.

Art. 2 (2,3,4 and 5) of the Rules offer definitions of the following terms: 'commercial dispute', 'civil dispute', 'domestic dispute', 'international commercial dispute', 'international civil dispute':

- a commercial dispute is any dispute deriving from commercial agreement, including disputes referring to the conclusion, execution or termination of such agreement, as well as disputes resulting from other legal commercial relations resolvable by arbitration;

- a civil dispute is any dispute deriving from a civil contract, including disputes referring to the conclusion, execution or termination of such contract, as well as disputes resulting from other legal civil relations resolvable by arbitration;

- a domestic dispute is any dispute deriving from a domestic agreement or other domestic legal commercial and civil relations that binds entities of Romanian nationality or Romanian citizens and does not contain foreign elements which are relevant enough to result in the application of foreign law;

- an international commercial dispute is any dispute deriving from an international contract or from any other international legal commercial relation related to foreign trade;

- an international civil dispute is any dispute deriving from legal civil relations presenting foreign elements which are relevant enough to raise the issue of the application of foreign law, even if the law applicable to the merits of the dispute is Romanian law.

The principles established by the Rules ensure equal treatment of the parties,[11] the right to a reasonable opportunity to defend and present one's case as well as confidentiality during the proceedings.[12] The parties must exercise their

[9] For instance, the European Convention of international commercial arbitration, Geneva, 1961, or the Convention on recognition and enforcement of foreign arbitral awards, New York, 1958.

[10] See BĂCANU I., 'Litigii arbitrabile' [Disputes subject to settlement of arbitration], in: *Revista Dreptul* 2000, at 30.

[11] See TĂNĂSESCU V. / LEAUA C., 'Consideraţii introductive cu privire la dreptul la un proces echitabil şi arbitrajul comercial internaţional' [Introductive remarks on the right to fair trial and international coomercial arbitration], in: *Revista Română de Arbitraj* 2007, at 16-20.

[12] Art. 7(2) of the Rules provides that filing of a dispute shall be confidential. As a general principle, no one shall have access to the file without the written agreement of the parties, with the exception of parties directly involved in the settlement of a particular dispute. In addition, Art. 8 (1 and 2) of the Rules provides that arbitral awards may be published entirely (only upon parties' consentment) or partially, or summarized, analysed with respect to the legal issues posed, in Law reviews, or as arbitration Case Law, without revealing the name of the parties or elements that may result in damage to their rights. In

procedural rights *bona fide*, and in accordance with the purpose for which they are granted. In addition, the parties must cooperate with the Arbitral Tribunal for the settlement of the dispute in due time. In turn, the Arbitral Tribunal attempts to settle any dispute concerning the parties' agreement by making relevant efforts to facilitate such settlements.

Where the parties[13] have agreed to submit their dispute to arbitration under the Rules, they are deemed to have submitted *ipso facto* to the Rules in force on the date of commencement of arbitration proceedings,[14] unless, upon issuing a request for arbitration, the parties have agreed in writing to the application of other arbitral rules accepted by the Arbitral Tribunal.

General principles concerning time limits and the place of arbitration in domestic disputes are the following. The parties determine the time limits of arbitration. Otherwise, the Arbitral Tribunal renders the award within five months of the date of its constitution. By mutual consentment, either by written or oral statement made before the Arbitral Tribunal, the parties may agree during arbitral proceedings to delay the time limits of arbitration. In addition, if based upon solid grounds, the Arbitral Tribunal may order an extension of the time limit for arbitration for no more than two months. *De jure* extensions of the time limit for arbitration would operate in the event that one party involved in arbitration is deprived of its legal capacity or dies, or the arbitrators do not agree on the award to be granted (the Arbitral Tribunal is composed of an even number of arbitrators).[15] The time limit for arbitration is suspended in event of plea of unconstitutionality or for settlement of an incidental request addressed to a state court or for completion of the arbitral panel (in cases where a challenge is made concerning an arbitrator) or if the dispute is suspended according to a legal provision.

Generally, in the case of a domestic dispute, the place of arbitration is the seat of the Court of Arbitration. Nonetheless, upon the agreement between the parties and the President of the Court of Arbitration, the place of arbitration can be fixed elsewhere.

---

addition, the President of Court of Arbitration may authorize, in particular cases, the study of files for scientific, research purposes after settlement of disputes anf if final court decisions have been rendered.

[13] Art. 14 of the Rules provides that within the limits of domestic and international laws to which Romania is party, Romanian State and public authorities are entitled to conclude valid arbitration agreements with respect to commercial and civil disputes.

[14] The parties who, under a valid arbitration clause, have recognized the jurisdiction of the Court of Arbitration have, implicitly, accepted arbitral proceedings specific for this arbitration forum. See arbitral award no.30/23 June 1973, in BABIUC V./CĂPĂȚÂNĂ O. (note 4), at 4.

[15] Art. 35(6) of the Rules provides that exceeding time limits shall not be considered as grounds for a claim of ineffectiveness of arbitration unless one of the parties has notified the other party and the Arbitral Tribunal by the first day of hearings that he/she intends to claim ineffectiveness of arbitration.

B. Specific Provisions

1. International Commercial Arbitration

The question of monism or dualism in arbitration is one of the most alluring topics ever debated in Romanian[16] and European literature.[17] The Rules are applied to international disputes, but the Court must take into account some specific principles.

The Arbitral Tribunal is composed of an even number of arbitrators, each party being entitled to appoint an equal number of arbitrators, who can be either Romanian or foreign citizens.

International disputes are settled in full accordance with the Rules and international conventions to which Romania is a party. The parties are entitled to choose to apply either the Rules, or other rules of arbitration. In the event that the parties choose to apply the UNCITRAL Rules of Arbitration, the authority for the appointment of arbitrators is the President of the National Chamber of Commerce and Industry of Romania.

The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute (*lex voluntatis* principle).[18] Art. 83(2) of the Rules provides that if the parties didn't agree upon the rules of law to be applied to the merits of the dispute, the Arbitral Tribunal shall decide upon the applicable law taking into account the relevant conflict of law rules of Romanian legislation. According to relevant conflict of law rules, the Arbitral Tribunal shall decide upon the applicable law in default of such agreement.

---

[16] See BABIUC. V, 'Monism sau dualism în arbitrajul comercial' [Monism or dualism in commercial arbitration], in: *Revista Română de Arbitraj* 2008, at 1-6. The author argues for the existence of mitigated monism.

[17] PELLERIN J, 'Monisme ou dualisme de l'arbitrage: Le point de vue français', in: *Les Cahiers de l'Arbitrage* 2006, at 5-10, PERRET F., 'Arbitrage interne/arbitrage international ou arbitrage tout court: dualisme ou monisme?', in: *Les Cahiers de l'Arbitrage* 2006, at 11-15, RICCI E. F., 'La longue marche vers l'internationalisation du droit italien de l'arbitrage', in: *Les cahiers de l'Arbitrage* 2006, at 16-22.

[18] See arbitral award no. 47/2007, unpublished, arbitral award no. 165/2006, unpublished, and arbitral award no. 178/2006, unpublished. In a recent Romanian case, the parties established the law applicable to the merits of the dispute according to the requirements of the *lex voluntatis* principle. The Arbitral Tribunal adjudicated the litigations by making reference to the Vienna Convention on Contracts for the International Sale of Goods. The reasoning was the following: *'[…] the contract signed by the parties at issue is governed by the Romanian law, the law chosen by the parties under contract, which means – since at issue is an international sale agreement, mainly, the Convention on contracts for the international sale of goods, Vienna, 1980, to which Romania is part.'* See arbitral award no.158/2006, in: *Revista Română de Arbitraj* 2007*(Romanian Review of Arbitration* 2007), at 99-102. The characterization of the nature of the dispute is always subject to the *lex fori* principle. See arbitral award no. 20/1968**,** in: BABIUC V. / CĂPĂTÂNĂ O. (note 4), at 148. See also, concerning characterization in international arbitration, BOBEI R.B. (note 1), at 356-410.

Art. 84 of the Rules provides that parties to an arbitration agreement on international commercial arbitration are entitled to establish the place of arbitration, either in Romania, or outside Romania. Moreover, the parties are entitled to establish time limits for rendering the award. Unless otherwise agreed by the parties, the Arbitral Tribunal, generally, must render the award within 12 months of the date of its constitution. Time limits provided for domestic arbitration shall be doubled in cases of international commercial arbitration.[19]

The parties may agree on the language in which arbitral proceedings shall be conducted. In the absence of such an agreement, the language of arbitral proceedings is established by the Arbitral Tribunal. In the latter case, the language used in arbitral proceedings would be a language used internationally. The Arbitral Tribunal would appoint an expert interpreter if the proceedings are conducted in a language other than a language that is well known by the parties. In addition, the parties can be assisted by their own expert interpreters.

Foreign arbitral awards comprise awards rendered abroad or that are not considered domestic awards. It is not possible to recognise and enforce in Romania a foreign award that was set aside in the country of origin. In addition, an interim arbitral award cannot be executed in the Romanian territory. Such awards, may, however, be recognised. Only awards that are final or have became irrevocable may be granted a writ of execution.

Specific national sources of law are applicable to the recognition and enforcement of foreign arbitral awards rendered in countries that have not signed the 1958 New York Convention, i.e. essentially, the Civil Procedural Code (Art. 370-370^3)[20] and the Law no. 105/1992 on the settlement of private international law relations (Art. 167-178, Art.181),[21] hereinafter 'LDIP'.[22] The main international source of law applicable to the recognition and enforcement of foreign arbitral awards rendered in countries that are signatories to the 1958 New

[19] Art. 85(2) last paragraph, of the Rules provides that the first date of arbitration shall be no sooner than 45 days from the date on which subpoenas have been issued.

[20] The documents filed for the purpose of recognition and enforcement of foreign awards are not confidential. The foregoing notwithstanding, only the parties to proceedings have access to the court's file. The court may decide to keep the hearings private for example in the event that publicity may cause damage to the public order, morality or the parties. The decision on recognition and/or enforcement of foreign award is always pronounced in a public session (Art. 121 of the Civil Procedure Code).

[21] See, for comments, SEVERIN A. (note 1), at 398-402, BABIUC V. (note 1), at 193-198, BOBEI R.B., *Comentariul Legii nr. 105/1992 cu privire la reglementarea raporturilor de drept internațional privat* [*Commentary on Law no. 105/1992 on Settlement of Private International Law Relations*], Bucharest 2005, at 165-204.

[22] Art. 170 and Art. 173 first paragraph of the LDIP provide that requests for recognition are within the jurisdiction of the (county) tribunal in the district where the respondent has his domicile or headquarters. Requests for enforcement are within the jurisdiction of the (county) tribunal where enforcement is sought.

York Convention is that Convention.[23] The date of entry into force of New York Convention is 24 July 1961. The Romanian source of applicability of the Convention is Decree no. 186/1961 on the accession of Romania to the Convention as reported in the Official Bulletin of Romania, no.19/1961. Romania has made a reciprocity reservation with regard to awards rendered in non-signatory countries. In this situation, Romania will apply the Convention only based on reciprocity established by agreement between Romania and the non-signatory parties. In addition, Romania has made a reservation for commercial relationships in the following sense: the New York Convention shall be applied in Romania only to disputes arising out of legal relationships, whether contractual or not, which are considered to be commercial under its national laws.

2. Ad hoc *Arbitration*

The Court of Arbitration can organize *ad hoc* arbitration upon request of the parties followed by explicit acceptance of the other party of the arbitral fee being paid. The assistance of the Court of Arbitration consists of fulfilling all or some activities, in full accordance with agreement of the parties, such as: making available to the parties the Rules and List of Arbitrators, the appointment of arbitrators (including the Presiding arbitrator), verifying formalities required concerning the composition of the Arbitral Tribunal and the fixing of arbitral fees, providing adequate space for arbitration proceedings and administrative and documentary services, ensuring adequate conditions for arbitration service, ensuring the respect of time limits of arbitration, providing a formal examination of the draft of the arbitral award.

C. The Arbitration Agreement

The Court of Arbitration has jurisdiction to settle the dispute if the parties concluded an arbitral agreement either in the form of arbitration clause included in the main contract or under the form of a separate agreement.[24] The validity of the

[23] Other relevant international documents are the European Convention on International Commercial Arbitration, Geneva, 1961 and the Convention on Settlements of Investment Disputes Between States and Private Entities, Washington, 1963. See, for comments, BĂCANU I, *Controlul judecătoresc asupra hotărârii arbitrale* [*Judicial Examination of Arbitral Award*], Bucharest 2005, at 157-172.

[24] Absent an express arbitration clause or a separate expression of the parties' willingness to accept a compromise or to recognize the competence of an arbitral forum during the litigation phase, a ruling must be issued acknowledging the lack of jurisdiction of the Court of Arbitration. See arbitral award no. 61/6 April, 1999, in: BABIUC V. / CĂPĂȚÂNĂ O. (note 4), at 3-4. See also SEVERIN A. (note 1), at 385-388, ROȘ V., *Arbitrajul comercial internațional* [*International Commercial Arbitration*], Bucharest 2000, at 82-93, PRESCURE T. / CRIȘAN R., *Arbitrajul commercial* [*Commercial Arbitration*], Bucharest 2005, at 39-53,

arbitration clause is independent of the validity of the contract containing such clause. The parties may conclude an arbitration agreement in a direct or indirect way (implicit, but in unequivocal terms).[25] Indeed, Art. 13 of the Rules provides that the arbitral agreement may also originate in the filling by a claimant of a request for arbitration and the respondent's acceptance of settlement of the dispute by the Court of Arbitration. If the parties have concluded an arbitral agreement with respect to a specific dispute, jurisdiction of the state courts is excluded.[26] Under the *Kompetenz-Kompetenz* rule, the Arbitral Tribunal is entitled to verify its own jurisdiction.[27] So, jurisdiction of the Court of Arbitration, including the existence, validity or effectiveness of the arbitration agreement, is established only by the Arbitral Tribunal.[28]

Owing to the fact that arbitration is consensual in nature and dependent upon the parties' agreement, an arbitration clause binds only the person or the persons or companies who signed the agreement containing it.[29] In a recent

---

DELEANU I. / DELEANU S., *Arbitraj intern şi internaţional* [*Domestic and International Arbitration*], Bucharest 2005, at 38-48. See, also, for a comparative approach to Romanian-Swiss arbitration practice: BOBEI R.B., 'Interpretări ale convenţiei arbitrale în jurisprudenţa română şi elveţiană' [Approaches of arbitration agreement in Romanian and Swiss case law], in: *Revista Română de Arbitraj 2008*, at 18-26, 13-21.

[25] See SEVERIN A., 'Convenţia arbitrală implicită' [Jurisdiction of Arbitral Tribunal issued in accordance with implicit arbitration agreement], in: *Revista Dreptul* 1990/1-2, at 30-36. Absent an arbitration agreement entered into prior to the referral of the matter to an arbitration court, the oral statement made by the respondent at the hearing (after having been duly notified of the arbitral action taken against him) to the effect that he acknowledges jurisdiction of the Court of Arbitration and the reference to such statement in the minutes of the hearing satisfies legal requirement of consent of parties for settling their dispute by arbitration. See arbitral award no. 177/17 July 1978, in: BABIUC V./CĂPĂŢÂNĂ O. (note 4), at 5. The clause stipulating an alternative competence should be construed as granting the claimant a choice between jurisdiction of the Arbitral Tribunal and jurisdiction of state court. See arbitral award no. 124/22 July 1999, in: BABIUC V./CĂPĂŢÂNĂ O. (note 4), at 11.

[26] The arbitration agreement is a genuine contract. The consequence is the supremacy of the *pacta sunt servanda* rule. See SEVERIN A. (note 1), at 389, BABIUC V. (note 1), at 180.

[27] For a discussion, see SEVERIN A. (note 1), at 390, FLORESCU C., 'Autonomia convenţiei arbitrale în interdependenţă cu principiul Kompetenz-Kompetenz' [Separability of arbitration agreement and its relation with Kompetenz-Kompetenz'], in: *Revista română de Arbitraj* 2008, at 26-36.

[28] Art. 16 (1 and 2) of the Rules provides that the President of the Court of Arbitration is entitled to refuse to organise an arbitration in case of existing doubts or challenges related to the arbitration agreement or the latter seems to be null or ineffective. If the parties (both of them or only one) insist that an arbitration is to be organized, the Court of Arbitration shall proceed with the organization and the Arbitral Tribunal shall rule on the existence or validity of the arbitration agreement.

[29] See, for the specifics of international commercial arbitration, SEVERIN. A. (note 1), at 377, BABIUC V. (note 1), at 174, BARROCAS M.P., 'Double difficulty for non-signatory parties to multiparty ICC arbitrations', in: *Newsletter Arbitration* 2008, at 56-57.

Romanian arbitral dispute, however, it was provided that an arbitral agreement may be held to require a non-signatory party to arbitrate when consent to the agreement was proved by some circumstances such as negotiating or/and performing the contract that was subject matter of the dispute. Parties involved in the arbitration were a Dutch company (the claimant), a Romanian company (the first respondent) and a company having its headquarters in Marshall Islands (the second respondent). The non-signatory third party was the Romanian company. The transaction at issue was a sale of goods, the seller being the Dutch company and the buyer being the Marshall Islands-based company. Owing to the fact that the latter did not pay the price, the Dutch company commenced the arbitration against the Marshall Islands-based company (signatory-party) as well as against the Romanian company (non-signatory party). The Arbitral Tribunal held that the consent of Romanian company to the arbitral agreement was implicitly expressed.[30] This holding was based on the following reasons: first, the Romanian company received the goods and promised the partial payment of the price; second, the Romanian company was aware of the existence of the contract that was the subject matter of the dispute. In this respect, the Arbitral Tribunal considered that the arbitral agreement was binding for the Romanian company because the latter was involved in the performance of the contract.

D. Arbitral Tribunal

1. General Principles

Arts. 17 (1) and 21 of the Rules contain provisions on the requirements and qualifications of arbitrators. Thus, the arbitrators must be independent of the parties involved in the arbitration, they must not be representatives of the parties, and they must have the benefit of adequate qualifications[31] and expertise in private, domestic and international law as well. Arbitrators are required to submit a statement of independence and impartiality and disclose any such circumstances as may raise doubts in this regard. By accepting to accomplish their mission, every member of the Arbitral Tribunal undertakes to carry out his

[30] See Interlocutory award, 3 August 2006, in: *Revista Română de Arbitraj* 2007/2, at 52-54. This situation is connected with the group of companies doctrine. See also VIDAL D., 'The extension of arbitration agreements within the group of companies: the *Alter Ego* doctrine in arbitral and court decisions', in: *ICC Bulletin* 2005, at 63-76, HANOTIAU B., 'L'arbitrage et les groupes de sociétés', in: *Gazette du Palais (Les Cahiers de l'Arbitrage)* 2002, at 6-17.

[31] The wish expressed by the party, without nominating the arbitrator, and the party's request that the arbitrator should be a professor of law specialized in Conflict of Laws, meets the legal requirements. Therefore, the President of the Court of Arbitration must appoint, using the List of Arbitrators, only the, or those, arbitrator(s) who meet the qualifications requested by the party. See arbitral award no. 13/14 March 1973, in BABIUC V. / CĂPĂTÂNĂ O. (note 4), at 16.

or her duties in full accordance with the Rules. The parties are entitled to have the appointment of arbitrators from among those enrolled on a list or the appointment of arbitrators not so listed. In the latter case, those persons enjoy the trust of the party due to their skills and upright nature.

2. Number of Arbitrators

Disputes shall be decided by one arbitrator or a three-person arbitration panel. A sole arbitrator or all appointed arbitrators, as the case may be,[32] constitute the Arbitral Tribunal. The consensual nature of arbitration entitles the parties to determine whether the dispute will be settled by a sole, or three-person arbitration panel. In of the event that no such determination is made, the dispute shall be settled by three arbitrators, one nominated by each party and the third arbitrator – the Presiding arbitrator – being appointed by the two arbitrators selected.[33] Where there are multiple parties, whether as claimant or as respondent, and the dispute has been referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, nominate an arbitrator.[34] On the date the Presiding arbitrator or the sole arbitrator, as the case may be, takes up his or her duties, or on the date of the last acceptance, if the panel is composed of two arbitrators, the Arbitral Tribunal shall be constituted.

3. Appointing Authority

In a specific arbitration case, the appointing authority[35] nominates the arbitrator if the parties or one of the parties has failed to appoint it and the arbitral clause contained no reference to any other appointing authority.[36] Taking into account

[32] Art. 85(1) of the Rules provides that in an international commercial arbitration held in Romania or in compliance with Romanian law, the Arbitral Tribunal shall be composed of an odd number of arbitrators, each party having the right to appoint an equal number of arbitrators, either Romanian or foreign citizens.

[33] Art. 19(2) last paragraph provides that where the value in dispute is insignificant or legal issues raised are clearly simple, the Leading Board of the Court of Arbitration shall decide whether the settlement of the dispute will be realized by a sole arbitrator.

[34] Art. 18 of the Rules provides that neither party shall be allowed to appoint an arbitrator on behalf of the other party or to nominate more arbitrators than the other party.

[35] Art. 20(1) last paragraph provides that the President of the National Chamber of Commerce and Industry is the Appointing Authority for a specific dispute.

[36] See SEVERIN A. (note 1), at 393, BABIUC V. (note 1), at 183. Appointing authorities are persons or institutions, other than parties to the dispute, who appoint some or all arbitrators, according to the rules and legal provisions applicable to arbitral proceedings. See LEAUA C., 'Autoritatea de nominare în arbitrajul comercial internaţional' [The Appointing Authorities in International Commercial Arbitration], in: *Austrian Arbitration Yearbook* 2008, at 89-113.

the specifics of the dispute and the professional background of an arbitrator appointed *ex officio*, the Leading Board of the Court of Arbitration must confirm or reject such appointment. In the latter case, the Leading Board, making some proposals in this respect, would ask the Appointing authority to make a new appointment.

4. Challenge and Replacement of Arbitrators

The Rules set up some principles for challenging and replacement of arbitrators. The reasons for challenging an arbitrator are those provided by the Romanian law system for challenges of judges.[37] Generally, an arbitrator can be challenged if there are justified doubts about his or her independence and impartiality or if the arbitrator lacks the qualifications required by the parties. A party is not entitled to challenge the arbitrator he or she has appointed except for supervening reasons or reason of which that party has become aware only after the appointment. Arbitrators must accomplish their tasks not only professionally, but in good faith. That is why the arbitrator aware of reasons that might justify challenging him/her is obliged to inform the parties and their fellow arbitrators before accepting being arbitrator in specific arbitration case. If such reason supervened after accepting to be an arbitrator in that case; the arbitrator must inform the parties and the Arbitral Tribunal as soon as he/she has knowledge of such reasons. Generally, such an arbitrator is not entitled to participate in the arbitral proceedings unless the parties have notified the arbitral tribunal that they have no intention to make a challenge. In that latter perspective, the arbitrator can state its abstention from arbitrating, without such attitude leading to the recognition of a justification of such a challenge. Replacement operates in case of a challenge, dismissal, abstention, renunciation, obstruction or demise of an arbitrator. In the case of the absence of an appointment of a substitute arbitrator, the party would make the appointment of another arbitrator. In the event of the absence of the latter appointment, the President of the National Chamber of Commerce and Industry shall appoint, within 5 days, a new arbitrator.[38] The arbitrator can be dismissed from a given dispute or can be removed from the List of Arbitrators in case such arbitrator has committed any of followed acts: unduly abandoning his/her duty as an arbitrator after having accepted the appointment, unreasonable failure to participate in the arbitral proceedings, to act properly for the settlement of the dispute, to render the award in due time, to respect the confidentiality of the arbitration, or to accomplish his/her duties.

[37] See, also, Interlocutory award, 3 August 1970, in: BABIUC V. / CĂPĂTÂNĂ O. (note 4), at 15.

[38] These principles of appointment in the event of a vacancy for any reason are available to the Presiding arbitrator.

E. Arbitral Proceedings

Arbitral proceedings are initiated upon the filing of a request for arbitration. If a claimant failed to notify a request for arbitration directly to respondent, such notification will be made by the Secretariat of the Court of Arbitration. Upon receiving a request for arbitration, the defendant shall submit an answer to the request. In addition, the Rules contain certain principles related to counterclaims,[39] conservatory and interim measures.

As of 18 April 2008, the Arbitral Tribunal must fulfill a new task: drafting the reference act. The reference act represents a source of good cooperation between the Arbitral Tribunal and the parties. As soon as a file is received from the Secretariat, the Arbitral Tribunal is obliged to draft a synthetic document (Reference Act) forecasting the development of the arbitral procedure. The Arbitral Tribunal accomplishes this task based on the documents submitted by the parties or, in case these are not sufficient, by asking the parties for clarifications in written form. A time limit for submission is established by the Arbitral Tribunal. The Reference Act contains the following elements: the name in full and capacity of parties to stand trial, the domicile or chosen address for notifying procedural documents, a summary of the parties' claims and, if applicable, some remarks on the amounts in dispute, main issues in dispute, evidence the parties intend to submit, procedural measures, time limits for submitting all documents relevant to the dispute, timetable of arbitral proceedings, seat of arbitration, and rules applicable to the procedure and to the merits of the dispute. Drafting the reference act is not the expression of unilateral behaviour of the Arbitral Tribunal. That is why the reference act must be submitted for appreciation to the parties within 30 days of the date on which the file was deposited with the Arbitral Tribunal. Each party's comments,[40] if any, shall be notified to the Arbitral Tribunal and to the other party by the Secretariat. In case it intends to make any comments, the Arbitral Tribunal will analyze them and then send a reference act to the parties for signature, as revised. The Arbitral Tribunal may postpone, if it deems it appropriate, the final draft of the reference act until the first day when the parties are legally summoned, when it shall be inserted into their debate. The reference act, as signed by parties and by the Arbitral Tribunal, shall be added to the case file. If a party refuses to sign it, the reference act shall be submitted for the Leading Board of the Court's approval. The consequences of drafting the reference act, as signed or approved by the Leading Board of the Court of Arbitration are the following: the arbitral procedure shall develop in full in accordance with the reference act; any amendment to the development of the arbitral procedure must be agreed, and reasoned, by the parties and approved by the Arbitral Tribunal; the parties are not allowed to formulate new requests or ask for new evidence or submit evidence outside time-limits, as established.

[39] Art. 45(2) first paragraph of Rules provides that a counterclaim shall be filed within the time limit for filing the answer or by the first day of hearings at the latest.

[40] The parties have 30 days to accept and/or make comments on the Reference Act.

The foregoing notwithstanding, the parties can submit new requests or request additional evidence or submit evidence outside the time-limits if the Arbitral Tribunal so approves, taking into consideration the nature of the requests, the development of the arbitral proceedings, new facts arising during the proceedings, the principle of celerity, as well as any other relevant circumstances.

The parties may participate in the proceedings either in person or through duly appointed representatives, and may be assisted by attorneys, advisers, expert interpreters or other persons.[41] A third party may participate in the proceedings only with the parties' and the Arbitral Tribunal's consent. Any plea concerning the existence or validity of an arbitration agreement, the constitution of the Arbitral Tribunal, limits of powers exercised by the arbitrators, as well as any other plea must be made in the statement of defense or by the date of the first hearings, at the latest, failing which the right to make such a claim will be lost. A plea concerning public order can be entered at any stage of the arbitral proceedings.[42]

Actori incumbit probatio is a well-known principle applicable in arbitral proceedings. According to this general principle, each party has the burden of proof or such party's claim or defense, respectively. Generally speaking, evidence must be produced in one or several sessions of the Arbitral Tribunal or in the manner agreed either pursuant to the reference act, or in accordance with art. 52(2) of the Rules.[43] If such requirements concerning the production of evidence[44] are not observed, such evidence cannot be subsequently introduced during the arbitration proceedings, unless the necessity of producing such evidence arises from hearings; production of evidence is not a cause for delaying settlement of a dispute. The evidence shall evaluated in the Arbitral Tribunal's discretion.

---

[41] See SEVERIN A. (note 1), at 394, BABIUC V. (note 1), at 184, BELIGRĂDEANU S., 'Discuţii în legătură cu unele aspecte privitoare la reprezentarea convenţională şi la asistarea părţilor în arbitrajul instituţional-jurisdicţional înfăptuit de Curtea de Arbitraj Comercial Internaţional de pe lângă Camera de Comerţ şi Industrie a României' ['Discussions on some aspects related to parties' conventional representation and legal assistance in jurisdictional-institutionalized arbitration organized by Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania'], in: *Revista Română de Arbitra*j 2009, awaiting publication.

[42] Art. 58(1) of the Rules provides that a plea of unconstitutionality of laws or Government ordinances can be made at the request of either party or *ex officio* by the Arbitral Tribunal in full accordance with the Law on organizing and operation of the Constitutional Court of Romania.

[43] Art. 52(2) of the Rules provides that, having obtained the Arbitral Tribunal's approval, the parties may agree that some stages of arbitral proceedings, except for hearings of witnesses and experts, as well as final conclusions on the merits of dispute, may take place by mail, e-mail or conference-calls.

[44] Taking an oath for hearing witnesses and experts is not permitted. Moreover, the Arbitral Tribunal is not entitled to take coercive or punitive action with respect to experts.

Any measure ordered by the Arbitral Tribunal must be reasoned and recorded in the minutes. Since the parties are entitled to examine each item in the file, upon the request of the parties the Arbitral Tribunal is required to release copies of the transcripts.[45]

F. Arbitral Award

1. General Principles

The final act of arbitral proceedings is the arbitral award.[46] In issuing the arbitral award, the Arbitral Tribunal will apply provisions of contract, legal provisions and trade usages as well as law. The Arbitral Tribunal may issue an interim arbitral award when the respondent acknowledges partially the claimant's claim and the latter requests that such an interim arbitral award be pronounced. The arbitral award should contain certain essential elements, such us a resolution of all claims of the parties, reference to the arbitration agreement, and a decision allocating the costs of the arbitral proceedings. Arbitral awards are issued unanimously or by a majority of votes.[47] In the latter case, an arbitrator not having joined the majority is required to issue a reasoned dissenting opinion and sign it as well. The arbitral award must be signed by each member of the Arbitral Tribunal, in the case of a unanimous award, or by the arbitrators representing the majority.[48] The Rules admit the possibility of correcting or interpreting the arbitral award. Once the final arbitral award is rendered, the Secretariat transmits it to the parties within one month, at the latest, of the date on which it was rendered. The time limit for transmitting the arbitral award can be extended by the President of the Court where required.

[45] Art. 61(5) of the Rules provides that, upon request of parties, the Arbitral Tribunal may amend or complete the transcripts.

[46] See SEVERIN A. (note 1), at 395-396, BABIUC V. (note 1), at 184-185.

[47] Art. 66(1) of the Rules provides that in of the event that the Arbitral Tribunal is composed of an even number of arbitrators and no majority decision can be reached, a Chairman shall be appointed in full accordance with an agreement of the parties or, in the absence of this agreement, by the President of the Court of Arbitration. After having heard both parties, and following debates with the other arbitrators, the Chairman is entitled to join one of the decisions, to amend the decision, or to issue another arbitral award.

[48] Once written and reasoned, the arbitral award shall be remitted to the Leading Board of the Court before it is transmitted to the parties. The Leading Board, based on the report made by the Secretariat, may formulate recommendations to the Arbitral Tribunal in relation with the clarity of writing and strength of reasoning. In so far as it assimilates the recommendations of the Board of the Court, the Arbitral Tribunal shall proceed with appropriately amending the award.

2. Setting Aside the Arbitral Award

The grounds for setting aside an arbitral award are the following:

a. the subject matter of the dispute is not arbitrable;

b. the arbitral tribunal has settled the dispute in the absence of an arbitration agreement or based on an arbitration agreement that is void or ineffective;

c. the Arbitral Tribunal was not constituted in full accordance with the arbitration agreement;

d. the absence of a party on the date of a hearing because the legal requirements concerning the summons to such hearing were not fulfilled;

e. the arbitral award was issued after the time limit for arbitration had expired;

f. the Arbitral Tribunal issued an award concerning matters not requested by the parties, failed to decide upon requested matters, or decided issues other than those requested;

g. the arbitral award failed to give the reasons for the order, to specify the date the award was pronounced and/or the seat of arbitration, or was not signed by the arbitrators;

h. the arbitral award contains provisions which cannot be complied with, the arbitral award violated public order, *boni mores* or mandatory provisions of law.

The action to set aside an arbitral award may be filed within one month of the date on which it was transmitted to the parties, with the state court which would have had jurisdiction over the case in absence of arbitration agreement. The right to set aside an arbitral award cannot be waived before such an award is issued, but can be waived subsequently by the parties.

3. Enforcement of the Arbitral Award

Generally, the party against whom the arbitral award was rendered will execute it on his/her own either immediately or in full accordance with any deadline set forth therein. Only an arbitral award invested with executory formula[49] will be treated as a writ of execution and will have the same force as any enforceable judgment.[50]

[49] *i.e.* pursuant to a public order of enforceability.

[50] Art. 77(1 and 2) of the Rules provides that upon the request of the winning party, the arbitral award will be invested with the executory formula, as provided by law. Such request must be submitted to the competent state court at the seat of the Court of Arbitration.

G. Arbitration Costs

Arbitration costs include administrative taxes, expenses for production and translation of evidence, arbitrators', attorneys', experts' and advisers' fees, travel expenses of the parties, arbitrators, witnesses, experts and advisers, as well as any other expenses related to the settlement of the dispute. The conduct of arbitral proceedings is flexible and expeditious due to the fact that calculation of arbitration costs is based on the amount of dispute (*ad valorem*). Upon filing a request for arbitration, the claimant must pay preliminary arbitration costs (including an administrative tax and arbitrators' fees). After the closing of the hearings, but before rendering its arbitral award, the Arbitral Tribunal will establish its final fee, which must be submitted for approval by the Leading Board of the Court of Arbitration, taking into account any difficulties encountered in the settlement of the dispute, the reasoning and any other relevant facts of the case. The Leading Board of the Court of Arbitration may confirm, or not confirm, such final fee. The final fee is then communicated to the parties for payment.

The arbitral award is rendered only after that payment is made. The additional principles concerning arbitration costs are the following: a request for arbitration will not be taken into account and arbitral proceedings will not be carried out unless the administrative tax and any other arbitration expenses are paid in full in accordance with the Schedules of Arbitration Costs; arbitration costs shall be borne according to agreement of the parties;[51] and the predictability of arbitration costs.[52]

IV. Conclusion

Romanian arbitration practice is developing as quickly as business is developing. That is why the legal basis for arbitration must be up date, as innovative European business requires innovative arbitration services. The most recent version of the Rules of Arbitration issued by the International Commercial Court of Arbitration attached to the Chamber of Commerce and Industry of Romania accomplishes the important task of promoting arbitration as a normal and

[51] Art. 50(9) of the Rules provides that, in the absence of such an agreement, the party against whom the award is issued is obliged by the Arbitral Tribunal to pay the arbitration costs in full (where the request for arbitration has been accepted in full), or in part (where the request for arbitration has been accepted only in part). In the latter case, the term 'arbitration costs' refers only to the administrative tax. With respect to other arbitration expenses, the Arbitral Tribunal allocates responsibility for those expenses to the extent it considers them to be justified, taking into account the relevant facts of the case.

[52] The Leading Board of the Court of Arbitration is entitled to approve the preliminary fees of arbitrators as final fees in the event that the arbitration does not give rise to specific or unanticipated legal issues.

preferred method for the settlement of domestic and international disputes. Romanian arbitration practice is prepared to face future challenges of globalisation, not only an economic plane, but also on a legal one.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS IN THE REPUBLIC OF LITHUANIA

Marijus KRASNICKAS*

I. Introduction

The Republic of Lithuania became a Member State of the European Union (hereinafter: the EU) on the 1st of May 2004[1] and since that day has been fully bound by the law of the EU. This date is also a watershed in the procedure of recognition and enforcement of foreign judicial decisions in Lithuania. The decisions of the courts of the EU Member States were distinguished as a separate category of decisions, the procedure for their recognition and enforcement being different from that applicable to the decisions issued by the authorities of the non-Member States. The Code of Civil Procedure of the Republic of Lithuania[2] (hereinafter – the CCP), which regulates procedural questions of private international law, i.e. *inter alia* recognition and enforcement of foreign judicial decisions, was amended accordingly,[3] in order to implement the relevant EU legislation.[4]

* Mykolas Romeris University, Faculty of Law, Department of International Law, doctoral student.

[1] Valstybes zinios, 2004, No 1 – 1.

[2] Valstybes zinios, 2002, No 36 – 1340.

[3] Valstybes zinios, 2004, No 72 – 2494.

[4] Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

Yearbook of Private International Law, Volume 10 (2008), pp. 493-504

A judicial decision, whether or not it is already *res judicata* in its country of origin, has no direct legal force outside this country. The judicial decision shall acquire legal force and, as a result, produce legal effects in a foreign State only if it is recognised in that foreign State. Recognition tends to provide the foreign judicial decision with the same legal force as a national judicial decision. More specifically, recognition of a foreign judicial decision shall, at least in Lithuania, mean that:

- it shall acquire *res judicata* power in the recognising State;
- it shall acquire prejudicial power in the recognising State;
- by recognising the foreign judicial decision, the recognising State shall also affirm that the principles of due process of law were followed during the hearing of the case in that foreign State;
- if capable of enforcement, it shall become enforceable in the State which recognised it, i.e. it shall have to be enforced in the same way as the decisions of the national courts.[5]

During the period between 2003 and 2007, 578 civil cases were heard by the Lithuanian Appellate Court on the basis of applications for recognition and enforcement of foreign judicial (or arbitration) decisions.[6]

In Chapter II here below, the recognition and enforcement procedure for foreign judicial decisions in Lithuania, before it became a member of the EU, is briefly reviewed. In Chapter III, the relevant procedure after Lithuania became a Member State of the EU is discussed, focusing on recognition and enforcement of EU Member States judicial decisions in Lithuania, analysing the judicial practice of the Lithuanian Appellate Court, as well as that of the Supreme Court of Lithuania. In the final chapter, certain conclusions are submitted.

---

matters; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[5] Review of the Generalisation of the Practice of the Courts of the Republic of Lithuania in Applying the Norms of the International Private Law, approbated by the Ruling No. 28, 21 December 2000, of the Senate of the Supreme Court of Lithuania, § 7.1.1; MIKELENAS V. *An Introduction to Private International Law* (in Lithuanian), Vilnius 2001, pp. 194-195.

[6] Yearly Activity Review by the Lithuanian Appellate Court (years 2003, 2004, 2005, 2006, 2007) (in Lithuanian), in <http://www.vtr.lt> (website of the Lithuanian Appellate Court).

II. Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania before the Joining of the European Union

The CCP provides that foreign judicial decisions can be enforced in the territory of the Republic of Lithuania only after their recognition by the Lithuanian Appellate Court. The Lithuanian Appellate Court is the only Lithuanian authority having jurisdiction to hear applications for recognition of decisions (Art. 809(1)). It should be noted that there is no need to recognise foreign judicial decisions regarding non-money judgments rendered on disputes between non-Lithuanian citizens, except in cases where such a decision is a basis for the conclusion of marriage or the registration of other civil status acts or of other rights in a public register.[7]

In the event of an international treaty, 'the procedure and grounds for the recognition and enforcement of foreign judgments are established by the international treaty itself' (CCP, Art. 810(1)).[8] However, the absence of a relevant international treaty shall not be considered as a basis for the non-recognition of a foreign decision, inasmuch as legal assistance by way of recognition of a foreign judgment is not rendered to the foreign State itself, but to the private persons to which the decision is directly or indirectly addressed.[9] In this case, recognition of a foreign judicial decision shall take place on the basis of the CCP (Art. 809 – 817).

As a result of the above, it is possible to distinguish three models for recognition and enforcement of foreign decisions depending on the particular foreign State whose judicial decision is to be enforced in the Republic of Lithuania. The models are as follows:

- recognition and enforcement of the judicial decisions of foreign States with which the Republic of Lithuania has concluded international treaties on mutual legal assistance and legal relationships (hereinafter – legal assistance treaties);
- recognition and enforcement of the judicial decisions of foreign States with which the Republic of Lithuania has concluded other international treaties, *inter alia* dealing with the recognition of foreign decisions;
- recognition and enforcement of the judicial decisions of foreign States with which the Republic of Lithuania has concluded no international treaties regulating recognition of foreign decisions.

Here below, the procedure in the Republic of Lithuania for the recognition and enforcement of foreign judicial decisions shall be briefly reviewed for each of the abovementioned models.

---

[7] STAUSKIENE E./VISINSKIS V., *Enforcement of Court Judgements* (in Lithuanian), Vilnius 2008, p.160.

[8] MIKELENAS V. , 'Reform of Private International Law in Lithuania', in this *Yearbook* 2005, p. 179.

[9] MIKELENAS V. (note 5), pp. 188-189, 199.

A. Legal Assistance Treaties

Legal assistance treaties on mutual legal assistance are specially designed for the regulation of the international private law sphere, *inter alia* recognition of foreign judicial decisions.

Before joining the EU, the Republic of Lithuania had concluded 12 legal assistance treaties with the following States: Russia,[10] Estonia and Latvia,[11] Belarus,[12] Poland,[13] Moldova,[14] Ukraine,[15] Turkey,[16] Uzbekistan,[17] Kazakhstan,[18] China,[19] Azerbaijan[20] and Armenia.[21] All these treaties are bilateral, with the exception of that which is concluded with Estonia and Latvia, which is tripartite.

The abovementioned legal assistance treaties provide that decisions issued in one of the Contracting States shall be recognized in the other Contracting State without a re-examination of the case. However, the defendant has the right to prove the existence of the grounds for non-recognition provided for by a particular treaty. In all cases, the court must *ex officio* ascertain whether recognition of a foreign decision would violate Lithuanian public order. If recognition of a foreign decision does so, such recognition must be refused.[22]

Legal assistance treaties, concluded by the Republic of Lithuania with foreign States, establish, generally, the following general grounds for non-recognition of foreign judicial decisions:

- if the claimant, or a defendant, was absent from the proceedings due to the fact that he was not served with the summons in due time or in the prescribed form, i.e. one of the basic principles of due process of law, that of proper notification, was breached;

- if a court of the Republic of Lithuania had earlier issued a decision, which is already *res judicata*, regarding the same legal dispute between the same parties;

- if court proceedings have already begun regarding the same legal dispute between the same parties before a court of the Republic of Lithuania. In such a case, the rule of *lis pendens* shall be applicable, which in international civil proce-

[10] Valstybes zinios, 1995, No 13-296 (entered into force on 21 January 1995).

[11] Valstybes zinios, 1994, No 28-492 (entered into force on 3 April, 1994).

[12] Valstybes zinios, 1994, No 43-779 (entered into force on 11 July, 1993).

[13] Valstybes zinios, 1994, No 14-234 (entered into force on 18 October, 1993).

[14] Valstybes zinios, 1995, No 19-440 (entered into force on 18 February, 1995).

[15] Valstybes zinios, 1994, No 91-1767 (entered into force on 20 November, 1994).

[16] Valstybes zinios, 1996, No 18-464 (entered into force on 15 August, 2004).

[17] Valstybes zinios, 1997, No 101-2552 (entered into force on 10 July, 1998).

[18] Valstybes zinios, 1998, No 51-1339 (entered into force on 8 April, 1999).

[19] Valstybes zinios, 2001, No 75-2642 (entered into force on 29 January, 2002).

[20] Valstybes zinios, 2002, No 75-3210 (entered into force on 22 November, 2002).

[21] Valstybes zinios, 2005, No 7-189 (entered into force on 8 July, 2005).

[22] MIKELENAS V. (note 8), pp. 179-180.

dure means that after submitting a claim before one contracting State's court, the right to submit a claim before another contracting State's court is lost;

- the case was under the exclusive jurisdiction of courts of the Republic of Lithuania in accordance with the provisions of the law of the Republic of Lithuania or an international treaty.[23]

B. Other International Treaties

Foreign State judicial decisions may also be recognised and enforced in Lithuania on other legal bases.[24] In particular, Lithuania is also party to multilateral international treaties, which uniformly regulate certain material legal relationships, including recognition of foreign judgments rendered on the specific matters falling within their substantial scope.[25] The Supreme Court of Lithuania,[26] as well as legal doctrine[27] *notably* identify the following multilateral international treaties as examples of this category:

- March 19, 1998, Framework Agreement between the Republic of Lithuania and the European Investment Bank governing EIB Activities in Lithuania;[28]

- 1956 Convention of the Contract for the International Carriage of Goods by Road;[29]

- 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.[30]

C. Absence of International Treaty

In the absence of an international treaty (whether bilateral on legal assistance, or multilateral), the recognition and enforcement procedures shall be carried out on the basis of the rules provided by the CCP (Articles 809-817).

These provisions of the CCP differ from those of the Civil Code of Procedure, which was valid until January 1, 2003, when the CCP entered into force. The

---

[23] MIKELENAS V. (note 5), pp. 197-199; LAUZIKAS E./MIKELENAS V./NEKROSIUS V. *Civil Procedure Law, Volume II* (in Lithuanian), Vilnius 2005, pp. 624-625.

[24] Review of the Generalisation of the Practice of the Courts of the Republic of Lithuania in Applying the Norms of International Private Law, approved by Ruling No. 28, 21 December 2000, of the Senate of the Supreme Court of Lithuania, § 7.1.4.

[25] MIKELENAS V. (note 5), p. 200; LAUZIKAS E./MIKELENAS V./NEKROSIUS V. *Civil Procedure Law, Volume II* (in Lithuanian), Vilnius 2005, pp. 625-626.

[26] note 24.

[27] MIKELENAS V. (note 5), p. 200; LAUZIKAS E./MIKELENAS V./NEKROSIUS V. (note 23), p. 626.

[28] Valstybes zinios, 1998, No 79-2218 (entered into force on 26 November 1998).

[29] Valstybes zinios, 1998, No 107-2932 (entered into force on 15 June 1993).

[30] Valstybes zinios, 1997, No 101-2550 (entered into force on 1 August 1998).

previous Civil Code of Procedure limited the recognition of foreign decisions to cases covered by an international treaty, however the Supreme Court of Lithuania stated that 'foreign State judicial decisions may be recognised and enforced in Lithuania on the basis of reciprocity, i.e. if the courts of the relevant State recognise the decisions of Lithuanian courts'.[31] However, in practice, no decisions were refused recognition and enforceability on the basis of a lack of reciprocity.[32]

The CCP establishes no requirement of reciprocity for the recognition of foreign judicial decisions. According to Article 810 of the CCP, in the absence of an international treaty, recognition of a foreign judicial decision could be refused in the following cases:

- the decision is not *res judicata* under the laws of the State where the decision was issued;

- the case was under the exclusive jurisdiction of the courts of the Republic of Lithuania or of a third State, under provisions of the law of the Republic of Lithuania or of an international treaty;

- a party to whom a decision was not favourable and who was absent from the proceedings was not duly informed of the initiation of civil proceedings, nor provided with an opportunity to exercise procedural remedies or be properly represented (if the party was legally incapable) during the proceedings;

- a decision of a foreign court, the recognition of which is sought, is incompatible with a decision issued by a court of the Republic of Lithuania in proceedings between the same parties;

- the foreign judicial decision is inconsistent with public order as determined in the Constitution of the Republic of Lithuania;

- a court of a foreign State, in its decision, resolved questions of legal capacity, legal representation, family property or inheritance concerning a citizen of the Republic of Lithuania, where such a decision is inconsistent with the international private law of the Republic of Lithuania, except in cases where Lithuanian courts would have issued the same decision in the proceedings.

An application to recognise a foreign judicial decision (or a part thereof) may be submitted to the Lithuanian Appellate Court by any person, who has a legal interest in a case. Such an application is not subject to stamp duty. An applicant must attach the following documents to his application for recognition: the decision of which recognition is sought and its translation into the Lithuanian language, a certification that the decision is *res judicata* and evidence that any party, who was absent from the proceedings, was duly informed of the place and time of the civil case hearing (if a case was resolved in absence of a party); in cases of applications to permit the enforcement of a foreign decision – also a certification that this decision is enforceable in its State of origin (CCP, Articles 811 – 813).

Application for recognition and permission to enforce foreign decisions shall be heard by the Lithuanian Appellate Court's three-judge college. Persons to

[31] Note 24.

[32] ZURAUSKAITE E. 'A Lack of Reciprocity as a Ground for Nonrecognition of Foreign Judgments' in: *International Journal of Baltic Law*, issue: 3 / 2004, pp. 184-186.

whom the judgement is not favourable shall be informed of the date and place of the hearing; however, their absence shall not be an obstacle to the resolution of an application. An application for recognition may be left untried if it is established that it was submitted contrary to the procedure stated by the CCP or international agreements. The ruling of the Lithuanian Appellate Court shall become effective as of the day of its issuing. A judicial review upon such a ruling may be requested from the Supreme Court of Lithuania (CCP, Articles 812, 813).

The same procedure is applied to the recognition and enforcement of foreign State court-approved settlements and foreign court rulings on interim measures (CCP, Articles 816 – 817).[33]

Foreign judicial decisions shall be enforced in the Republic of Lithuania according to general procedure unless otherwise stated in the CCP (Art. 773(2)), i.e. in the same way as Lithuanian judicial decisions. An enforcement order on the basis of recognised and enforceable foreign decisions in the Republic of Lithuania shall be issued by Lithuanian Appellate Court and sent to the applicant, if he indicated in the application for recognition that the recognition is required for the enforcement of the decision in the Republic of Lithuania (CCP, Art. 774). The amounts of money indicated in foreign currency shall be replaced by litas (the Lithuanian currency) on the basis of the official foreign currency and litas exchange rate established by the Bank of Lithuania (CCP, Art. 776).

III. Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania after the Accession

Decisions of the Member State courts (hereinafter – EU decisions) are recognised in the Republic of Lithuania according to a different procedure than that used for those of non-Member States. As already mentioned, after Lithuania's accession to the EU, the CCP was changed by introducing a new section 'Recognition and Enforcement Procedure for the European Union Member States Judicial Decisions'.[34] Article 718 of the CCP establishes that the EU Member States judicial decisions and other documents enforceable on the basis of EU regulations shall be recognised and enforceable according to the procedure prescribed by the EU regulations and this Code.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[35] (hereinafter – the Regulation) provides for a general regulation of recognition and enforcement of EU decisions in EU Member States. Due to the limited scope

[33] LAUZIKAS E./MIKELENAS V./NEKROSIUS V. (note 23), p. 621 – 623.

[34] Note 3.

[35] OJ L 12, 16.1.2001, p. 1–23.

of this paper, only the general procedure which is applicable in Lithuania for recognition and enforcement of EU decisions, as prescribed by the Regulation, is covered herein, without commenting on specific categories of EU decisions, whose recognition is regulated by other EU regulations.[36]

When an interested party wants the EU decision to be performed in the Republic of Lithuania, it must file an application before the Lithuanian Appellate Court for permission to enforce such a decision (Art. 38, 39, 40 of the Regulation, Art. 818 of the CCP). The application must comply with the general requirements for procedural documents (Art. 111 of the CCP), including that the application and annexes thereto be in the Lithuanian language or their translation into the Lithuanian language be submitted. If an applicant does not live in Lithuania and has not assigned, in the case, a representative, or a person authorised to receive procedural documents, in Lithuania, an address in Lithuania or a telecommunications terminal address, by which he can be served procedural documents, must be indicated in the application. Such an application is also not subject to stamp duty.

Such applications shall be heard by the sole judge of the Lithuanian Appellate Court in a written procedure. In this phase, interested persons shall not be informed of the hearing on the application; the judge shall verify whether the application complies with the requirements provided by the CCP and EU regulations. If the application does not comply with said requirements, the applicant shall be requested to correct the defects within a certain period. If the judge establishes that the application complies with the requirements as to form and content, the EU decision shall be recognised (as enforceable) in the Republic of Lithuania by a ruling, without verifying whether any grounds for the refusal of recognition of EU decisions, as stated in EU regulations, exist. The ruling becomes *res judicata* and an enforcement order may be issued if a complaint is not submitted to the Lithuanian Appellate Court within the period indicated in Article 43(5) of the Regulation (Art. 818 of the CCP).

If a ruling of the Lithuanian Appellate Court judge is challenged within the statutory period, the complaint shall be examined by the college of three judges of the Lithuanian Appellate Court. However, the judge who issued the ruling which is being challenged cannot be appointed to the college. The college cannot simply quash the challenged ruling and transfer the issue back to the sole judge for a new hearing, i.e. in all cases the college must examine the complaint in substance and issue a relevant ruling – either leaving the challenged ruling in force or quash it and refusing permission to enforce the judicial decision. This ruling becomes ef-

[36] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

fective from the moment of its issuing; however a request for judicial review may be submitted to the Supreme Court of Lithuania within three months of its issuing.[37] The approximate duration of appeal proceedings in the Republic of Lithuania is 2 months.[38]

During the period since Lithuania's accession to the EU to year 2007 (inclusive), 79 civil cases on the basis of applications for recognition and enforcement of EU decisions have been heard by the Lithuanian Appellate Court. 70 applications for recognition and permission to enforce the EU decision were satisfied, i.e. more than 90 percent of all applications. The overall majority of such decisions are very laconic and short, having no significant value for the development of jurisprudence as they do not explain the essence of legal norms merely reiterating their text in the decisions.

Despite the fact that the Regulation clearly establishes that it shall apply only to legal proceedings instituted, and to documents formally drawn up or registered as authentic instruments, after the entry into force thereof (Art. 66(1)), the Lithuanian Appellate Court also took it into account for the recognition procedure of EU decisions which were issued before its entry into force.[39]

However, in certain instances, the Lithuanian Appellate Court acted correctly and the EU decisions issued before the Regulation were recognised not on the basis of the Regulation, but according to the procedure provided by the relevant legislation of the Republic of Lithuania. The Lithuanian Appellate Court ruled as follows:

> 'In the present case the Regulation shall not apply, because on the basis of Article 66 it shall apply only to legal proceedings instituted, and to documents formally drawn up or registered as authentic instruments, after the entry into force thereof. The Republic of Lithuania became bound by the Regulation after its accession to the EU, whereas the decisions for which recognition is sought, as can be seen from the case material, were issued before Lithuania's membership in the EU. In such cases, the issue of recognition and permission to enforce a foreign judicial decision shall be decided on the basis of the CCP provisions. After hearing the case, the college did not identify any grounds [established in Article 810 of the CCP] for the refusal to recognise English Horsham County judicial decisions on the

[37] LAUZIKAS E./MIKELENAS V./NEKROSIUS V. (note 23), pp. 632-633.

[38] Report on the Application of Regulation Brussels I in the Member States, Final version, September 2007, p. 259.

[39] *Inter alia*, Lithuanian Appellate Court rulings in civil case: No 2T-149/2008 (decision for which recognition was sought was issued on 23 April, 2004), No 2T-88/2007 and 2T-18/2007 (court order for which recognition was sought was issued on 12 June, 2003), No 2T-69/2006 (decision for which recognition was sought was issued on 7 May 2002).

> adjudication of monetary sums, dated 17 December, 2001, 22 February and 11 July, 2002, and 28 February, 2003'.[40]

A similar reasoning was adopted in another case while resolving an application for the recognition of a Dutch Breda County judicial decision, dated 1 May, 2001, and the provisions of the Civil Code of Procedure, effective at the moment of the reception of the application for recognition, were applied.[41]

Therefore, a recent ruling of the Supreme Court of Lithuania is of importance, as it clearly explains when the Regulation is to be applied, and, further, should clarify the rather ambiguous jurisprudence of the Lithuanian Appellate Court:

> 'There is a question raised in the case of whether an authentic instrument issued in another State of the EU can be recognised and enforced in Lithuania, if Lithuania at the moment of issuing thereof was not a Member State of the EU and the law of the EU had not taken direct effect therein.'[42]

An applicant, the German company Bördesparkasse, submitted to the Lithuanian Appellate Court an application for recognition and permission to enforce in the Republic of Lithuania of a certification No 404/1991 regarding the indebtedness of Jürgen Dannies, which had been issued by Peter Majewski, a German notary public, on 2 September, 1991. In a certificate issued by Jens Jenrich, a German notary public, dated 30 October, 2007, issued using the standard form in Annex VI to the EU Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter – the Regulation), it is indicated that this certification of indebtedness is enforceable.

In Article 66(1) of the Regulation it is established that this Regulation shall apply only to legal proceedings instituted, and to documents formally drawn up or registered as authentic instruments, after the entry into force thereof. In a public notary's certificate, dated 30 October, 2007, present in the case, it is indicated that the indebtedness certificate as an authentic instrument had been issued and registered on 2 September, 1991. Therefore, the rules for recognition and declaration as enforceable of the authentic instruments as stated in the Regulation shall not be applicable to this certification of indebtedness.

However, the fact that the authentic instruments, which had been issued and registered before the Regulation's entry into force, are not covered by the Regulation, does not mean that such instruments are not subject to recognition and enforcement Non-recognition of authentic instruments issued in other EU State solely

---

[40] Lithuanian Appellate Court ruling in a civil case No 2T-122/2007, dated 8 October, 2007.

[41] Lithuanian Appellate Court ruling in a civil case No 2T-1/2005, dated 18 October, 2005.

[42] The Supreme Court of Lithuania ruling in a civil case No 3K-3-347/2008, dated 30 July, 2008.

on the above-mentioned technical grounds, i.e. due to the fact that such an instrument had been issued before the Regulation's entry into force, would entail that the legal rights of persons acquired on the basis of authentic instruments issued before the Regulation's entry into force would not be enforceable in Lithuania; and on the contrary, the legal rights of persons acquired on the basis of authentic instruments issued after Regulation's entry into force would be recognisable and enforceable according to the procedure provided by the Regulation. Such a situation would be an unjustified constraint on the implementation of individual rights. Private ownership rights as well as creditors' rights of claim over the debtor's property cannot be treated differently according to the time when the enforceable instrument certifying such a persons' rights was issued in another EU State, under the condition that such an instrument be in force.

It should also be noted that at the moment of issuing of the authentic instrument, approved by Peter Majewski, German notary public, on 2 September, 1991, Lithuania and Germany had not concluded any bilateral agreement on legal assistance, regulating recognition and enforcement of authentic instruments (and neither have later). The Supreme Court of Lithuania, in its Review of the Generalisation of the Practice of the Courts of the Republic of Lithuania in Applying the Norms of the International Private Law, dated 21 December, 2000, had indicated:

> 'it is not private persons' fault that their States had concluded no such agreements. Refusal to recognise foreign judicial decisions solely on such technical grounds would breach private persons' rights, as they could not implement said rights, as certified by the foreign State judicial decision, in Lithuania. When recognising foreign judicial decisions, in the absence of a bilateral agreement on legal assistance, the grounds for non-recognition should be those universally accepted in international practice, as well as those instituted in bilateral agreements on legal assistance concluded by Lithuania and foreign States, applied analogically'.

According to Article 818(1) of CCP, EU decisions and other instruments enforceable in conformity with EU regulations shall be recognised and enforceable in the Republic of Lithuania according to the procedure provided in EU regulations and this Code; if the EU regulations do not establish the procedure for recognition and permission to enforce the judicial decisions of EU Member States, these decisions shall be recognised and enforceable under Sections 4, 5 and 6 of the Chapter LX Part VII of this Code.

Whereas the Regulation does not establish the procedure for recognition and declaration as enforceable of authentic instruments issued before the Regulation's entry into force, therefore the provisions of Articles 809 – 817 of the CPP shall apply, under Article 818(1) of the CCP *mutatis mutandis*.

On the basis of the aforementioned arguments, the Court ruled that the view taken by the Lithuanian Appellate Court, according to which an authentic instru-

ment which falls outside the scope of the Regulation is not subject of recognition, is legally unfounded.[43]

Whereas the Constitutional Court of the Republic of Lithuania emphasised the need to follow court precedents, the Lithuanian Appellate Court should follow the abovementioned legal explanation of the Supreme Court of Lithuania, and in this way should avoid further mistakes in the procedure of recognition and enforcement of EU judicial decisions:

> 'The courts must follow such relevant legal provisions (norms, principles) in their contents and conception of application, as formulated and followed when applying said provisions (norms, principles) in previous cases, *inter alia* resolving analogous cases. [...] According to the [Lithuanian] Constitution, lower courts are bound, when issuing decisions in cases of the relevant categories, by the precedents sent down by higher courts in cases of those same categories.'[44]

IV. Conclusions

After Lithuania's accession to the EU, a new category of decisions – the decisions rendered by EU Member States – with a specific procedure for recognition and enforcement, was introduced. The practice of the Lithuanian Appellate Court – which is the Lithuanian authority having jurisdiction with respect to requests for recognition – is both sparse and ambiguous. It is to be hoped that the above-mentioned recent ruling by the Supreme Court of Lithuania will help to ensure consistent jurisprudence in this crucial field of private international law.

[43] The Supreme Court of Lithuania ruling in a civil case No 3K-3-347/2008, dated 30 July, 2008.

[44] The Constitutional Court of the Republic of Lithuania ruling 'On court precedents and on lodging complaints against court rulings whereby one applies to the Constitutional Court or an administrative court' in a case No 26/07, dated 24 October, 2007.

ATTEMPTING A 'JUDICIAL RESTATEMENT' OF PRIVATE INTERNATIONAL LAW IN BELARUS

Daria SOLENIK*

I. Background

Though undergoing a period of prolonged transition, the legal system of the Republic of Belarus has not yet recovered from its Soviet past. The ghost of the long-deceased Soviet legal order still seems to be haunting Belarusian law, affecting its contents and system of sources. Following the pattern of most of the Post-Soviet States, Belarusian law is essentially based upon written legislative norms, leaving little room for jurisprudence and legal doctrine.[1] Judge-made rules do not enjoy the status of legal norms. Judicial decisions of first and second instances are subject neither to official publication, nor to academic commentaries. They are not easily accessible to lay persons and non-judiciary legal professionals, thus forming quite an obscure and technical part of Belarusian law.

Judgments of the Supreme jurisdictions – which are the Supreme Court and the High Economic Court – on the contrary, enjoy a greater authority and are

* Staff Legal Advisor at the Swiss Institute of Comparative Law, Lausanne; Scientific expert for the Council of Europe, Strasbourg; Lecturer-in-law at the European Humanities University of Vilnius.

[1] BOGUSLAVSKII M. M., *Private International Law: the Soviet Approach*, Dordrecht/Boston/Lancaster 1988, p. 43.

Yearbook of Private International Law, Volume 10 (2008), pp. 505-521

considered as an 'auxiliary source of law'[2] or 'source of interpretation'.[3] Among these, Ordinances of Plenary Sessions of the Supreme jurisdictions are of a particular importance. Held at least four times a year, these Plenary Sessions are competent to study the materials of existing judicial practice, in order to generalize it and adopt synthetic guidelines for the application of a particular kind of legislation.[4] Thus, Ordinances of the Supreme jurisdictions in Belarus do not only give an insight into the state of previously obscure judicial practice, but also tend to be a form of 'restatement' of positive law.

This methodology of 'judicial restatement' aims to equip every legal norm with an explanation, a clear instruction for use, in order to guarantee the correct and uniform application of law by the judge and decrease the number of annulment procedures. Even if such 'judicial restatements' enjoy neither the status of directly applicable legal norms nor that of a judicial precedent, the lower jurisdictions tend to follow these guidelines for fear of their decisions being overturned. Thus, Ordinances of the Supreme jurisdictions which incorporate such restatements have a particular influence on the law-making and law-enforcement processes, shifting the position of jurisprudence in the pyramid of legal sources and showing a gradual judiciarisation of law.[5]

Going beyond a simple handbook for trial judges, judicial restatements may explain, complete, and even modify the primary sense of a legislative provision. Quite characteristic for legal systems in transition, 'judicial restatements' are used to detect defective and unclear legal provisions that were often adopted in haste or simply copied from the neighboring States. Such restatements are frequently solicited in newly elaborated or transplanted branches of law, which are particularly in need of judicial interpretation.

Private international law has recently provided a fertile ground for such restatement. On December 22, 2006, the Supreme Economic Court, which is the highest jurisdiction presiding over the Economic Courts specialized in commercial matters, issued the Ordinance n° 19 'On judicial practice in cases involving foreign litigants' (hereafter referred to as 'the Ordinance').[6] Addressed exclusively to Economic Courts, the Ordinance limits its scope to commercial matters. Attempting an exhaustive coverage of the issues involved, the Ordinance, which

---

[2] НЕШАТАЕВА Т. Н., *Международное частное право и Международный гражданский процесс*, Москва, Городец, 2004, p. 62.

[3] *Ibid.*; cf. LASSERRE-KIESOW V., 'L'ordre des sources ou Le renouvellement des sources du droit', in: *Recueil Dalloz* 2006, p. 2279.

[4] Sec. 51 and 73 of the Code on the Judicial System and Judges' Status (*Кодекс Республики Беларусь о судоустройстве и статусе судей*), promulgated on June 29, 2006, № 139-З.

[5] MALAURIE P./AYNES L./MORVAN P., *Introduction générale*, 2e éd., Paris 2005, n° 203.

[6] Постановление Пленума Высшего Хозяйственного Суда Республики Беларусь от 22.12.2006 № 19 'О практике рассмотрения хозяйственными судами Республики Беларусь дел с участием иностранных лиц', in: *Национальный реестр правовых актов, 01.02.2006, № 6/473*.

consists of nine Chapters, gives technical, though sometimes laconic, guidelines concerning the sources of private international law,[7] rules of international jurisdiction,[8] arbitral agreements,[9] letters rogatory to foreign courts,[10] legalization of documents,[11] procedural status of foreign litigants,[12] determination of the applicable law,[13] letters rogatory sent by foreign courts[14] and refusal of judicial cooperation.[15] Given its nature, its objective, and its addressees, a special emphasis is placed by the Ordinance on the judicial cooperation. However, the Ordinance still gives an insight into the two key aspects of Belarusian private international law, that of international jurisdiction (I) and applicable law (II). It is on these two points that we propose to focus our attention in the following.

II. Jurisdiction

The High Economic Court singles out three categories of rules determining international jurisdiction: general rules of jurisdiction (A), special rules of jurisdiction (B), rules of exclusive jurisdiction (C) and a regional regime of jurisdiction applicable to litigants originating from the Commonwealth of Independent States (hereafter referred to as 'CIS') (D).[16]

[7] Ordinance n° 19, Chapter I.

[8] Ordinance n° 19, Chapter II.

[9] Ordinance n° 19, Chapter III.

[10] Ordinance n° 19, Chapter IV.

[11] Ordinance n° 19, Chapter V.

[12] Ordinance n° 19, Chapter VI.

[13] Ordinance n° 19, Chapter VII.

[14] Ordinance n° 19, Chapter VIII.

[15] Ordinance n° 19, Chapter IX, exhaustively detailing the cases, in which Belarusian judges are entitled to refuse procedural assistance requested by a foreign court.

[16] The Commonwealth of Independent States (CIS) (in Russian: *Содружество Независимых Государств (СНГ)* is a regional organization, founded on December 8, 1991 by Belarus, Russia, and Ukraine as a successor entity to the USSR. Although comparable to the original European Community, the CIS has few supranational powers, possessing mainly coordinating powers in the sphere of trade, finance, lawmaking, judicial cooperation and security. It promotes cooperation on democratization and cross-border crime prevention. The organisation is open to all Republics of the former Soviet Union, as well as to other nations sharing the same goals.

A. General Rules of Jurisdiction

Referring to Chapter 27 of the Procedural Code for Economic Disputes,[17] the Ordinance reminds that the sole general criterion of international jurisdiction consists in the territorial proximity of disputes to Belarus' economy. However, the Ordinance omits to say that this seemingly unequivocal principle is concretized by a double rule under the section 235 of the Procedural Code for Economic Disputes.[18] Far from being clear, this text has given rise to some uncertainties in practice and, as a result, deserves further comments.

The first part of section 235 enables Belarusian Economic Courts *'to handle economic (commercial) disputes [involving foreign litigants], if the defendant resides or is established in the territory of the Republic, or if his property is localized therein'*. The commonly accepted European principle of 'the defendant's domicile' may be clearly read in the abovementioned provision. The text requires a certain intensity of ties to be maintained by the defendant with the State's territory, in order to benefit from this principle. Normally, a simple stay of a foreign defendant in the country shall not suffice to confer jurisdiction to Belarusian courts. However, this interpretation seems compromised by the alternative criterion laid down by sec. 235, granting jurisdiction to Belarusian courts if the defendant's property is located in Belarus. As a result, the defendant's physical presence in the territory is not necessary, provided that a part of his property is localized therein, no matter the importance of the assets. Thus, the intensity of the dispute's connection to the State's territory is measured less rigidly in Belarus than in most of its European counterparts.[19] Such jurisdiction criteria may sometimes run counter to the idea the proximity principle, especially in cases where the defendant's property is scattered among several States and the assets located in Belarus have no relation whatsoever to the claim. In general, the jurisdiction criteria able to found the international enforcement of the resulting judicial decisions may not necessarily satisfy the principle of efficient and fair administration of justice.

---

[17] Procedural Code for Economic Disputes, promulgated on December 15, 1998, № 219-З, in: *Национальный реестр правовых актов Республики Беларусь* 2002, № 136, 2/902; 2004, № 138-139, 2/1064; 2003, № 8, 2/932; 2006, № 6, 2/1173, № 107, 2/1235.

[18] Section 235, part 1 of the Procedural Code for Economic Disputes reads as follows: *'Economic Courts in the Republic of Belarus handle economic (commercial) disputes, as well as other cases related to entrepreneurial or other commercial (economic) activities involving foreign entities, international organisations, foreign nationals, stateless persons carrying out entrepreneurial or other commercial (economic) activities (hereafter referred to as «foreign litigants»), if: - the defendant resides or is situated in the territory of the Republic, or if his property is localized therein […]'*.

[19] НЕШАТАЕВА Т. Н. (note 2), p. 458; ПЛИГИН В.Н., *Юрисдикция судов по гражданским и коммерческим делам в условиях создания единого правового пространства*, СЕМП, 1992, стр. 12-14. Cf. Sec. 247 of the Code of Arbitral Procedure of the Russian Federation.

The second part of section 235 states an additional rule, according to which Belarusian Economic Courts also have adjudicatory jurisdiction '*if one of the litigants – plaintiff or defendant – has his governing body, affiliated society, or representative office in the territory of the Republic of Belarus'*. This provision opens an apparent possibility for all the above-mentioned persons to file an international case with Belarusian courts, notwithstanding the defendant's domicile or place of residence, as long as the aforementioned conditions are satisfied. One may here read a disguised rule, founding jurisdiction on the domicile of the plaintiff (*forum actoris*). Indeed, it gives all foreign plaintiffs established in Belarus the possibility of bringing their disputes before the courts of Belarus, regardless of the strength of the connection of the dispute to this country. The use of such a provision by a foreign plaintiff against a foreign defendant will surely shift the balance of powers between the litigants in favor of the former. In the absence of other proximity requirements, Belarusian courts may well become *fora* of convenience, complicating access to justice for defendants in international cases. The Ordinance of the High Economic Court does not comment on this provision other than by saying that '*Belarusian courts have jurisdiction even if both parties are foreign persons'*.[20] This disguised privilege of jurisdiction based on the place of establishment is similar to that provided for by the French civil code for its nationals[21] and thus suffers the same criticism of non-compliance with the non-discrimination principle.[22]

B. Special Rules of Jurisdiction

The Ordinance refrains from restating the special rules of jurisdiction and limits its effort to referring the judge to the applicable rules. Depending upon the category of the legal relationship in dispute, section 235 of the Procedural Code for Economic Disputes distinguishes the following special criteria of international jurisdiction.

In contractual matters, Belarusian courts enjoy international jurisdiction if the dispute results from a contract that has been performed or should have been performed in the territory of the Republic of Belarus. This rule is nevertheless not an easy tool to handle.[23] Firstly, one needs to determine what is understood by 'contractual matters', next, determine which contractual obligation is to be

[20] Ordinance n° 31, pt. 7 § 2.

[21] Sec. 14 of the French Civil code reads as follows: '*An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons*'.

[22] DROZ G.A.L., 'Réflexions pour une réforme des articles 14 et 15 du Code civil français', in: *Rev. crit. dr. int. pr.* 1975, p. 1 ss; GAUDEMET-TALLON H., 'Nationalisme et compétence judiciaire: déclin ou renouveau?', in: *Trav. com. fr. dr. int. pr.* 1987-88, p. 17 ss.

[23] НЕШПАТАЕВА T. H. (note 2), p. 461.

taken into account, and finally localize the place where it should be executed. The definition of 'contractual matters' shall certainly be provided by the law of the forum, as it relates to the material scope of internal conflict of law rules. It may nevertheless occur that the determination of the relevant contractual obligation and the place of performance of the contract must be carried out according to the material law applicable to the contract.[24] In such cases, the question of applicable law must be resolved before the question of jurisdiction. This requires the judges to mobilize great procedural efforts, notwithstanding the fact that they are not certain to accept jurisdiction on the case.

In matters relating to extra-contractual obligations, Belarusian legislation contemplates two criteria of international jurisdiction: the place where the harmful event or action occurred and the place where the damage has taken place. The flexibility of the criteria stems from the legislator's wish to enable victims to choose the jurisdiction that corresponds most to the needs of their case. The Ordinance still gives no guidelines as to the scope of the damage covered by the territorial competence in the situations where the damage occurs in more than two States. If the harmful event or action occurred in Belarus, shall Belarusian courts take cognizance of the damages having occurred in Belarus only or also of those having occurred abroad? The Ordinance gives no answer to this question. On the other hand, if the damage caused by a foreign factor (located abroad) results in the Belarusian territory, the principles of proximity and fair administration of justice command limiting the scope of the Belarusian courts' jurisdiction to the damage occurred within the State's territory.[25]

The alternative between *locus acti* and *locus damni* is subject to exceptions. In cases of unjust enrichment, the international jurisdiction of Belarusian courts is justified if the enrichment took place in the territory of the Republic of Belarus. In cases concerning the protection of a business' reputation, the plaintiffs residing in Belarus enjoy the privilege of jurisdiction, allowing them to lodge the complaint with Belarusian courts (*forum actoris*). The transcending criterion of territorial proximity also grants jurisdiction to Belarusian courts in other cases, such as disputes relating to the issuance of securities, the establishing of legally significant facts, the registration of names, and services provided via the Internet.[26] The Ordinance of the High Economic Court reiterates that the list of specific jurisdiction criteria is not exhaustive. In cases that are not ex-

[24] As this is emphasized by the doctrine: ТИХИНЯ В.Г., *Международное частное право*, Минск, ТетраСистемс, 4-е изд., 2007, 144 с.; cf. the position of the Court of Justice of the European Communities on this matter: CJEC, October 6, 1976, case12/76, *Tessili*, in: *Rev. crit. dr. int. pr.* 1977.614, note DROZ G.A.L.; 1977.751, note GOTHOT P. / HOLLEAUX D.; *Clunet* 1977.719, note BISCHOFF J.-M.

[25] BOUREL P., 'Du rattachement de quelques délits spéciaux en droit international privé', in: *Recueil des Cours* 1989.II, p. 351, esp. p. 355.

[26] Sec. 235, part 7, 8, and 9 of the Procedural Code for Economic Disputes.

pressly provided for by the legislation, *'Belarusian courts must accept jurisdiction if the dispute is closely connected to the Belarusian territory'*.[27]

C. Rules of Exclusive Jurisdiction

The Ordinance draws attention to the fact that exclusive jurisdiction criteria are established by internal legislation and by international treaties ratified by the Republic of Belarus.[28]

The internal legislation, namely section 236 of the Procedural Code for Economic Disputes, lays down a number of bases for exclusive jurisdiction, that is in case of disputes relating to the State's property, to immovable property located in the Belarusian territory, to the validity of inscriptions in Public Registers, to the incorporation, registration and liquidation of legal entities in the Republic of Belarus, to insolvency procedures initiated against persons residing or established in Belarusian territory, as well as all disputes involving the interests of the State as a public entity.

International treaties binding the Republic of Belarus complete the list hereabove by including claims against transporters that belong to the exclusive competence of the country of establishment of the transportation company to which the claim is addressed.[29]

D. Prorogation of Competence

The Ordinance places a particular emphasis on party autonomy in the determination of jurisdiction.[30] In a procedural model of an inquisitorial nature, such as the one established in Belarus, the principle of party autonomy is probably the most difficult to justify. The High Economic Court calls upon the lower courts to enforce this principle, which binds the Republic of Belarus by virtue of multiple international treaties concluded with other countries of the ex USSR.[31] The post-reform internal legislation, adopted in 1998, has equally introduced the proroga-

---

[27] Sec. 235, part 10 of the Procedural Code for Economic Disputes; Ordinance n° 19, pt. 7 § 3.

[28] Ordinance n° 19, pt. 9.

[29] Sec. 20 § 3 of the CIS Convention on legal assistance and legal relations in civil, family, and criminal matters, adopted in Minsk on January 22, 1993 (hereafter referred to as 'Minsk Convention'); sec. 22 § 3 of the CIS Convention on legal assistance and legal relations in civil, family and criminal matters, adopted in Chisinau on October 7, 2002 (hereafter referred to as 'Chisinau Convention').

[30] Ordinance n° 19, pt. 10 § 1.

[31] Sec. 4 § 2 of the CIS Agreement on settlement of disputes related to carrying out economic activities, concluded in Kiev on March 20, 1992 (hereafter referred to as 'Kiev Agreement'); sec. 21 of Minsk Convention; sec. 23 § 1 of Chisinau Convention.

tion of competence.[32] Respect of the parties' choice by a judge is subject to control by superior jurisdictions and may be sanctioned through an annulment procedure.

The Ordinance states that the validity of a choice of court agreement does not depend upon the parties' nationality. Belarusian courts must accept jurisdiction even if both litigants are foreign. The only exception to this rule is admitted for the procedures regarding uncontested claims (*prikaznoïe proizvodstvo*). Such procedures are designed to ensure an expedient enforcement of a pecuniary claim while skipping the trial stage of the procedure (Sec. 220 § 1 of the Procedural Code for Economic Disputes). As the efficiency of the State's enforcement system is limited by its territory, such procedures are accessible to foreign litigants only if the debtor is established within the courts' jurisdiction. From this, the Ordinance derives the impossibility for foreign litigants to conclude agreements conferring jurisdiction to Belarusian courts over their uncontested claims.[33]

Although motivated by the need to ensure enforceability of court orders, the exclusion of expedient enforcement procedures from the scope of party autonomy still seems to exceed its primary objective. In fact, the efficiency of enforcement procedures, should these be international or internal, is directly proportionate to the accessibility of the debtor's property.[34] If the foreign debtor's property is located in the territory of the Republic of Belarus, there is no objective reason to deny foreign litigants the possibility to confer to Belarusian courts jurisdiction over the uncontested claim and enable them to use the expedient procedure. Blocking access to fast-track enforcement procedures on the basis of the litigant's nationality or place of establishment, even if the debtor's property is located within the national courts jurisdiction, runs counter to the constitutional principle of non-discrimination and goes beyond the primary meaning of sec. 222 § 1 of the Procedural Code for Economic Disputes.

Outside the procedural scope of the parties' autonomy, the Ordinance establishes formal requirements for prorogation agreements. The latter are subject to the same formal constraints as international contracts, which imply a mandatory written document performed separately or included into the main agreement.[35] Barely limited in scope, prorogation agreements may alter common and special rules of international jurisdiction. Classically, the rules of exclusive jurisdiction may not be overturned by the parties' choice.[36]

As to the moment when the parties' agreement may be manifested, the Ordinance contains a useful procedural guideline. The High Economic Court

---

[32] Sec. 237 § 1 of the Procedural Code for Economic Disputes.

[33] Ordinance n° 19, pt. 10 § 2; 12.

[34] Section 222 § 1 allows courts to deny jurisdiction in procedures for uncontested claims, 'if the debtor is established outside the courts' jurisdiction'. Cf. LHUILLIER J./LHUILLIER-SOLENIK D./NUCERA G.C./ PASSALAQUA J., *Enforcement of Court Decisions in Europe*, Council of Europe, Strasbourg, CEPEJ Studies 2008, n° 8, p. 60 ss.

[35] Ordinance n° 19, pt. 10 § 6.

[36] Ordinance n° 19, pt. 10 § 7.

tends to consider that a pre-trial prorogation agreement in favour of a foreign court does not constitute an obstacle to handing the case to Belarusian courts. The judge will not consider the prior agreement if the defendant does not make a statement to the contrary before considering the case on merits.[37] Thus, a tacit modification of a prorogation agreement is possible at any moment prior to the contentious part of trial.

E. Regional Regime of Jurisdiction Applicable within the Commonwealth of Independent States

The principle of the supremacy of international treaties over internal legislation in Belarus[38] has become a foundation for the creation of a regional system of private international law and judicial cooperation. The network of treaties rapidly developed at the beginning of 1990s, immediately after the Soviet Union's collapse. The disintegration of the Federal state led to an almost immediate internationalization of the one nation's integrated economy. The formerly single market was divided by multiple frontiers between fifteen new sovereign States. Boosted by progressive liberalization of the economy and the need for economic reconstruction, the internationalization of the formerly internal market left the USSR's successors with a great number of disputes henceforth of a purely international character. The conclusion of bilateral and regional treaties in matters of private international law was thus a logical step, needed to cement the disintegrating economy and ensure the proper functioning of trans-border justice.

In commercial matters, the key mechanism of judicial cooperation is based on the Kiev Agreement on the settlement of disputes, signed on March 20, 1992 (hereafter referred to as 'Kiev Agreement').[39] The Kiev Agreement is supplemented by the Minsk Convention on legal assistance and legal relations in civil, family and criminal matters, signed on January 22, 1993 and revised by the Chisinau Convention on October 7, 2002.[40]

The High Economic Court restates that the rules on international jurisdiction provided by the abovementioned regional inter-State treaties enjoy priority over the national rules[41] and should be applied by the trial courts *proprio motu* to the detriment of the former. Furthermore, the Ordinance of the Court makes a particular effort to systematize the international jurisdiction rules established by the treaties, rendering them more intelligible and practicable for lower jurisdictions. Thus, if the dispute involves persons originating from the Commonwealth

---

[37] Ordinance n° 19, pt. 10 § 10.

[38] Constitution of the Republic of Belarus, adopted on November 27, 1996, sec. 8.

[39] *Национальный реестр правовых актов Республики Беларусь*, 22 октября 2003 г., № 3/916.

[40] *Национальный реестр правовых актов Республики Беларусь*, 18 августа 2004 г., № 3/1462.

[41] Ordinance n° 19, pt. 7 § 4.

of Independent States, the Belarusian courts shall accept jurisdiction, if the dispute presents one of the following connections with the territory of the Republic of Belarus:

- the defendant's place of residence or the place of establishment;
- the defendant's place of commercial, industrial, or other economic activities;
- the plaintiff's place of residence or place of establishment in cases concerning the protection of a business reputation;
- the place of establishment of the party, engaged by contract to sell goods or provide services, in cases relating to the conclusion, modification, and termination of contracts.

Although resembling the jurisdiction rules set by internal legislation,[42] the unified jurisdiction rules have the advantage of clarity and simplicity, thus providing the trial judges with an operational tool for establishing the competent *forum*.

It is curious to note, behind the paucity of comment and analysis in the Ordinance, that the unified rules provide a definition of 'contractual matters', the very definition that the European unification projects did their best to avoid.[43] The latter are understood as covering the 'conclusion, modification, and termination of contracts'. Apparently restrictive, the wording of the definition does not cover the performance of contracts, despite its being the most dispute-generating phase of a contractual relationship. The courts of the seller and the service provider will thus only take cognizance of the disputes concerning the 'conclusion, modification, and termination of contracts'. Which courts are then competent to handle disputes relating to non-execution, incomplete execution, or other undue execution of contracts? Should the courts turn back to the rule of the defendant's place of residence (establishment) or to the rules established by internal legislation? The constitutional principle of supremacy of international treaties over internal legislation seems to plead in favor of the first solution, which is nevertheless not flawless itself. In fact, as the Ordinance points out, the defendant's place of residence (or place of establishment) has not the status of a general principle, the treaties allowing for the defendant's place of commercial, industrial or other economic activities to establish the courts' international competence. In the absence of any apparent hierarchy between the two connecting

[42] Sec. 235 of the Procedural Code for Economic Disputes.

[43] See interpretations given by the European Court of Justice of the terms 'contractual matters' contained in sec. 5.1 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on September 27, 1968: CJEC, June 17, 1992, case C-26/91, *Jacob Handte*, in: *Rev. crit. dr. int. pr.* 1992.726, note GAUDEMET-TALLON H.; *Clunet* 1993.469, note BISCHOFF J.-M.; *Recueil Dalloz* 1993, somm.comm, obs. KULLMAN J; *JCP* 1992.II.21927, note LARROUMET CH. See also CJEC, October 27, 1998, case C-51-97, *La reunion européenne*, in: *Rev. crit. dr. int. pr.* DIP 1999.322, note GAUDEMET-TALLON H.; *Clunet* 1999.625, note LECLERC F; CJEC, September 17, 2002, case C-334/00, *Tacconi*, *Rev. crit. dr. int. pr.* 2003.668, note REMY-CORLAY P.

factors, they may be used alternatively by the litigants to choose the courts of the country whose judicial system or legislation best satisfies their particular interests in a dispute (*forum shopping*).

Although encouraging a form of *forum shopping* within the Commonwealth of Independent States, such a configuration of connecting factors attempts to cover all forms of establishment existing in modern commerce, in order to localize the defendant's place in the trans-border economy (*siège statutaire, siège réel*).[44] Yet, it entails the multiplication of potentially competent courts to handle disputes related to the commercial activities of a sole economic operator. Thus, legal entities, of which the places of establishment and of principal economic activity are dissociated, may well be forced to face litigation in two or more different countries, encountering fees and other inconveniences related to the trans-border character of disputes. Seen in this light, the alternative jurisdiction based on either the place of establishment or the place of activity may penalize internationally active enterprises in the region. However, neither national doctrine nor judicial practice have yet been alarmed by such potential developments.[45]

III. Applicable Law

Traditionally viewed as independent from matters of international jurisdiction,[46] the issues relating to applicable law are treated in Chapter VII of the Ordinance. The basic principle governing the procedure of determining, ascertaining, and applying relevant norms is the obligation of the judge '*to take measures [to ascertain, interpret, and apply the law applicable to an external economic transaction] on the basis of the Constitution, internal legislation, international treaties, and internationally recognized customs that are not contrary to the internal legislation of Belarus*'.[47] Although becoming gradually obsolete, the term of 'external economic transactions' (A) is a key notion in Belarusian post-Soviet private international law. Coexisting and overlapping with the notion of 'inter-

[44] MENJUCQ M., *Droit international et européen des sociétés*, Paris 2001, § 273-274.

[45] НЕШАТАЕВА Т. Н. (note 2), p. 468 ss.

[46] Doctrine traditionally distinguishes between procedural and material aspects of Private International Law. The schism between the two is so deep that the procedural aspects concerning the rules of international jurisdiction, the enforcement of foreign judgements, the sending and executing of letters rogatory and other elements of international judicial cooperation have been singled out to form an independent branch of law, namely, the law of international civil procedure: ЛУНЦ Л. А./МАРЫШЕВА Н. И., *Курс международного частного права. Международный гражданский процесс*, Москва, 1976; ПУШМИН Э. А., 'О процессуальных вопросах современного международного права', in: *Советское государство и право*, 1982. 1, pp. 107-111.

[47] Ordinance n° 19, pt. 34 § 1.

national contracts', external economic transactions are governed by codified conflict of law rules (B). Once a dispute is qualified as relating to an external economic transaction, this launches a particular codified procedural regime (C), principally motored by the judge, and residually by the parties.

A. The Notion of 'External Economic Transactions'

Dating back to the period when the monopoly on international trade belonged to the State, the term of 'external economic transactions' somehow managed to subsist in modern Belarusian private international law. Defined in 1949 by Professor Luntz as '*transactions in which one of the parties is a foreigner (foreign natural person or foreign legal entity) and the substance of which consists in operations of trans-border import or export of goods or other related operations*',[48] the term is still used in the jurisprudence of Economic Courts and in sub-legislative acts.

Notwithstanding the fact that the recent reform has introduced the notion of 'international contracts',[49] Belarusian legislative and judicial practices have kept the generic term of 'external economic transactions', encompassing contractual relations, non-contractual relations and the accessory transactions accompanying trans-border dealings, such as trans-border accounts.

Though a simple piece of judicial jargon, external economic transactions still do not constitute a separate category for the purposes of the conflict of law. Chapter 75 of the new Civil Code relating to conflict of laws has kept the generic term of 'transactions', understood as legal acts, only for the purposes of determining the law applicable to the form of the latter.[50] The other categories, formerly covered by the term of 'external economic transactions' are the classical private international law categories of contractual and non-contractual obligations.[51] However, this terminological evolution is not given any attention by the High Economic Court, which traditionally stays away from doctrinal debates. Sticking to its role of ensuring a fair administration of justice, the supreme judicial institution does not go beyond the objective of a simple guideline, a manual for an ordinary judge. This is a pity, as there clearly was an opportunity to enhance judicial culture, by going beyond the traditional level of basic law mechanics and making a step towards a veritable legal doctrine.

---

[48] Лунц, Л. А., *Международное частное право*, Москва, 1949, p. 207.

[49] The new Civil code of the Republic of Belarus, adopted on December 7, 1998, introduced a new Section VII codifying conflict of law rules in civil and commercial matters.

[50] Sec. 1116 of the Civil code reads as follows: '1. The form of a *transaction* is governed by the law of the place where it was accomplished […]. 2. *External economic transactions*, in which at least one of the participants is a Belarusian legal entity or a Belarusian national, are to be made in writing, notwithstanding the place where they are accomplished […].' (author's italics).

[51] Treated respectively in paragraphs 5 and 7 of Chapter 75 of the Civil code.

B. Conflict of Laws in Contractual Matters

The lack of doctrinal thinking and analysis is also manifest in the weak effort of restatement in the Ordinance of the High Economic Court. When instructing the judges on determining the applicable law in the absence of choice, the Court limits its guiding effort to referring the judges to conflict of law rules contained in international treaties and, in the absence thereof, to the rules codified by internal law.[52] Yet, section 1125 of the Civil code, establishing the rules applicable in the absence of choice of law, is particularly in need of 'user's instructions'. This section establishes a series of conflict of law rules for particular types of contracts,[53] all of which are subdued to a single principle: the contract is governed by the law of the country where the party which is to effect the characteristic performance has his principal place of activity. The vague resemblance with the famous principle of Europe's Rome Convention[54] and Rome I Regulation[55] vanishes at the sight of the connecting factor chosen by the Belarusian legislator – the country where the author of the characteristic performance has located his principal place of activity. The reality of modern commerce makes this connecting factor fairly impracticable, as the principal place of activity may be multiple, difficult to determine, or hard to locate.

---

[52] Ordinance n° 19, pt. 36.

[53] Section 1125 of the Civil code reads as follows: 'To the extent that the law applicable to the contract has not been chosen by the parties, the contract shall be governed by the law of the country, where the principal place of activity of the following contracting parties is located:

- sellers – in contracts of sale;
- donors – in donation contracts;
- renters – in lease contracts;
- lenders – in loan contracts;
- contractors – in work and labor contracts:
- transporters – in contracts of carriage:
- forwarders – in contracts of freight forwarding;
- creditors – in contracts of debt;
- agents – in contracts of agency;
- commissioners – in contracts of commission;
- depositaries – in contracts of regular deposit;
- insurers – in insurance contracts of;
- guarantors – in guaranty contracts of;
- pledgers – in contracts of pledge;
- grantors of license – in license contracts […]'.

[54] Convention on the law applicable to contractual obligations of June 19, 1980, Official Journal C 027, 26/01/1998, pp. 34-46.

[55] Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), in: *Official Journal*, L 177, 04/07/2008, pp. 6-16.

Foreseeing this difficulty, the Belarusian legislator established a subsidiary connecting factor – that of the author's place of residence (place of establishment for legal entities) – applicable in cases where the principal connecting factor fails. Aware of the difficulty in determining the main place of the author's activity, judges are often tempted to skip this step and search directly for the place of residence (place of establishment) of the party which has to effect the characteristic performance. Comforting the principle of procedural economy, this situation may however often lead to the designation of the law of a country, with which the dispute is weakly connected. Moreover, in presence of multiple connections of equivalent intensity, litigants cannot reasonably foresee which law is going to be applied. Making the determination of applicable law utterly dependent upon the judge's discretion, this construction increases legal uncertainty and insecurity. The High Economic Court has here clearly missed an opportunity to respond to a need for legal clarity and to prevent discord in national jurisprudence.

Concerning the contracts that are not expressly mentioned in sec. 1125 of the Civil code, the situation is even less clear. The main connecting factor is the principal place of activity of the party required to effect the characteristic performance of the contract. No definition is offered for the notion of 'characteristic performance', the gap that the Ordinance of the High Economic Court unfortunately fails to fill. If the principal place of activity of the author of the characteristic performance may not be determined, the place of residence (place of establishment) comes to supply the failing connecting factor. As already described above, the weakness of the principal connecting factor incites the judge to resort directly to the law of the place of residence (place of establishment). However, the hierarchy of connecting factors is further complicated by the possibility, where the characteristic performance may not be determined, to resort to the law of the country with which the contract is most closely connected.[56] Without any guideline to the application of such a complex conflict of law construction, Belarusian judges may well fall into the same trap that caught their Western European counterparts in the 1990s.[57] To avoid discrepancies in the application of sec. 1125 of the Civil code, it seems highly advisable for the Supreme jurisdiction to elaborate uniform guidelines, taking into account European experience in this field.

C. Procedural Rules of Ascertainment of Applicable Law

Traditionally, the inquisitorial character of civil procedure (placing a particular accent on the role of the judge) seems to be emphasized, wherever the procedure bears an international character. As stated by the High Economic Court, the

[56] Sec. 1125 § 4 of the Civil code.

[57] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, pt. 3.2.5.2. Cf. *Hoge Raad*, September 25, 1992, *Nouvelles des Papeteries de l' Aa v. BV Machinenfabriek BOA.*

judges' obligation to ascertain, interpret, and apply the competent law is principally based on the Constitution. One may read here a constitutionally guaranteed right of litigants to access foreign law and have their dispute resolved according to its provisions, whenever the dispute falls under the Belarusian courts' jurisdiction.

The right to have one's dispute resolved according to the competent law is inspired, on one hand, by the party autonomy principle, and, on the other hand, by the respect of foreign law as an emanation of a foreign sovereignty. Following this theory, the High Economic Court establishes a clear and operational methodology of law ascertainment, which ensures the efficiency of these principles. Whatever the nature and the difficulty of the case, the judge must identify the applicable law. This requires the judges to first verify, whether the parties have chosen a law applicable to their contract. In the absence of an express provision therefor in the contract, the judge must look for an eventual tacit choice 'resulting from the contract's provisions and all circumstances of the case'.[58] If the absence of both express and tacit choice of law is established, the judge must then turn in priority to the conflict of law rules contained in international treaties binding the Republic of Belarus.[59] In the absence thereof, the judge shall apply conflict of law rules contained in internal legislation.[60]

Once the applicable law has been identified, its contents must be ascertained *'in conformity with the official interpretation, judicial application, and doctrine of their country of origin'*.[61] The procedural right to access foreign law is thus reinforced by the judges' positive obligation to ascertain the applicable law by all available procedural means. For this purpose, the judge may address the Ministry of Justice, diplomatic missions abroad, as well as foreign specialists.[62]

The parties are entitled, but not obliged, *'to present documents establishing the contents of the applicable law (e.g. texts of normative acts, jurisprudence, etc.) or otherwise assist the judge in ascertaining these norms'*. It appears that the judge may not be discharged from the obligation of ascertaining foreign law by ordering the parties to present relevant documents. The obligation to establish foreign law may not be shifted from the judge to the parties, and the role of the latter remains reduced to active cooperation. Such a maximalist view of civil procedure seems unable to satisfy the specific needs of international commercial litigation. Economic operators involved in trans-border trade are sometimes better equipped to rapidly access foreign law than a trial judge. Allowing parties

[58] Ordinance n° 19, pt. 34 § 3.

[59] Ordinance n° 19, pt. 34 § 4.

[60] Ordinance n° 19, pt. 34 § 5.

[61] Ordinance n° 19, pt. 35 § 1.

[62] Order of the President of the Republic of Belarus n 121 of February 3, 1997 'On joining the European Convention on information on foreign law and the Additional Protocol thereto', in: *Собрание декретов, указов Президента и постановлений Правительства Республики Беларусь* 1997, № 4, ст. 136.

to have a more active role in law ascertainment would shift the costs from the classically overburdened and underfinanced judicial system to private litigants, naturally interested in rapid and efficient dispute resolution. This painless procedural adjustment might be realized without diminishing the role of the judge, as the latter would still monitor the completeness and impartiality of the presented 'proof of foreign law'.[63]

As for the moment and procedural form of law ascertainment, the Ordinance gives clear-cut guidelines. The '*necessary measures*' must to be taken before the trial, at the preparatory stage. When the need to apply foreign law becomes apparent at later stages of the procedure, the hearing must be deferred[64] or suspended.[65]

Foreign law being considered as matter of law, the questions relevant to the ascertainment, interpretation, or application of foreign law may be raised on appeal, annulment and revision.[66]

The law of the forum may not be substituted for the applicable law on any basis. However, if the attempts of the judge to ascertain foreign did not bring about a satisfactory result 'in a reasonable procedural timeframe, Belarusian law shall be applied'. It this case, the impossibility to ascertain foreign law should be exhaustively motivated in the final decision.[67] The 'reasonable time frame' should certainly be determined on a case-by-case basis, bearing in mind that cases involving foreign litigants residing outside Belarus must be resolved within a maximal legal term of seven months.[68] Yet, this requirement of celerity, combined with the absence of effective mechanisms of law ascertainment, may result in frequent application of law of the forum, as a remedy to a failure to establish the contents of applicable law within a reasonable time.

IV. Conclusion

The Belarusian legal system has vested in its Supreme Jurisdictions a high capacity of 'judicial restatement' of legal norms. Yet, in private international law matters, the 'restatement' proposed by the High Economic Court has not realized

[63] For further developments on this subject, see our monograph *L'application de la loi étrangère par les juges du fond anglais et français: réflexions pour une approche convergente dans l'espace européen*, Paris 2006, pp. 207 et s.

[64] Ordinance n° 19, pt. 35 § 5; sec. 179 of the Procedural Code for Economic Disputes.

[65] Ordinance n° 19, pt. 35 § 5; sec. 145, 146 of the Procedural Code for Economic Disputes.

[66] Ordinance n° 19, pt. 35 § 5, *in fine*.

[67] *Ibid.*

[68] Sec. 175 of the Procedural Code for Economic Disputes.

its entire potential. Ordinance n° 19 of the High Economic Court does not go beyond technical directives and methodological guidelines, bearing a pronouncedly procedural character. Behind the need to ensure operational administration of justice, little space is left for the interpretation and adjustment of private international law.

The attainment of the Ordinance's objectives is however to be measured in the context of its elaboration. Being a product of the transitional period, this piece of 'judicial restatement' represents an attempt to gather all relevant elements of the emerging branch of law and bring them to the judges' knowledge. Thanks to this instrument, Belarusian private international law is no longer ignored by lower courts. International litigation, with its particular rules and customs, has become a part of the judicial culture. While leaving many issues unresolved and awaiting interpretation, the Ordinance has nevertheless built a solid foundation for further developments.

THE PANAMANIAN BUSINESS COMPANY AND THE CONFLICT OF LAWS

Gilberto BOUTIN*

* Professor of Private International Law of the Faculty of Law and Political Science of the University of Panama.

Yearbook of Private International Law, Volume 10 (2008), pp. 523-545

Printed in Germany

I. Introduction

The Panamanian company is a corporate legal instrument at the service of overseas activities. This legal structure promotes Panama as a convenient jurisdiction[1] for international transactions.[2] The use of Panamanian business companies is becoming noticeable in the milieu of international commercial law, particularly in international maritime law,[3] regarding the recognition of business company status,[4] in relation to trust[5] asset protection or tax planning,[6] in cross-border litigation[7] and in international bankruptcy.[8] In order to understand the nature and role of this international commercial legal instrument, it is necessary to give a snapshot explanation of the history of business companies in Panama.

A. Historical Background

At the early part of the last century, the Panamanian legal system was essentially classified as Roman-Germanic. The influence of the 1804 French Civil Code mixed with the Latin character of the Panamanian system.[9] But the adoption of the

[1] ALEMAN J., 'Tax Advantages Panama Close Up', in: *Journal of the Offshore Institute* 1991, at 24.

[2] OZORES R., *Apuntes de derecho mercantil*, Panama 1964, at 26.

[3] DROBNIG U. / PUTTFARKEN H.J., *Arbeitskampt auf Schiffen fremder Flagge*, N. P. Engel Verlag 1989, at 109.

[4] PERRIN J.F., 'La Reconnaissance des sociétés étrangères et ses effets', in: *Mémoires Publiés par la Faculté de Droit Genève*, Genève 1969, at 51.

[5] Case *Athina Roussel Onasiss*, decision dated 11 August 2000, of the Supreme Court. In *Athina Roussel*'s case, the plaintiff sought Panamanian recognition of a declarative judgment revoking the general power of attorney (POA) granted to Mr. Roussel as trustee of all the holdings of a Panamanian company: *Jurisprudencia de derecho internacional privado panameño* 2000.

[6] ROBIN C., 'European Union and the effects on the offshore industry', in: *Trust and Trustee* 1997, at 14.

[7] Case *Fomento de Contrucciones y Contratas, S.A.*, 30 November 2000, Tribunal Arbitral CCI Geneva (it was a Panamanian company having activities in Free Zone Panama).

[8] Case *International Bankruptcy a Panamanian Subsidiary of Bank of Credit and Commerce international (overseas), BCCI*, Supreme Court of Panama, 3 August 1993. The judgment upheld a local (Panama domiciliary) creditor's privilege over the creditors from the company's incorporated head-quarters in Gran Cayman Island.

[9] GARAY N., *Introducción al Derecho Panameño, apuntes de Derecho Civil 1970*, Facultad de Derecho y Ciencias Políticas de la Universidad de Panamá, 1970 (The entire Panamanian system was copied by President PORRA'S government in 1916, and the civil, commercial, administrative, and criminal codes followed the continental system).

Monetary Treaty of 1904,[10] entered between Panama and the United States, changed the 'topography' of Panamanian legislation. This event marked the beginning of the Anglo-Saxon, and particularly American culture in Panama,[11] overshadowing the previous French influence. Three important laws were transplanted from the American Common Law system: the 1911 open registration system for vessels,[12] the 1927 law of negotiable instruments,[13] and finally the law of business companies, which was partially[14] superseded by the 1916 Code of Commerce.[15] Panamanian Company Law was inspired by the most liberal legislation in the United States, particularly the 1888 New Jersey Law of Corporations,[16] which introduced the idea of a 'holding company,'[17] and other statutes from the State[18] of Delaware. The main purpose of transplanting these laws was to position Panama in the international commercial arena through the use of two legal principles: party autonomy and the protecting the identity of foreign investors (confidentiality). We will now study the business company's structure from the standpoint of Panamanian Private International Law.

B. Summary

The conflict of laws as it pertains to the Panamanian business companies, is divided into two general parts. The first part deals with the criteria for determining the nationality of Panamanian business companies and the criteria for recognizing the status of Foreign Companies under Panamanian law. The second part deals with the law governing Panamanian business companies and the Recognition and Enforcement of Foreign Judgements in Panama.

[10] Monetary Agreement, Law Decree No. 74 of 6 December 1904, edited by Revista Cultural Lotería.

[11] DE CASTRO W., 'La organización judicial en la Zona del Canal', in: *Anuario de Derecho* 1956, at 203.

[12] Decree No. 6 of 19 January 1921, in: *Official Gazette* No. 03,532 of 25 January 1921.

[13] Law No. 52 of 13 August 1917, in: *Official Gazette* No. 2,577 of 22 March 1917.

[14] GONZÁLEZ A. / FRANCISCO J., *Constitución de una Sociedad Anónima Panameña, Tesis*, Facultad de Derecho y Ciencias Política de la Universidad de Panamá 1974, at 21-22.

[15] Law No. 2 of 22 August 1916, in: *Official Gazette* No. 2,418 of 7 September 1916.

[16] GONZÁLEZ A. / FRANCISCO J. (note 14), at 11.

[17] GONZÁLEZ A. / FRANCISCO J. (note 14), at 11.

[18] DURDLING R.A., *La Sociedad Anónima en Panamá*, Panama 1986, at 27.

II. Notion of Nationality of Panamanian Business Companies and Status of Foreign Companies

A. The Nationality of Panamanian Business Companies and the Status of Foreign Companies in Panama

To understand the importance and use of this notion, we need to explain the different doctrines governing the personal law applicable to Panamanian business companies. Furthermore, we will study the fact that the alien status of a company is a *scolastique*[19] and controversial[20] issue, which implies that a foreign company could be subject to both *constitutional law* and the applicable *lex fori*.

B. The Nationality of Business Companies in Panama

Certainly, no one doubts the utmost importance that business company nationality has in private international law. Traditionally, the nationality of physical[21] and juridical persons is based[22] on domestic and international statutory sources. Contrary to the South American doctrine,[23] nationality is one of those legal categories of the Panamanian private international law regulated by Panama's constitution,[24] which is the cornerstone of the Panamanian conflict of laws system.[25]

In this sense, the Panamanian conflict of laws system provides three criteria for determining whether or not a company could be classified as a Panamanian legal entity: the *control* of the company, its *incorporation,* and its *real seat.*

---

[19] ARMINJON P., *Précis de Droit International Privé*, Paris 1927, at 59; and LAINÉ A., *Droit International Privé*, Aalen 1970, at 316.

[20] DE VAREILLES-SOMMIÉRES P., *La synthèse du droit international privé*, 1972, vol. 2, at 45.

[21] Art. 5 of the Civil Code of Panama. 'Laws concerning to the rights and duties of the family, state, legal capacity and condition of individuals are binding upon Panamanians individuals worldwide.'

[22] Art. 16 of the Bustamante Code: 'The nationality of origin of corporations and foundations shall be determined by the law of the State which authorizes or approves them.'

[23] GOLDSCHMIDT W., *Derecho Internacional Privado*, Buenos Aires 1985, at 171-172.

[24] BRILMAYER L., *Choice of Law and the Constitution*, New York 1991, at 111.

[25] GENS DE MOURA RAMOS R.M., *Direito Internacional Privado e Constitución*, Coimbra 1980, at 210, BOUTIN G., 'El Derecho Internacional Privado en la Constitución Panameña', in: *Anuario de la Facultad de derecho y ciencias políticas de la Universidad de Panáma* 2006, at 358.

C. The Criterion of Control

The Panamanian Constitution introduced, under Article 286, the notion of corporate control[26] as a connecting factor to determine the nationality of a juridical person in Panama. According to this criterion, the status of a company is determined by the status of the shareholders or beneficial owner. For the Panamanian doctrine, this constitutional provision reinforces the nationality of a juridical person doctrine's applicability.[27] However, the control criterion is an indirect and restricted concept. It is used by the Panamanian Judicial Authorities when it is necessary to verify whether or not a company organised under Panamanian law is a national company controlled by local individuals. The control criterion is political[28] and economic.[29]

Article 286 seeks to prevent foreigners from acquiring the strategic borderland of the State. Consequently, this constitutional provision on control regulates a matter of internal public policy and security of Panama. Nonetheless, the application of the control criterion is not very effective in Panama, as the structure of a Panamanian business company is usually based on the issuance of bearer shares and the use of nominees to manage the company's affairs. As a result, it is often impossible to determine the shareholders' nationality. In conclusion, control is a residual method of determining what Panamian authors tend to call, using a French terminology, the *statut personnel* of a Panamanian business company, in view of the fact that corporate control is an indirect criterion[30] for defining a juridical person's grade of connection with a particular State. Such a concept could be useful in the field of International Economical Law or International Taxation.

---

[26] Art. 286 of the Constitution of the Republic of Panama: 'No foreign natural or legal persons, nor national juridical person with foreign capital, entirely or in part, may acquire ownership of national or private lands situated at a distance less than ten kilometers from the border...'.

[27] QUINTERO C., *Derecho Constitucional*, Panama 1967, at 104-105.

[28] Inconstitucional Acción dated 6 June 2006, Supreme Court, filed by Pardini & Asociados on the basis of Art. 121 of the Tax Code, which forbids foreigners from acquiring land and islands in Panama.

[29] Resolution No. 220 of 1998 of 19 June 1998, in: *Official Gazette* No. 23,580 of 7 July 1998; Executive Decree No. 35 of 24 May 1996 regulates the general obligation of the resident agent of the companies to declare if the shareholders are foreigners or local residents in Panama.

[30] LEVY H., *La nationalité des sociétés*, Paris 1964, at 221 ('Dans une telle conception, le contrôle apparaît comme l'un des éléments de fait – qui permettent au juge du fond de considérer que le lieu d'exploitation, ou le siège social, ne se situe pas là où la société a obtenu son immatriculation').

D. Real Seat

The real seat is defined as the place where a company has the centre of the corporate administration.[31] This theory has been known in Latin America since the early twentieth century, and, as a result, the Bustamante Code recognized the real seat as an auxiliary criterion for determining the nationality of business companies and other juridical persons.[32] Some continental conflicts systems are also reported to have adopted the real seat as the criterion for determining the nationality of business companies. In the Panamanian legal system, this notion is secondary to the incorporation theory and is used only when the company in question performs business activities in Panama.[33] The Supreme Court of Panama refers to the real seat as the effective or real domicilein international maritime claims cases.[34] There are other terms that are also used for the real seat, such as the 'centre of interest', '*siège statutaire*'[35] and 'interest activities'.[36] When determining the jurisdiction of

[31] Art. 60 of the Commercial Code of Panama: 'corporate real seat shall be understood as the place where the Board of Directors of the corporation usually holds its meetings or where the centre of the corporate administration is located'.

[32] Bustamante Code, Art. 18: 'Unincorporated civil, commercial, or industrial societies or companies shall have the nationality provided by the articles of association, or in any applicable case, that of the place where its principal management or governing body is habitually located'.

[33] *Patrick Canavaggio and Jack Canavaggio vs Distillers of Tanqueray*. The decision of the court in *Canavaggio's* case was that even if the real seat of the company was not in Panama, the Panamanian court had jurisdiction on the matter, because the company performed commercial activities in Panama.

[34] In the Supreme Court case settled by decision of 6 January 2000 (*Luz Marina Reyes et al vs Mitsui O.S.K Lines and Diamond Camelia S.A*), the victim of a maritime accident filed a claim against *Mitsui Osk* and *Diamond Camelia S.A.* The defendant claimed that if the shipping line had a Panamanian flag, then the case should become a domestic affair. The Supreme Court of Panama redefined the notion of domicile as the place where the maritime company developed its activities. The Supreme Court referred to the real seat as the effective domicile and therefore held that it was in Osaka, Japan. Given that the company's domicile was in Japan, the maritime court of Panama was competent to decide the case against *M/N Mitsui O.S.K Lines And Diamond Camelia S.A.*

[35] The Hague Convention on the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations of 1956, employs the French term 'siège statutaire' as synonymous for real seat. The concept of 'siege statutaire' is not used correctly and leads to confusion, since this term refers to the incorporation deed of the company, not to the real seat. As a result, the 'siège statutaire' is different than the real seat. While the 'siège statutaire' is subordinated to the Principle of Party Autonomy, the real seat is not.

[36] FELICIANO F., 'Legal Problems of Private International Business Associations and Economic Development', in: *Recueil des Cours* 1966, at 287. Note the traditional maritime conflict of laws between the law of the flag or the law of maritime labor convention. The tendency of the Supreme Court of Panama is to decline the competence in favor of the maritime labor excluding the law of the flag. See case *Cho Yang Shipping Co. Ltd., Twinhill Tanker Lines, S.A. y Jupiter Cowvezer* of 8 March 2007, in which the Supreme Court declined the jurisdiction in favor of the Philippine Forum.

Panamanian Courts, the real seat is a connecting factor rarely recognized by case law. The real seat is taken into consideration by Court decisions on tax law matters.[37] On the contrary, in maritime cases a company's real seat is crucial in determining the Maritime Court's competence, because Panamanian individuals and legal entities are barred from Panamanian International Maritime Jurisdiction, since this tribunal is restricted to hearing maritime claims with international connections.

E. Incorporation Theory

The incorporation theory provides that the determination of a company's nationality is governed by the law under which it was organized or incorporated. This is the preferred criterion under Panamian law. In other words, according to Panamanian law, the connecting factor for determining a company's nationality is the country of its incorporation.[38]

Obviously, the incorporation system is a liberal one and, as a result, useful for individuals wishing to form a business company.[39] Indeed, this system allows shareholders to choose the legal system that shall be applied. An example that illustrates the advantage of the incorporation theory is when a legal action is initiated by or against a Panamanian company whose real seat is in Nassau. In such a case, Bahamian law would apply to matters related to the activities and management conducted by the company in Bahamas, but Panamanian substantive law would apply to matters such as formation, structure and organ's duties, dissolution, and liquidation. In other words, the Directors or Management of the Panamanian company could conduct any activities in Nassau on behalf of the company, since

[37] *Tabacalera Istmeña S.A.* of the Supreme Court (Third Chamber) of Panama Contencioso Administrativo of 9 October 1981. This case sets forth the domicile as the legal factor for a company branch to be taxed by Tax Authorities and to justify the jurisdiction of the Panamanian Court. The Supreme Court drew a line between a branch and a head office to determine the stream of income to be taxed. Another case is the Bank of Credit and International Commerce (Overseas), bankruptcy process. In this international bankruptcy case, regarding Bank of Credit and of International Commerce (Overseas), Panamanian subsidiary of BCCI, the Supreme Court of Panama, on 3 August 1993 upheld that the local creditors domiciled in Panama have a privileged credit over the creditors of the head office incorporated in Gran Cayman Island.

[38] Art. 6 of the Law No. 32 of 1927, in: *Official Gazette* No. 05,067 of 16 May 1927: The Public Deed containing the Articles of Incorporation must be filed for registration at the Mercantile Registry. The organization of the corporation shall be ineffective, as regards third parties, until such registration has taken place.

[39] Art. 1 of the Law No. 32 of 1927, in: *Official Gazette* No. 05,067 of 16 May 1927: Two or more persons of legal age, regardless of nationality or whether they reside in the Republic, may organize a corporation for any lawful purpose, according to the formalities prescribed in the present law.

Panama has not followed the *ultra vires* principle.[40] But the doctrine of incorporation is not contained only in Panamanian legislation; in international economic law, foreign companies and investors are entitled to the legal protection and benefits provided by specific international statutes governing international investment protection.[41]

In the context of international investment protection, the *statut personnel* of a company is a milestone when a dispute arises between a Foreign Investor's Company and the host State. The recent decision rendered on September 20, 2006 in *Corporate Holding Lesseps v the State of Panama* provides an excellent illustration of this. In this case the Panamanian Government granted a concession to Corporate Holding Lesseps for the construction of a transport terminal in Colon City. The Government however called off the concession, because Corporate Holding Lesseps could not implement the work order and was trying to speculate with the contract by assigning its rights to a third company. Corporate Holding Lesseps initiated an arbitration procedure against the State of Panama under the Bilateral Investment Agreement between the Government of the French Republic and the Government of the Republic of Panama concerning the treatment and protection of investments, which was signed on 5 November 1982. The Supreme Court refused to enforce the arbitral award, because Corporate Holding Lesseps was not a French company given that its place of incorporation was in Panama. Moreover, the arbitration took place in breach of the ICSID Washington Convention (1965) on the Settlement of Investment Disputes.[42] In other words, Corporate Holding Lesseps was a Panamanian company and, as such, was not entitled to the protection provided by the bilateral treaty.

Finally, the incorporation theory is not only applicable to Business companies but also to other juridical persons. In this sense, the place of incorporation is

---

[40] LÓPEZ G./CARLOS A., *The Ultra Vires doctrine in Panama. Corporation Law of Panama*, Panama 1980, at 19. 'Many legal actions have been filed in the United States on the ground that a corporation has exceeded the scope of its object, as set forth in its incorporation charter. This is known as the *ultra vires* doctrine. This issue arises in cases where the charter is very extensive and specific as to its objectives. This happens because of the *inclusio unius est exclusio alterius* principle, which hold that including one object means to exclude another. It is argued that if a business has been set up to transport passengers, then it should not build hotels. Law 32 of Panamanian Companies does not contain such a restriction and it provides in its article 19 (11) that a Panamanian Corporation may perform any kind of legal business, even if it has not been mentioned in its incorporation charter. However, this is a partial assertion, because the *ultra vires* principle applies to all companies that performs certain local activities subject to regulation, such as Banks, Insurance and Leasing companies which activities become more restrictive.

[41] Convenio entre la República de Panamá y el Gobierno de la República Francesa sobre la protección de inversiones. Law No. 2 of 25 October 1983, in: *Official Gazette* No. 20,357.

[42] Washington Convention of 18 March 1965, Act No. 13 of 1996, in: *Official Gazette* No. 22,947.

also the connecting factor to determine the nationality of trusts[43] and private foundations[44] under Panamanian Law.

F. Important Institutions in Panamanian Business Companies: Public Registry and Registered Agent

1. The Public Registry

The Panamanian incorporation system is based upon two institutions: the Public Registry and the Resident Agent.

As a matter of fact, these institutions are the starting point in distinguishing the Panamanian incorporation system from the incorporation system of common law countries. The key for a foreign attorney to understand the Panamanian incorporation system is to be familiarized with the Public Registry's role.[45] The Public Registry is the public entity in charge of keeping and guaranteeing the transparency of private and commercial transactions in Panama.[46] The Public Registry is divided into four sections: Property, Mortgages, Persons, and Commercial. It is the institution in charge of recording the constitution, management, and dissolution or winding up of business companies registered in Panama.[47] This institution has multiple roles affecting the companies.[48]

The Bustamante Code mostly regulates the matter of Public Registries of the Contracting States, particularly as it concerns the deeds affecting third parties.[49] For instance, articles 137-139 of this Code provides that the property deeds,

---

[43] Art. 13, Of the Law No. 1 of 5 January 1984, in: *Official Gazette* No. 19,971 of 10 January 1984.

[44] Art. 9 of the Law No. 25 of 12 June 1995, in: *Official Gazette* No. 22,804 of 14 June 1995.

[45] VAN EPS J., *Fines del Registro Público, Centro de Investigación Jurídica*, 3. ed, Universidad de Panama 2001, at 3.

[46] Art. 1753 of the Civil Code of Panama: 'The Public Registry has the following object... (4) To guarantee the legality and security of the documents, titles or deeds to be registered'.

[47] Art. 1776 of the Civil Code of Panama: 'The following will be registered at the person's section of the Public Registry: ... (6). The public and legal documents whereby a legal person is constituted or is granted representation.' Art. 1777-A: 'In addition to other normal conditions, the record at the Persons Registry shall indicate the type of legal incapacity, the right that arise from the title deed, with indication of the name, family name and address of the persons appearing in the document.'

[48] VAN EPS J. (note 45), at 19. It regulates the acts affecting the existence of the company and its activities. Basically, the Public Registry records the amendments made to the article of incorporations or By-laws of any business company.

[49] Art. 136 of the Bustamante Code: 'The provisions that establish and regulate the registries of property are of public interest and are binding to third parties'.

mortgages, and foreign judgments affecting private companies shall be registered at the Public Registry of each Member State.

In short, we can conclude that the Public Registry is an institution that handles and records the information of the juridical persons and properties of the contracting States.

2. Registered Agent

A registered agent is the law firm or lawyer appointed to incorporate the company before the local authorities. The Panamanian law does not define the Registered Agent. Nevertheless, Registered Agent can be defined, *lege ferenda*, as a Panamanian law firm or lawyer responsible for verifying the charter, deeds, or articles of incorporation of the legal entities existing in Panama.[50] Parallel to the Public Registry Office, the Registered Agent is also an essential party to contact to obtain information when international judicial assistance of a company incorporated by the Resident Agent is required. In the context of international cooperation, the Registered Agent is relatively important, because he is charged with obtaining the general information of the company, including the information relating to the company's purpose, before organizing the company. In this respect, the Supreme Court has held that the Registered Agent is unrelated to the activities of the company, having only the information concerning the company's purposes and presumably the identity of the company's owner.[51]

G. The Status of Foreign Companies in Panama

The status of foreign companies is both a classical[52] and technical[53] matter, as a company is a creature of law that cannot exist outside the boundaries of its state of incorporation.

There is another question that comes up: how can a company created in a foreign jurisdiction exercise its rights outside the territory of its original jurisdiction?[54] To answer this question, two essential issues must be addressed: the matter

[50] BOUTIN G., 'The role and liability of the registered agent in Panamanian asset protection', in: *Trusts and Trustees* 2003, at 13. BOUTIN G., 'The role and liability of the registered agent in Panamanian asset protection', in: *Trusts and Trustees*, Vol. 9, issue 3, 2003, at 13.

[51] BOUTIN G. (note 50), at 13.

[52] REESE W. / ROSENBERG M., *Conflict of Laws-Case and Materials*, 8th edition, 1984, at 963.

[53] LAINE A., *Introduction au Droit International Privé*, Glashütten im Taunus 1970, at 328.

[54] REESE W. / ROSENBERG M. (note 52), at 964.

of equal treatment[55] and the legal conditions[56] for the recognition of foreign companies in Panama.

Certainly, a foreign company is subject to two concomitant laws.[57] The law of the country of incorporation is essential for the recognition of foreign companies. In this sense, the Panamanian law states that for a foreign company to be able to operate within the Panamanian territory, it needs to comply with the following formal requirements: (1) a notarized deed of incorporation, (2) presentation of the last balance sheet, and (3) a certificate of good standing.[58] However, a restriction is contained in Article 10 of the Code of Commerce, which states that Panama cannot extend more rights to a foreign company than is provided by that company's law of incorporation.[59]

In summary, the local Panamanian law will govern the following matters: (1) commercial activities, (2) access to justice, and (3) prerequisites for the recognition of the status of foreign companies.[60]

H. Equal Treatment as a General Principle

The Principle of equal treatment was introduced in the 19th century by the 1868 Calvo doctrine,[61] which sought equal treatment for foreign investors in the host State.

Panamanian Private International Law has formally recognized and adopted the principle of equal treatment for both foreign and local individuals and juridical persons. Equal treatment is a supranational[62] and constitutional principle

[55] BREA J.J., 'Aspectos Relevantes sobre la Protección Diplomática en el Derecho Internacional', in: *Revista Lex* 2001, at 33.

[56] SIERRA QUINTERO F., *La Condición Jurídica de las Sociedades Anónimas extranjeras*, Tesis de la Facultad de Derecho y Ciencias Políticas de la Universidad de Panamá 1999, at 100.

[57] Art. 60 of the Commercial Code of Panama: Personal Rules and *Lex Fori Rules*.

[58] Art. 90 of the Law 32, 1927.

[59] Art. 10 of the Code of Commerce: 'The companies legally constituted under the laws of another country that establishes branches or agencies in the Republic of Panama, could not perform operations other than the ones they are entitled for in their country of domicile.'

[60] SIERRA QUINTERO F. (note 56), at 107.

[61] CERDAS DUEÑA C., 'Los orígenes de la «Cláusula Calvo» y de su inserción en la legislación mexicana', in: *Revista Jurídica Jalisciencie* 2004, at 116.

[62] The Bustamante Code states that: 'Foreigners belonging to any of the contracting States enjoy in the territory of the others member states, the same civil rights granted to the local individual or companies.' The 2nd provision of this Code recognizes the Principle of Equal Treatment, but subject to a restriction: 'Foreigners from any of the contracting States shall also enjoy in the territory of the other member states the same guarantees afforded to nationals, unless otherwise is determined by the Constitution and the laws of the member states.'

recognized by the conflict of laws system of Panama. In other words, the principle of equal treatment is reflected in international and domestic statutory legal sources. For instance, Article 20 of the Panamanian Constitution adopted this universal principle by providing that: '*All Panamanian and aliens are equal before the law.*' In addition, this principle has been confirmed by Article 8 of the Panamanian Code of Commerce, which goes even farther by allowing foreign companies to participate not only in commercial and industrial activities, but also to public-interest activities through obtaining public services concessions. An example of this is the case of Hutchinson,[63] which operates the ports of Panama and Colon, even though it is a foreign company with its real seat in Beijing. Also, Panama grants concessions to foreign Classification Societies recognized by the International Association of Classification Societies (IACS).[64]

I. The Recognition of Foreign Companies and their Freedom to Establishment in Panama

The Panamanian legal system neither provides mutual reciprocity nor diplomatic approval for the recognition of foreign companies. The national and international statutes provide the minimum legal requirements for foreign companies to operate in Panama.[65] The Bustamante Multilateral Convention[66] and the Pan-American Declaration[67] state that recognition of foreign companies is a prerogative of the Contracting States. Besides, Article 60 of the National Statute[68] regulates a foreign company's transfer of its real seat to Panama; the purpose of the transfer is to obtain tax advantages, but does not imply either a change of nationality or dissolution of the company. In relation to the conflict of laws rules, the transfer of the real seat implies that the new law will regulate the activities of control and management, because these activities will gravitate in Panama.

---

[63] Law No. 5 of 16 January 1997, in: *Official Gazette* No. 23,208 of 21 January 1997. This concession created a confrontation between Panama and the USA, because the control of the Panama Harbour Pacific and Atlantic is a security matter for the USA.

[64] BOISSON P., 'Etats du Pavillon, Le Pavillon', in: *Colloque International, Société de Classification*, Paris, 2-3 March 2007, at 39.

[65] Art. 60 of the Act Decree No 16 of 23 August 1958, in: *Official Gazette* No. 13,634 of 6 September 1958.

[66] Bustamante Code, Art. 252 provides that: 'Commercial companies duly constituted in a contracting State will enjoy the same juristic personality in the other contracting States except for the limitations of territorial law.'

[67] The American Republics Declaration on the Juridical Personality of Foreign Companies from 25 June 1936 provides that the recognition of the Personality of foreign companies is an attribute to be exercised by the contracting States.

[68] Decree No. 16 of 23 August 1958, in: *Official Gazette* No. 13,634 of 6 September 1958.

III. Law Governing Business Companies in Panama

A. The Law Governing the Panamanian Business Company

Under Panamanian law, there are no special conflict rules[69] indicating the law applicable to Panamanian companies. Therefore, it is necessary to apply the traditional and general conflict of law rules. Thus, the judge will take a bilateral approach in order to choose the law applicable to a Panamanian business company, i.e. essentially either a personal (one may almost say 'anthropomorphic') approach[70] or a contractual approach, whereby the autonomy of the parties prevails.[71] Indeed, a company may be characterised under either its *statut personnel* or its contractual status. In other words, the structure and activities of the company could lead to multiple applicable laws, which could be useful in determining which law will be applied to certain personality aspects or contractual matters of the company.

Three different sets of rules come into play in the field of conflict of laws concerning business companies. The first are the rules of the company's country of incorporation or *lex societatis.*[72] The second are the rules of party autonomy.[73] And, finally, the third is the *principle of continuity* as a modality of party autonomy.

B. *Lex societatis*

The concept of *lex societatis* is recognized in Article 2 of the Law No. 32 of 1927, which regulates business companies in Panama. Occasionally, Panamanian statutes use the term 'law of the constitution' as equivalent for law of the company. The role of the *lex societatis* is to allow the existence of the corporation. The *lex societatis* governs the existence and the juridical personality of the company in both the national and international field. The *lex societatis* has a political and economical connotation. In other words, *lex societatis* is constituted by the substantive and procedural laws that regulate the commercial dynamic of the company. In brief, the *lex societatis* is the support or framework of the rule of autonomy.

---

[69] As the Swiss jurisdiction: *Loi fédérale sur le droit international privé du 18 décembre 1987*, Chapter 10 in particular the conflicts rules Art 154 and 155.

[70] ANCEL B. / LEQUETTE Y., *Grands arrêts de la jurisprudence française de droit international privé*, Paris 1987, at 176 and 177 (*Banque Ottomane*). HOLLEAUX D. / FOYER J. / DE GEOUFFRE DE LA PRADELLE G., *Droit International Privé*, Paris 1985, at 242-243.

[71] MIRANDA ICAZA F., *Constitución y Funcionamiento de las Sociedades Anónimas*, Panama 1967-68, at 71.

[72] RAMMELOO S., *Corporations in Private International Law*, Oxford 2001, at 10.

[73] GOWER L.C.B., *Principles of Modern Company Law*, 4th edition, London 1979, at 745.

Lex societatis is the connecting factor applied to all matters related to the existence[74] or validity[75] of the company, its internal structure,[76] the aspect of legal representation, the amendment[77] of the articles incorporation, merger,[78] prorogation,[79] dissolution,[80] liquidation,[81] reactivation, and rights of minority shareholders[82] of the company, as long as the relevant deeds are required to be registered at the state of incorporation.

However, there are two situations in which the *lex societatis* will be disregarded. The first limitation concerns the real seat, when a company incorporated in Panama carries its main activities or has its real seat in a different country. If a company has its management in, say, Caracas, the law of Colombia as the country of the real seat governs all activities and transactions performed in that country as well as the liability of the board of directors. The second exception is the application of the local law to forms (*locus regit actum* principle). If the business company incorporated in Panama has its real seat in Caracas and celebrates a general shareholders' meeting in Bahamas, the law of Bahamas will apply to the formalities which are necessary for the holding of the meeting.

C. The Rule of Autonomy

Parties enjoy a large power to choose the law governing the business corporation. The parties have the power to administer or wind-up the company; however we will emphasize only two of the issues that affect the company's contractual status. The first issue is the *dépeçage*. The parties can choose a law by inserting a clause into the company's articles incorporation indicating that the law governing the activities of the corporation will be the place of the real seat of the company or the place of its main activities. In this sense, the *lex societatis* or the law of the incorporation provided in Article 2 of Law No. 32 of 1927 will be discarded. In other words, the company could be governed by two or more laws. This is natural, as the Panama provides a flexible offshore legal instrument.[83]

The second issue affecting a company's contractual status is the fact that shareholder status is a matter that can be freely negotiated by the parties. The

[74] Art. 1 of the Law No. 32 of 1927.

[75] Art. 2 of the Law No. 32 of 1927.

[76] Art. 49 to 67 of the Law No. 32 of 1927.

[77] Art. 3 of the Law N 32 of 1927.

[78] Art. 71 of the Law No. 32 of 1927.

[79] Art. 522 of the Commercial Code.

[80] Art. 80 of the Law No. 32 of 1927.

[81] Art. 85 to 89 of the Law No. 32 of 1927.

[82] Art. 417 to 420 of the Law No. 32 of 1927.

[83] BOUTIN G., *Le droit des sociétés offshore panaméennes et les conflits de lois*, Saint-Imier 2006, at 2.

Decree No. 5 of 1997 modernized the way in which companies' books could be maintained, e.g. the stock ledger, share certificates, company and accounting books and balance sheet can now all be digitalized.[84] Furthermore, it is no longer necessary for companies incorporated in Panama to keep their stock ledger book in Panama.[85] If the stocks of a Panamanian company were issued in another country, then the law of the place of issuance will have jurisdiction to determine the existence of a negotiable instrument[86] or a parallel e-document.[87] In the event that the minority shareholders of a Panamanian company contest the resolutions of the special shareholders meeting ('ESM') held in Nassau on the basis of misrepresentation, then the law of the Bahamas will apply to determine the validity of such an ESM.

D. The Rule of Continuity

The principle of continuity is a corollary to the incorporation doctrine. In practice, the decision to move to another jurisdiction is made based on tax reasons, civil emergencies, natural risks, or political reasons.[88] The company's continuity or permanence was initially exposed by the Bustamante Code.[89]

The continuity principle is based on the parties' prerogatives to change the personal status of a legal entity without going through dissolution. This process has many names: change of nationality, domicile or real seat[90] re-domicile, company migration, mutation of jurisdiction,[91] change of the registry office, escape clause.[92] In any case, the decision to move to another jurisdiction and change the law

---

[84] Art. 9 of the Decree No. 5 of 1997, in: *Official Gazette* No. 23,327 of 9 July 1997, states the elimination of the physical book to prove the status of the shareholders.

[85] FÁBREGA J.P., *Los derechos de los accionistas minoritarios en las sociedades anónimas panameña*, Panama 2005, at 45.

[86] Art. 399 of the Bustamante Code: In order to determine the means of evidence that may be used in each case, the law of the place in which the act or deed took place shall be applied, unless such evidence is not allowed by the law of the forum state.

[87] LOO MARTINEZ L.M., *De la Ley aplicable en la Valoración de la Prueba Electrónica Internacional*, Panama 2004, at 194.

[88] BOUTIN G., *La Regla de la Continuidad o del Cambio de Nacionalidad de las Sociedades Anónimas*, Panama 1998, at 14.

[89] Art. 20 of the Bustamante Code: As consequence of the change of the nationality of corporations, foundations, associations and partnerships, except in the event of change of the territorial sovereignty, they shall be subject to the provisions of their prior and new law. In the event of change of the territorial sovereignty, due to independence, the rule established in Article 13 for collective naturalization shall apply.

[90] BOGGIANO A., *Derecho Internacional Privado*, Buenos Aires 1991, at 113.

[91] PEREZ PRICE A.R., *La Figura de la Continuidad de Sociedades y su Incorporación a la Legislación Panameña*, Panama 1998, at 59.

[92] MATTHEWS P., *Trust: Migration and Change of Proper Law*, 1997, at 67.

applicable to the company is a privilege of the shareholders' meeting. Continuity has been treated as an unfamiliar phenomenon by the jurisprudence,[93] since it was a singularity promoted by 'tax heaven' countries and economic integration.[94] The aim of company migration is to preserve the continuity of the corporate image and assets by changing the law applicable to its commercial activities.[95] In the continental doctrine's opinion, the underpinning reason of company migration is to safeguard the benefits and interests of the individual shareholders.[96] However, such a position is not accurate, because a company is a legal vehicle whereby the shareholders carry out transactions independently from their individual patrimony and with the advantage of confidentiality as to the real beneficiary owner. The real problems with the continuity process are the duality of conflict of laws and the effects on third parties.

E. The Process of Continuity

The process of continuity is an extraterritorial phenomenon that entails the application of two legal systems to a company. In other words, this process creates an inter-temporary conflict of laws.[97] Obviously, the process of company continuity introduces a special provision, or *lex specialis*,[98] that leads to an implicit inter-temporary conflict of laws or a real mobile conflict of laws.[99] Such a situation is characterized by two successive laws being applied to the same legal situation or

[93] LALIVE P., *Jurisprudence Suisse en Droit International Privé, Société de droit international*, Vol. XXIII, 1966, at 203 ('Si bien que la these de l'impossibilité du transfert de siege sans dissolution paraît dépasser ce qui est requis par une juste protection des différents intérêts en cause. On peut conjecturer que la structure actuelle du commerce international et la mobilité accrue des sociétés amèneront une évolution des idées sur ce sujet.').

[94] ANTOINE R.M., *Confidentiality in Offshore Financial Law*, Oxford 2002, at 14. ('Offshore legal entities are attractive due to their inherent mobility and flexibility. An offshore company may choose to relocate for a number of reasons').

[95] PÉREZ PRICE A.R. (note 91), at 63.

[96] MENJUCQ M., *Droit International et Européen des Sociétés*, Paris 2001, at 298.

[97] DIEZ PICAZO L.M., *La Derogación de las leyes*, Madrid 1990, at 183.

[98] Art. 11c of the Commercial Code of Panama: 'Upon registration of the corresponding documents at the Public Registry, the continuation of the corporation under the laws of the Republic of Panama will come into effect between the parties and with respect to third parties as of the date of first incorporation of the corporation at the country or jurisdiction of origin. The corporation shall continue with any and all its properties, rights, privileges, powers and franchises, as the owner and holder in title thereof, subject to the restriction, obligations and duties corresponding to the corporation at its country or jurisdiction of origin, being it understood that the rights of the creditors of the corporation and the encumbrances on the property thereof shall not be impaired by its continuation under the laws of the Republic of Panama.'

[99] LOUSSOUARN Y. / BOUREL P., *Droit International Privé*, Paris 1978, at 296.

legal person. Thus, the validity and effect of the continuity of a company is subject to two distributive laws.[100] This distributive method restrains the application of the new Panamanian law to the events that took place or produced legal effects under the former law. For instance, if a Bermudian company undertook an equity obligation and/or guaranteed a corporate bonus in Londonderry, these obligations will follow that company, even if the personal law has changed. In accordance with the non-retroactivity principle, or *tempus regit actum* principle, the assets and liabilities of the company are not affected by any registration in a new jurisdiction. The *ratio legis* of this non-retroactivity provision is to protect third parties and to guarantee the continuity of international commerce by means of the non-retroactivity principle, which is laid down in the Constitution.[101] The process of continuity in Panama could take place under two circumstances: when a foreign company migrates to Panama[102] and when the Panamanian company migrates to another country.[103]

To re-incorporate a Liechtenstein company in Panama, two essential conditions must be met: the shareholders' meeting must (1) authorize the redomicile and (2) adapt the articles of incorporation to comply with Panamanian law. But sometimes the process of relocation raises a conflict of laws issue. This could occur when the applicable law of the new incorporation registry is more restrictive than the former foreign law. Hypothetically, this could be the case when the *juridical nature* of the foreign company is incompatible with requirements for a Panamanian business company; this is the case of an *Anstalt*[104] from Liechtenstein. Under Panamanian law, the nature of the *Anstalt* is not equivalent to that of a business corporation. Then, it is impossible to recognize the right to re-domicile the

---

[100] BLANCO-MORALES LIMONES P., *La Transferencia Internacional de Sede Social*, Madrid 1997, at 84.

[101] Art. 46 of the Constitution of the Republic of Panama.

[102] Art. 11b of the Commercial Code of Panama.

[103] Art. 11e of the Commercial Code of Panama: 'A corporation organized pursuant to the laws of Panama may, according to the provisions of its articles of incorporation or the amendments thereof, continue under the laws of any other country or jurisdiction, provided that it is permitted by the laws of said country or jurisdiction and the corporation is up-to-date with its tax obligations in the Republic of Panama. To that effect, the corporation shall file a certification or a certified copy of the corresponding decision or agreement as well as the certificate evidencing that it is duly registered at the jurisdiction to which it is transferred, by a public document, for its registration at the Public Registry Through an attorney-at-law in the Republic of Panama. Upon registration thereof, the corporation shall continue with any and all its properties, rights, privileges, powers and franchises, as the owner and holder thereof subject to the restrictions, obligations and duties corresponding to the corporation, being it understood that the rights of the creditors of the corporation and the encumbrances on the assets thereof shall not be impaired by its continuation in the foreign country. The failure to register the corporation in the other county, duly evidenced, shall not impair the effects of its registration in the jurisdiction of origin.'

[104] Art. 535, Fifth Title, *The Legal Entities, Liechtenstein Company Law*, Vaduz 1992.

Liechtenstein company in Panama, because this is a 'unipersonal company' (some authors talk of a '*egocompany*').[105] For this reason, the process of adaptation is not possible.[106] Another situation may be when the *purpose* or *activities* of a foreign company are illegal or incompatible with a Panamanian business company.[107] For example, if an alien trust company incorporated in Nevis wants to become a Panamanian Trust company. In Panama, trust companies are subject to a supplementary administrative procedure. In this case the administrative procedure becomes a regulation of public order that restrains the freedom of the parties.

From our point of view, the Panamanian process for the continuity of a Juridical Person is a *myth*, because continuity is restricted to only asset protection instruments and is not a general 'democratic rule.'

The process for Panamanian companies to migrate to another jurisdiction requires three conditions: (1) authorization of the shareholders, (2) payment of local taxes, (3) and a showing that the company has already been incorporated in the new Public Registry Office. In practice, if evidence that the company had been incorporated in a new jurisdiction is not provided, then the local Panamanian IRS will continue charging the annual fee charged to corporations in Panama.[108]

IV. Recognition and Enforcement of Foreign Judgments

In this section, we will study the historical approach for the recognition and enforcement of foreign judgments, as well as the problem of the diversification of legal statutory sources. Finally, we are going to recapitulate the general requirements to enforce foreign judgments in Panama.

A. Institutional Approach

The Fourth Chamber of the Supreme Court of Panama has jurisdiction to hear cases on the recognition and enforcement of foreign decisions and international arbitral awards. It also coordinates international legal assistance, in accordance with Article 100 paragraph 2 and 3 of Book One of the Procedural Code.

The process to recognize foreign judgments is characterized by the prevalence of the international procedure's re-examination rule. The principle of

[105] ENDARA G., 'La finalidad de la Sociedad Anónima', in: *Anuario de la Facultad de Derecho y ciencias políticas de la Universidad de Panama* 1970-1971 (No. 9), at 96.

[106] MARXER G. / KIEBER, *Société et Impôts au Liechtenstein*, Vaduz 1989, at 51.

[107] Art 39 of the Constitution of the Republic of Panama.

[108] Código Fiscal, Taxes. Law No. 6 of 2 February 2005, in: *Official Gazette* No. 25232 of 3 February 2005, regulating the taxes of the Panamanian Company.

révision au fond[109] was first incorporated at the Lima Convention of 1878-79[110] as a reaction in Latin American countries against suspicious foreign jurisdiction. In this paper, we have not included the political principle of negative and positive reciprocity[111] as a previous condition to enforce foreign judgments, since this doctrine was set aside by the Supreme Court. Instead, the Supreme Court substituted the reciprocity condition with the traditional *comity* or *courtoisie internationale*, to allow the recognition of foreign judgments or international precautionary measures in Panama. In the Panamanian local legal system there are diverse procedures to recognize and enforce foreign decisions, in addition to the procedure laid down by the Bustamante Code.

B. Diversification and Harmonization of the Control of Foreign Decisions in Panama

The first Procedure Code[112] of the Republic of Panama was enacted in 1916. In this Code, the process of exequatur was a *mélange* of the Lima Convention and the *Ley de Enjuiciamiento Español* of 1881. With the annexation by Panama[113] of the former Canal Zone, a court of the United States was subrogated by Panamanian Courts[114] and the code of international maritime procedure was enacted.[115] The

[109] Art. 1420 of the Judicial Code: 'The petition to declare whether a judgment of a foreign court should be complied with or not, shall be submitted before the Supreme Court of Justice, unless, pursuant to the corresponding treaties, another court must decide the case. The Court shall notify and convey the petition to the party that has to comply with the judgment and to the General Attorney of the Country, each party will have a term of five to reply, and should all the parties are in agreement, then the court shall order the judgment to be executed. Should the parties be in disagreement and if there are facts to be proved, then the Court shall give a term of three days to furnish the evidence, and fifteen days for the evidential hearing, without prejudice of giving an extraordinary term to practice the evidences at the foreign country. After the term has expired, the parties shall have a hearing, and the court will provide each a term of three days, after this the court shall decide if the enforcement of the judgment shall be accepted or not.'

[110] Article 43 of the Lima Convention of 1878-79.

[111] Art. 1419, paragraphs 2 and 3, of the Judicial Code: 'There has been no special treaty with the Country where the judgment has been granted, the judgment could be enforced in Panama, unless there is evidence that in such Country, no execution is given to the judgments granted by Panamanian Courts. Should the judgment come from a Country where no enforcement is given to judgments granted by Panamanian Courts, it shall not have effect in Panama.'

[112] *Official Gazette* No. 2404 of 22 August 1916.

[113] Tratados Torrijos Carter, 7 September of 1977 (Texto único No. 1 del 28 de octubre de 1977 – Tratado del Canal de Panamá), in: *Official Gazette* No. 18,451 of 1 November 1977.

[114] BOUTIN G., 'Les règles de compétence exorbitantes en droit maritime panamien', in: *Mélanges en l'honneur de Jacques Foyer*, Paris 2008, at 163.

Maritime Procedure Code[116] only regulates the conflict of laws in maritime matters,[117] and it contains a Special Section regulating the process of recognition and enforcement of maritime judgments.[118] Obviously, this statute involves an internal conflict of authorities over the control or cognizance of foreign decisions sought to be enforced in Panama. *Ceres-Hellenic Shipping Enterprise* of March 20, 1990 was the case that settled this conflict. The Ceres-Hellenic Shipping Entreprise tried to enforce a Greek maritime decision in a special maritime court. The Supreme Court overturned the decision of the inferior court, stating that exclusive jurisdiction over recognition and enforcement proceedings within the Republic of Panama is granted to the Supreme Court.[119]

But the problematic issue of harmonizing the legal sources regarding the control of foreign decisions could not be resolved by Ceres-Hellenic Shipping. Both the Procedural Code and the Maritime Code fail to define the legal terms of the exequatur procedure, and they ignore the essential legal requirement of indirect control of the jurisdiction or competence of the foreign Court. This could be explained from a historical standpoint, because the local system was inspired by the *Ley de enjuiciamiento española* of 1881, and this Spanish law ignored the control of competence[120] and provided the classification of the foreign judicial action.[121] The absence of any control over the jurisdiction of a foreign court produced the appalling precedent of the Clay Bridge Shipping Company dated October 26, 1982, in which the House of Lords liquidated of a Panamanian company pursuant to the English Act of 1948.[122] As a reaction to this decision, the Fourth Chamber of the Supreme Court of Panama included the principle of indirect laid down by the

---

[115] The Maritime Procedure Code of 30 March 1982, in: *Official Gazette* No. 19,539 of 1982.

[116] BOUTIN G., *La Competencia Extraterritorial de los Tribunales Panameños. Primer Congreso Panameño de Derecho Procesal*, Panama 2004, at 617-625.

[117] Art. 557 of the Maritime Procedure Law: 'Except as otherwise provided by international treaties ratified by the Republic of Panama, the rights and obligations of the parties to an action filed in the Panamanian Maritime Courts shall be determined in accordance with the following special principles of private international law and, in the cases not expressly covered by this Chapter, in accordance with that established by the civil law.'

[118] Art. 419 of the Maritime Procedure Law: 'Final judgments, arbitration awards, interlocutory judgments and resolutions which decree precautionary measures rendered by foreign States shall have in the Republic of Panama the force accorded thereto in the respective treaties.'

[119] BOUTIN G., 'El Exequátur en Panamá', in: *Revista Lex* 1986, at 113.

[120] DIEZ DE VELAZCO M. / BORRAS A., *Prácticas de Derecho Internacional Privado*, Madrid 1980, at 490-492.

[121] BOUTIN G., *Eficacia de la sentencia extranjera en el nuevo Código Judicial*, Panama 1990, at 69.

[122] BOUTIN G., *Jurisprudencia de Derecho Internacional Privado Panameño*, Panama 2004, at 1076.

Bustamante Code.[123] Consequently, the control of foreign judgments in Panama has been applied in accordance to the Bustamante Code, which is a subsidiary statute. In addition, the Spanish and Panamanian exequatur procedures do not contain modern legal terminology.[124]

C. The General Regime for the Recognition and Enforcement of Foreign Judgments as per the Judicial Procedure Code

It is important to point out that the object of recognition and enforcement consists in controlling the effects of the decisions rendered by foreign Courts. It is also worth mentioning at the outset that that the general regime of Panama,[125] which was inspired by article 954 of the *Ley de Enjuiciamiento Civil Español*, does not make any distinction between the recognition and enforcement of foreign judgments.[126] Under Panamanian law, foreign judgments, which are *res iudicata* in the country of origin, have the nature of *res judicata*. Thus, the Supreme Court tend to refuse to grant an exequatur to enforce a declaratory[127] or constitutive judgment that creates a new legal situation, e.g. the appointment of a liquidator or the allocation of bankruptcy[128] assets. This type of judicial resolution could be used as a foreign document or evidence[129] in other ongoing ordinary proceedings in Panama. In order to to be enforced in Panama, a foreign decision must pass three tests: (1) the control of the foreign court's jurisdiction, (2) the compliance with the contradiction principle, and (3) the compliance with Panamanian public policy. The minor formalities of

[123] Art. 423, paragraph 1, of the Bustamante Code: 'Every civil or contentious administrative judgment rendered in one of the contracting States shall be binding and may be executed in the others if it complies the following conditions: That the judge or the court which has rendered it have competence to take cognizance of the matter and to pass judgment upon it, in accordance with the rules of this Code.'

[124] MONTERO AROCA J., *Análisis crítico-segmento la falta de sistema y de precisión terminological*, Panama 1982, at 103.

[125] Art. 1419 of the Judicial Code of Panama.

[126] MIAJA DE LA MUELA A. *Derecho Internacional Privado, Parte Especial*, Ediciones Atlas II, 1999, at 744.

[127] *Cf.* Art. 100 of the Bustamante Code (prodigality); Art. 83 of the Bustamante Code (absence and extension) to Art. 101 of the Bustamante Code (emancipation); Art. 435 of the Bustamante Code; BOUTIN G., *Derecho Internacional Privado, de las sentencias extranjeras exentas del control del exequátur*, Panama 2006, at 763.

[128] BOUTIN G., *La faillite en droit international privé panamien et comparé*, Paris 2005, at 227.

[129] Art. 435 of the Bustamante Code: 'The resolutions adopted in acts of voluntary jurisdiction in civil matters in a contracting State shall be accepted by the others if they fulfil the conditions required by this Code for the validity of documents executed in a foreign country and were rendered by a competent judge or tribunal, and they shall in consequence have extraterritorial validity.'

the exequatur procedure are that the foreign judgment must be authenticated / apostilled and translated into Spanish.

D. Foreign Court Jurisdiction

Originally, the Judicial Procedure Code of 1916[130] and the new Judicial Code of 2001[131] followed the Spanish tradition of granting exequaturs only to enforce foreign judgments derived from actions *in personam*. Two Spanish jurists of the early twentieth century, Manresa and Navarro, stated that this requirement must be interpreted restrictively. In other words, only the foreign decisions derived from actions *in personam* could be recognized by the Spanish Court, excluding *actions in rem.* Currently, the Panamanian Court has made two changes: (1) it has set aside the classification of the action as a legal pre-requisite to recognition of foreign judgments and (2) it has adopted the principle of the indirect control, as suggested in the Bustamante Code. The process of verifying or controlling judicial competence is achieved by re-examining the allocation of jurisdiction[132] stated in the Panamanian Judicial Code, which determines whether or not a Panamanian court has jurisdiction.[133]

E. The Contradictory Rule

The Panamanian Judicial Procedure Code does not use the term 'contradictory' as a formal requirement for granting an exequatur to enforce a foreign decision. The legal term used by the Code is the 'default proceedings' (*rebeldía*). The party requesting recognition and enforcement of a foreign judgment must prove to the Supreme Court that the defendant was given notice of the process.[134] The contradictory rule is breached if the defendant has not been personally served. The contradiction doctrine provides a defendant with an opportunity to defend himself. Within the general principle of contradiction, there is also the bilateral principle and the principle of the defendant's cognition. My countryman and colleague Raúl Aparicio considers the contradictory principle as a rule of *due process*[135] and some

[130] Art. 584 of Book II of former Judicial Code of 1916.

[131] New Judicial Code, 10 September 2001, in: *Official Gazette* No. 24,384, amendment the Judicial Code of 1986.

[132] Art. 258-264 of the Judicial Procedure Code that provides the criteria of the jurisdiction of the Panamanian Court.

[133] Jack Canavaggio and Patricio Canavaggio vs Mcdonald Greenless Limited, United Distillers P.L.C., John Dewar And Sons Limited, Charles Tanqueray & Co., White Horse Distillers Limited, 16 September 2002.

[134] BOUTIN G., *La Noción de Rebeldía en el Proceso de Exequátur del Código Judicial Panameño*, Panama 1991, at 16.

[135] APARICIO R.R., *La Cooperación Judicial Internacional en el Sistema Interamericano*, Editorial Pablo Penacho, 2007, at 39.

European authors deem it as a modality of *public policy*.[136] Our point of view is that the contradictory rule is a judicial *ius commune*, or a rule know by the modern judicial state as a necessary trans-national procedure rule, equivalent to the international *ius cogens*. Ironically, even if there has been a breach of the contradictory rule, an exequatur will be granted if the enforcement is sought by the defendant. We consider that this alternative in favour of the defendant is an open window for cases of international fraud against third parties.

F. The Public Policy

The Procedural Code does not refer to the term *public policy* as a ground to deny recognition of a foreign judgment. The term 'illegal content of the foreign judgment'[137] is equivalent to an expression of public policy. Originally, the notion of public policy was introduced in the Bustamante Code under the influence of Mancini.[138] However, this happened to be a complex and misunderstood[139] piece of law. Indeed, public policy terminology was subsequently explained in more detail due to the efforts of the *Inter-American Special Conference on Private International Law*,[140] especially during the Panama Convention of 1975, where public policy was introduced in Private International Treaties as a reason for rejecting the foreign applicable law.

Indeed, Panamanian jurisprudence on the recognition and enforcement of foreign judgments has experienced a positive development, thanks to the assimilation of the Bustamante Code's essential rules. The Bustamante Code is not only valuable as an international legal source but also as a national supplementary legal source.

---

[136] ROMANO G.P., 'Italian Rules on Adjudicatory Jurisdiction and Recognition and Enforcement of Foreign Judgements', in: *Derecho del Comercio Internacional* 2005, at 636.

[137] Case *Garett B., Juneau* of February 1999. In this case, the Fourth Chamber refused to recognize a foreign judgment, because the legislation from the USA was incompatible with the Panamanian legislation regarding the cause for a dissolution marriage. BOUTIN G., 'La noción de orden público en el Derecho Internacional Privado Panameño. Tribuna Forense', in: *Revista de la Academia Panameña de Derecho* 2001, at 41.

[138] MOSCONI F., 'Exceptions to the Operation of Choice of Law Rules', in: *Recueil de Cours* 1989, vol. 217, at 49.

[139] SAMTLEBEN J., *Derecho Internacional Privado en América Latina*, parte general, Buenos Aires 1983, at 216-219.

[140] BOUTIN G., 'Jornada Paraguaya de Derecho Internacional Privado', in: *Panamá en la Primera Conferencia Especializada de Derecho Internacional Privado de 1975*, 5-6 October 2007, at 23.

NEWS FROM UNCITRAL

INTERNATIONAL TRADE LAW REFORM IN AFRICA

Luca G. CASTELLANI [*]

I. Africa's Place in Global Trade Law

In mainstream news and public perception, Africa is often associated with economic and political crisis, famine, drought, war and other scourges. Little is said about Africa's contribution to international trade, despite the fact that the continent is a prominent source of the commodities which fuel the world's wealth.

Indeed, African countries under their current trade pattern not only intensively exploit non-renewable resources, but also expose themselves to a commodity-dependency path instead of pursuing balanced economic growth based on economic diversification.[1] Recently, the sharp increase in the price of energy and foodstuffs greatly improved African export performance, but it is precisely this

[*] Legal officer with the UNCITRAL Secretariat, Vienna, Austria. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

[1] UNCTAD, *The Least Developed Countries Report 2008*, New York-Geneva 2008, p. 11 (UN Publication Sales No. E.08.II.D.20), p. 19; UNCTAD, *Economic Development in Africa 2008. Export Performance Following Trade Liberalization: Some Patterns and Policy Perspectives*, New York-Geneva 2008, p. 19 (UN Publication Sales No. E.08.II.D.22); UNECA, *Economic Report on Africa 2007: Accelerating Africa's Development through Diversification*, Addis Ababa 2007 (UN Publication Sales No. E.07.II.K.1).

Yearbook of Private International Law, Volume 10 (2008), pp. 547-563

Printed in Germany

commodity success that could have a devastating effect on fragile economies in the event of a sudden fall in the commodities' prices. This, in turn, could exacerbate the cycle of socio-economic underdevelopment and environmental degradation. While the dangers in this scenario should not be underestimated, it is important to remember that Africa, due to its special needs, may present great challenges, but also unprecedented opportunities. This is also the case with reference to trade law reform.

There is a clear nexus between economic and social development and trade law reform.[2] It is reflected in Goal 8 of the UN Millennium Development Goals, which provides a mandate to 'develop further an open, rule-based, predictable, non-discriminatory trading and financial system'[3] to counterbalance those trends that threaten to widen the North-South gap, such as external debt, deteriorating trade conditions, and dependency on foreign aid. However, so far, the efforts to achieve this objective have focused on certain aspects of trade liberalization, in particular on those relating to market openness dealt with by the World Trade Organization and similar bodies.[4] Although the issues undermining the South's development call for more comprehensive legal reform, the interest in establishing a modern legal framework for commercial operators based on uniform trade law texts has so far been rather limited.

This article aims at taking stock of the reasons for Africa's limited participation in international trade law and at highlighting some arguments in favor of a renewed African engagement in this field.

A. The Participation of Africa in International Trade Law

1. At the Global Level

It is commonly said that Africa's participation in international trade is below the global average and insufficient to support the developmental needs of the African continent. This statement applies also to international trade law.

A first indicator of the commitment of a State to providing a modern commercial legal framework may be the participation in the two treaties commonly regarded as the main instruments of international trade law. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the 'New York Convention')[5] requires that a State court seized of a matter covered by an arbitration agreement must give effect to that agreement; it also requires

[2] PISTOR K./BERKOWITZ D./MOENIUS J., 'Legal Institutions and International Trade Flows', in: *University of Michigan International Law Review* 2005, pp. 163-198.

[3] See <http://www.undp.org/mdg/goal8.shtml> (last accessed on 3 January 2009). See also UNGA Res. A/RES/55/2 of 18 September 2000, para. 13.

[4] For an illustration of the various facets of this goal and an assessment of the progress towards its achievement, see UNITED NATIONS, *The Millennium Development Goals Report 2008*, New York 2008, pp. 44-48 (UN Publication Sales No. E.08.I.18).

[5] UNITED NATIONS, *Treaty Series*, vol. 330, p. 38.

State courts to recognize and enforce arbitral awards rendered in other States. The United Nations Convention on Contracts for the International Sale of Goods, 1980 ('CISG')[6] provides uniform rules on the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The New York Convention has 143 State parties,[7] 30 of which (out of 54 African States) are African. The CISG has 72 State parties,[8] of which only nine are African.[9]

The status of other treaties and model laws prepared by the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) or the Hague Conference on Private International Law, point to a similar pattern of limited and erratic adoption by African States.[10] However, African participation seems to increase when instruments are perceived as best serving the interests of developing countries.

An example is offered by the legal framework for the international transport of goods formed by the United Nations Convention on the Carriage of Goods by Sea, 1978 (the 'Hamburg Rules'),[11] the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (the 'OTT Convention'),[12] and the United Nations Convention on International Multimodal Transport of Goods, 1980 (the 'Multimodal Convention').[13] These conventions were prepared at the request of developing countries in an effort to redress the then prevailing rules, which had been drafted in colonial times and therefore did not take into consideration the needs and wishes of developing countries. While these texts have seen limited application in practice, as only the Hamburg Rules have entered into force, the participation of African States in them is significant. In detail, African States make up 17 of the 34 parties to the Hamburg Rules, two of the four

[6] UNITED NATIONS, *Treaty Series*, vol. 1489, p. 3.

[7] As of 1 January 2009.

[8] As of 1 January 2009.

[9] Among these, the only one economically prominent at the regional level is Egypt. However, it should also be noted that a renewed interest in the CISG has been emerging recently in various African countries. For a recent example of an article advocating the adoption of the CISG (in this case, in Kenya), GICHANGI E., 'The United Nations Convention on Contracts for the International Sale of Goods: a Case for Ratification by Kenya', in: *Kenya Law Review* 2007, pp. 305-322.

[10] For instance, Niger is the sole African country party to the Convention of 15 June 1955 on the law applicable to international sales of goods. For similar considerations on the texts prepared by the Hague Conference on Private International Law, OPPONG R.F., 'The Hague Conference and the Development of Private International Law in Africa: a Plea for Cooperation', in: *Yearbook of Private International Law* 2006, p. 195.

[11] UNITED NATIONS, *Treaty Series*, vol. 1695, p.3.

[12] UNITED NATIONS Doc. A/CONF/152/13. (Treaty not yet in force).

[13] UNITED NATIONS Doc. TD/MT/CONF/16. (Treaty not yet in force).

parties to the OTT Convention and seven of the eleven parties to the Multimodal Convention.[14]

The last observation points to the importance of participation in legislative-making activities, which may well be considered the complementary side of the adoption of legislative texts. If States are unable to effectively convey their views during the drafting process, their interest in adopting the final text may be reduced, due to the actual or perceived inadequacy of the text for regional needs, insufficient information or other reasons. Unfortunately, due to limited financial resources and expert capacity, African participation in legislative-making bodies with universal composition, such as UNCITRAL,[15] is limited, and few African countries are members of those organizations with a dedicated membership, such as UNIDROIT and the Hague Conference on Private International Law.[16] Exceptions are, of course, possible: thus, for instance, African countries took an active role in the discussion of the draft convention on the carriage of goods [wholly or partly] [by sea] held in UNCITRAL Working Group III.[17] Nevertheless, exceptions, due to their nature, remain such, and the inability to participate fully is particularly regrettable when it comes to those bodies, such as UNCITRAL, which were established with a particular view to assisting developing countries.[18]

To sum up, the inability of African States to participate regularly and effectively in legislative-making activities may affect the full and comprehensive consideration of regional needs at the drafting stage; this may, in turn, hinder African awareness of that text; and both elements may ultimately have a negative impact on the process of modernization of international trade law in the African continent.

---

[14] As of 1 January 2009. Additional factors may be relevant. For instance, in the case of maritime transport, sector associations (in the context of the liner conference system) ensure adequate coordination of commercial operators and representation of their interests. This may not be the case in other trading sectors.

[15] African States are entitled to elect 14 of the 60 UNCITRAL Members; UNITED NATIONS GENERAL ASSEMBLY, Resolution 57/20 of 21 January 2003, 'Enlargement of the membership of the United Nations Commission on International Trade Law'.

[16] OPPONG R.F. (note 10), p. 194.

[17] See, e.g., UNITED NATIONS Doc. A/CN.9/WG.III/WP.93, 'Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments and Proposals of the Government of Nigeria' (reflecting the results of consultations between Central and West African countries).

[18] UNITED NATIONS GENERAL ASSEMBLY, Resolution 2205 (XXI) of 17 December 1966, 'Establishment of the United Nations Commission on International Trade Law'. See also BERGSTEN E., 'The Interest of Developing Countries in the Work of UNCITRAL', in: ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, *Essays on international law. Thirtieth anniversary commemorative volume*, New Delhi 1987, pp. 28-41.

2. At the Regional Level

The analysis above would not be complete without reference to regional efforts in trade law harmonization.[19]

At the time of decolonization, a common view foresaw the broad adoption of uniform commercial texts in the Continent in light of the existing uniformity of national legislation and of the calls for African political and economic unity.[20] A number of regional organizations were entrusted with promoting the goal of uniform trade law, sometimes in specific domains such as intellectual property or insurance law. Despite limited early results, this movement reached its peak in 1993, with the creation of the *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA), regrouping States mostly belonging to the French legal tradition.[21] In other cases, a regional international organization has undertaken work in the field of international trade law within the scope of its broader mandate. This is the case, for instance, of the Southern African Development Community (SADC), which has prepared a model law on electronic commerce based on the UNCITRAL Model Law on Electronic Commerce.[22]

These regional initiatives should, on the one hand, complement and buttress global initiatives and, on the other hand, interact with domestic legislation by modernizing it and providing a more efficient legal framework for business operators, particularly suited for regional exchanges. It is doubtful that these goals have been achieved. At the statutory level, these efforts have generally had limited impact on domestic legislative reform. A major exception is represented by OHADA, whose

---

[19] In general, see BAMODU G., 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa', in: *Journal of African Law* 1994, pp. 125-143.

[20] ALLOTT A.N., 'Towards the Unification of Laws in Africa', in: *I.C.L.Q.* 1965, pp. 366-389; M'BAYE K., 'L'expérience du droit uniforme dans les pays d'Afrique', in: UNIDROIT (éd.), *Le droit uniforme international dans la pratique*, New York 1988, pp. 48-65.

[21] OHADA texts have inspired a number of comments, especially in the French language. Most recently see: 'L'harmonisation du droit OHADA des contrats. Actes du Colloque de Ouagadougou (Burkina Faso) 15-17 Nov. 2007/The Harmonisation of Contract Law within OHADA. Acts of the Colloquium of Ouagadougou (Burkina Faso) 15-17 Nov. 2007', in: *Uniform Law Review/Revue de droit uniforme* 2008; 'Actualités de l'OHADA' in *Revue internationale de droit comparé* 2008, p. 7 *et seq.*; 'La promotion du droit des affaires en Afrique: évaluation du droit OHADA et de la dynamique d'intégration juridique/The Development of Business Law in Africa: Assessment of OHADA Laws and the Dynamics of Legal Integration,' in: *Revue de Droit des Affaires Internationales/International Business Law Journal* 2008, n. 6; for a critical discussion, see BOUREL P., 'A propos de l'OHADA: libres opinions sur l'harmonisation du droit des affaires en Afrique', in: *Recueil Dalloz* 2007, p. 969. For an introduction to OHADA in other languages, see MARTOR B./ PILKINGTON N./SELLERS D.S./THOUVENOT S., *Business Law in Africa. OHADA and the Harmonization Process*, 2nd ed., London 2007; CUETO ÁLVAREZ DE SOTOMAYOR J.M./ABESO TOMO S.E./MARTÍNEZ GARCÍA J.C., *Armonización del Derecho Mercantil en África impulsada por la OHADA*, Madrid 2006.

[22] UN Publication Sales no. E.99.V.4.

uniform acts, once adopted, are automatically enacted in OHADA member States,[23] though with some difficulties in their harmonization with domestic legislation.[24] At the factual level, the degree of effectiveness of the law on the books is unclear. Commentators stress the passive attitude of the legal actors involved in the implementation of the uniform texts in the case of OHADA, too.[25]

Moreover, the insertion of a regional or sub-regional layer may pose additional co-ordination issues For instance, OHADA's approach reflects a commonality of legal heritage, but not necessarily the prevailing regional trade flows. Hence, OHADA laws do not facilitate exchanges between OHADA member States and neighboring countries belonging to the common law tradition.[26] To maximize the benefits arising from regional harmonization, regional texts should be drafted in close alignment with universal ones, and, at the same time, universal texts should enjoy widespread adoption.[27] However, practice shows an irregular pattern of co-ordination between regional and global international organizations and only limited participation in texts with universal application.[28] In conclusion, despite best intentions regional initiatives without global co-ordination may well contribute to creating additional barriers to cross-border trade, not only at the global level, but also within Africa.

Finally, while African regional economic powerhouses seem keen on maintaining their leadership as trade-friendly hubs, they do not seem to lead the

---

[23] OPPONG R.F., 'Re-Imagining International Law: an Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa', in: *Fordham International Law Journal* 2007, pp. 306-310.

[24] DE LA BOUILLIERIE P./THOUVENOT S., 'Droit des États membres et normes OHADA: de l´opportunité et de la méthode d´une mise en conformité', in: *Revue de Droit des Affaires Internationales/International Business Law Journal* 2007, p. 100.

[25] FOKO A., 'Le droit OHADA et les droits nationaux des Etats parties: une complémentarité vieille de plus d'une décennie', in: *Revue de droit international et de droit comparé* 2008, p. 476 *et seq.*

[26] For example, Benin, an OHADA member State, has strong regional trade relations with neighbouring Ghana and Nigeria, non-OHADA members. Therefore, a significant share of Benin's cross-border trade falls outside the scope of application of OHADA's texts.

[27] Similarly, DATE-BAH S.K., 'The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer', in *Uniform Law Review/Revue de droit uniforme* 2008, pp. 217-221, points out that the fact that the Draft OHADA Uniform Act on Contract Law is based on the UNIDROIT Principles of International Commercial Contracts (and on the CISG) may pave the way to the adoption of legislation similar to that draft act in West African States belonging to the Common Law tradition.

[28] COETZEE J./DE GAMA M., 'Harmonization of Sales Law: an International and Regional Prospective', in: *The Vindobona Journal of International Commercial Law and Arbitration*, 2006, pp. 15-26, come to different conclusions, arguing that the regional integration pattern may lead the way to universal integration, and that the limited participation of OHADA States in universal instruments is the outcome of a deliberate choice (id., p. 25). The arguments seem rather speculative.

way in trade law reform.[29] Indeed, observation indicates that the implementation of trade law reform programs may be easier in smaller economies than in larger ones, where a more complex bureaucratic process and the need to cater to a broader number and variety of vested interests in the face of limited institutional capacity may effectively hinder legal reform.

B. Africa and Uniform Trade Law: a Missed Opportunity?

Limiting the analysis to formal legislative enactments would miss a number of factors relevant in the determination of the causes for a limited engagement in trade law reform.

A number of conditions that could have supported a swift and effective unification of commercial law on the continent were present at the time of decolonization: interest in economic integration matched with limited technical obstacles, given that, in spite of different legal traditions, commercial laws were largely similar across the continent. This was particularly true in the case of neighboring colonies sharing the same legal heritage.[30] The experience of certain countries, such as Cameroon and Somalia, which had to merge different legal traditions in the post-colonial era, may give a sense of the challenges faced and of the goals attainable.[31]

Moreover, while non-State law, be it traditional customary, modern customary or otherwise, is particularly prominent in Africa, it did not create obstacles to commercial uniformity.[32] On the contrary, trade customs and practices were often common across communities, and brought an element of uniformity despite artificial colonial borders.

In spite of these conditions, uniform trade law did not achieve the success anticipated in Africa. An initial obstacle was the lack of real political support, as the post-colonial African State has traditionally been a staunch guardian of its sovereign prerogatives despite widespread expressions of pan-African sentiments. Therefore, the creation of supranational institutions was not followed by an effective transfer of powers to those institutions; on the contrary, cross-border relations among neighboring States have often been affected by disputes, including fierce

[29] This may be particularly true for common law countries, which do not benefit from the work of OHADA.

[30] DIAMOND A.L., 'Sale of Goods in East Africa', in: *I.C.L.Q.* 1967, p. 1045.

[31] FOMBAD C.M., The Scope for Uniform National Laws in Cameroon, in: *The Journal of Modern African Studies* 1991, p. 443; CONTINI P., *The Somali Republic: an Experiment in Legal Integration*, London 1969; BATTERA F./CAMPO A. 'The Evolution and Integration of Different Legal Systems in the Horn of Africa: the Case of Somaliland', in: *Global Jurist Topics* 2001 (available at: <http://www.bepress.com/gj/topics/vol1/iss1/art4>).

[32] The vast literature on African customary law has produced classic works, such as, for instance, SCHAPERA I., *A Handbook of Tswana Law and Custom*, London 1938 (or. ed.); BERQUE J., *Structures sociales du Haut-Atlas*, Paris 1978; BENNETT T.W., *Customary Law in South Africa*, Lansdowne 2004. For an introduction to African customary law and additional bibliographic references, see SACCO R., *Le droit africain*, Paris 2009.

conflicts over the same artificial borders inherited from the colonizers. In this context, it is not surprising that trade law unification, which has historically been a forerunner of closer regional economic integration, has not gained momentum.[33]

Unfortunately, the evolution of African political systems towards military rule soon after independence, and widespread political instability at a later time, effectively took uniform trade law off the legislative agenda. A good example of this trend is seen in the case of Ghana, which had been actively engaged in uniform legislative work until the suspension of its Constitution in 1981.[34]

As poor governance and weak adherence to the rule of law spread, trade law matters became less prominent than those topics considered directly related to the basic safety and security of the populations at risk in failing States. The importance of a robust commercial framework as a means of improving the economic and social conditions of post-conflict societies, and, in its cross-border dimension, to rebuild trust in trade among neighboring trading communities, has only recently been appreciated.

Moreover, the adoption of a robust trade law system did not seem a priority for African economies in light of their structure. In fact, African economies typically involve the co-existence of a few major commercial actors, i.e. State-held corporations or local branches of multinational concerns, and a vast informal sector of small to medium-sized traders. This scheme perpetuates a colonial pattern. In colonial times, the foreign power wished to promote economic development through the public authorities' close and 'benevolent' oversight and a policy of subsidies to large metropolitan investors. With decolonization, this approach was not abandoned, but, rather, strengthened by the desire to promote economic development and to avoid social conflicts over sensitive issues. Therefore, in most African countries certain factors of production, such as land and natural resources, were kept in public hands irrespective of whether or not the Socialist option had been adopted. The extent to which the recent wave of trade liberalization has changed this economic structure remains unclear.

From the perspective of the legal regime, large State-held corporations and local branches of transnational corporations have both the contractual power and the resources to effectively negotiate the terms of the contracts into which they enter, thus catering to their needs with their own tailor-made provisions.[35] On the other hand, informal operators are by definition outside the domain of State law and therefore not affected by State legislation, including enactments of uniform trade law, though possibly subject to uniform commercial customs. In this economic context, the need for uniform trade law may be perceived as limited. Of

[33] Interestingly, those African States embracing the Socialist option did not take part in the efforts of that block to develop a uniform trade law regime in order to build a bridge towards capitalist economies.

[34] Ghana signed on 5 December 1974 the Convention on the Limitation Period in the International Sale of Goods, an early text complementing the CISG, and ratified it on 7 October 1975; Ghana then signed the CISG on 11 April 1980, but only recently restarted consideration of that treaty with a view to its ratification.

[35] These often opt out of uniform legal texts otherwise applicable to the transaction.

course, on a policy level, the argument that the adoption of those uniform texts may actually support cross-border business of small and medium-sized enterprises and encourage them to operate in the formal sector remains valid. But among conflicting priorities this reform may be perceived as one of a lesser urgency.

C. Trade Law Reform in Africa and International Actors

Despite the above, trade law reform may actually figure more prominently on the agenda of local law reformers seeking to improve the living conditions of their citizens than on that of the international community members in a position to influence the law reform process. Unlike in other regions of the world, Africa's major trading and financial partners have not placed particular stress on trade law reform. This is true at the bilateral level, but becomes more evident and particularly significant in the context of multilateral preferential trade agreements, of which the main purpose should be to promote African trade and foster economic development.

Unfortunately, the co-ordination between the different aspects of the formulation and implementation of international trade policy could be improved. This applies, to different extents, to all the actors involved in trade deals, including International Financial Institutions, the World Trade Organization, the European Community and its Member States, and certain very large trading countries such as the United States of America and the People's Republic of China.

International Financial Institutions are one of the most effective forces in trade law reform, for instance through the use of conditionalities.[36] The World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development (EBRD) and the Asian Development Bank, among others, have advocated effective and efficient reforms in certain fields such as insolvency and public procurement. This, in practice, has promoted the adoption of 'soft' uniform

[36] For more information on conditionalities, see: KAPUR D./WEBB R., *Governance-Related Conditionalities of the International Financial Institutions, G-24 Discussion Paper No. 6*, New York-Geneva 2000 (UN Doc. UNCTAD/GDS/MDPB/G24/6); BUIRA A., *An Analysis of IMF Conditionality, G-24 Discussion Paper No. 22*, New York-Geneva 2003 (UN Doc. UNCTAD/GDS/MDPB/G24/2003/3); OMOTUNDE E.G.J., *Country Ownership of Reform Programmes and the Implications for Conditionality, G-24 Discussion Paper No. 35*, New York-Geneva 2005 (UN Doc. UNCTAD/GDS/MDPB/G24/2005/2); HEAD J.W., 'For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks', in: *Kansas Law Review* 2004, pp. 241-324; LEE C.H., 'To Thine Ownself Be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis', in: *University of Pennsylvania Journal of International Economic Law* 2003, pp. 875-904. On International Financial Institutions see also BOON K.E., ''Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law', in: *NYU Journal of International Law and Politics* 2007, pp. 513-581; SCHLEMMER-SCHULTE S., 'The World Bank's Role in the Promotion of the Rule of Law in Developing Countries', in: SCHLEMMER-SCHULTE S./KO-YUNG TUNG (eds.) *Liber Amicorum Ibrahim F. I. Shihata*, The Hague 2001, pp. 677-725.

trade law texts such as the UNCITRAL Model Law on Cross-Border Insolvency, 1997,[37] the UNCITRAL Legislative Guide on Insolvency Law, 2004,[38], and the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994,[39] and of the principles contained therein.

Interestingly, the involvement of these institutions in trade law reform is indirect as it stems from their work in related areas. For instance, the Financial Stability Forum has identified '12 Key Standards for Sound Financial Systems', one of which relates to insolvency and creditor rights.[40] The World Bank leads the work on this topic by preparing the standards to be used in the Reports of the Observance of Standards and Codes (ROSCs).[41] UNCITRAL texts are used both at the diagnostics level[42] and as a facilitation tool for law reform. In the field of public procurement, the World Bank considers sound procurement systems essential to good governance; it is therefore involved in the assessment of procurement systems of borrowing countries through Country Procurement Assessment Reports (CPAR). Similarly, outside the Bretton Woods system, the EBRD, of which the mandate is to promote market economies and democracies in countries in transition in Eastern Europe and Central Asia, is active in making recommendations for legal reform. In doing so, it refers to international standards, including UNCITRAL texts, as a benchmark for its country assessments.[43]

At the multilateral level, the World Trade Organization (WTO) may offer another interesting opportunity for trade law reform. While the WTO does not deal directly with the law applicable to private transactions, its system of multilateral agreements requires the existence of an efficient legal framework for commercial exchanges.[44] Traders and investors are not in a position to engage significantly in cross-border operations in an inefficient legal framework, as they would be not able to predict the fate of their operations. Thus, a poor commercial framework

[37] UN Publication Sales No. E.99.V.3.

[38] UN Publication Sales No. E.05.V.10.

[39] UN Publication Sales No. E.98.V.13.

[40] See <http://www.fsforum.org/cos/key_standards.htm> (last accessed on 3 January 2009).

[41] See <http://www.worldbank.org/ifa/rosc_icr.html> (last visited on 3 January 2009).

[42] More specifically, the diagnostics methodology uses the World Bank Principles for Effective Insolvency and Creditor Rights Systems and the Recommendations contained in the UNCITRAL Legislative Guide on Insolvency Law.

[43] See, for an example, EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, *Strategy for Ukraine as approved by the Board of Directors on 18 September 2007*, p. 52 (quality of concession legislation measured against the UNCITRAL Legislative Guide for Privately Financed Infrastructure Projects, 2000).

[44] BOURQUE J.-F., 'Addressing Complexity: ITC´s Experience in Trade Law Related Technical Assistance', in: *Papers presented at the UNCITRAL Congress 'Modern Law for Global Commerce', Vienna, 9-12 July 2007* (UN Sales Publication, forthcoming), refers to the trade law framework as 'the forest behind the WTO tree'.

may greatly reduce or nullify any progress made in opening up markets at the WTO level. Therefore, co-ordination of the WTO reform process – in particular, at the accession stage, when countries are more willing to engage in legislative review and reform – and broader trade law reform is particularly desirable.[45] Yet, the current WTO accession process is not perceived as closely connected with trade law reform. A prominent exception is offered by the People's Republic of China, where the adoption of uniform trade law texts paved the way, on the one hand, to broader commercial law reform, including at the domestic level, and, on the other hand, to accession to WTO and effective integration in global markets as a prominent player.[46]

Closer coordination among global and regional actors charged with providing technical assistance in trade law reform also seems desirable. The weak African institutional framework and limited capacity may only magnify the many delicate challenges posed by this issue.[47] In practice, this would entail illustrating the relationship between the various texts regardless of their source, and promoting their adoption and use in the broader framework of strengthening trade law at large.

As far as the relation between the European Community and its Member States and the African, Caribbean and Pacific Group of States is concerned (EU-ACP), the Cotonou Agreement, 2000,[48] as amended, is the text of reference containing the principles for trade cooperation, including aid and political components. Article 96 of the Cotonou Agreement provides measures for cases of viola-

---

[45] On technical assistance in the WTO context, see FLORESTAL M., 'Technical Assistance Post-Doha: Is There Any Hope of Integrating Developing Countries into the Global Trading System?', in: *Arizona International Law Journal* 2007, pp. 121-132.

[46] CHOUKROUNE L., 'Chine-OMC. L´état de droit par l´ouverture au commerce international?', in: *Revue de Droit des Affaires Internationales/International Business Law Journal* 2002, pp. 655-672; MAYEDA G., 'A Normative Perspective on Legal Harmonization: China's Accession to the WTO', in: *University of British Columbia Law Review* 2005, pp. 39-122 (available on-line at: <http://ssrn.com/abstract=801104>); for further bibliography, CASTELLANI L., 'Economic Development and the Rule of Law: Uniform Trade Law and Africa-China Relations', in CASTELLANI L., PANG ZHONGYING, TAYLOR I., *China outside China: China in Africa*, Turin 2008, pp. 75-90.

[47] For a comprehensive discussion of the matter from the point of view of an international civil servant, see ESTRELLA FARIA J.A., 'Brendan Brown Lecture Series: UNIDROIT Symposium: the Relationship between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL', in: *Loyola Law Review* 2005, pp. 253-285; from the point of view of a delegate to legislative-making bodies, see CHAN WAH-TECK J., 'Allocation of Work among Formulating Agencies' in: *Papers presented at the UNCITRAL Congress 'Modern Law for Global Commerce', Vienna, 9-12 July 2007* (UN Sales Publication, forthcoming).

[48] 'Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000', in: *Official Journal of the European Union* L 317/3 of 15.12.2000.

tion by one of the parties of the essential elements of the Agreement, namely, respect for human rights, democratic principles and the rule of law. The evolution in EU-ACP relations has further clarified the political dimension of the Agreement, highlighting political dialogue, human rights, accountability and good governance, and the 2005 revision of the Cotonou Agreement[49] expanded themes such as the control of weapons of mass destruction, the fight against terrorism, the prevention of mercenary activities and the strengthening of peace and international justice through the exchange of information on the implementation of the Rome Statute of the International Criminal Court. However, commercial law reform, or, at least, improvement of the business environment, seem not to be included among the goals of the treaty. Since the Cotonou Agreement has been criticized for not being able to achieve one of its main goals, i.e. contributing to African economic development through increased trade under revised terms,[50] devising measures for a coordinated approach to trade law in the treaty framework reform could contribute significantly to the achievement of this goal.

US-African trade relations are dealt with in the US African Growth and Opportunity Act (AGOA), first enacted in 2000 and subsequently revised every two years.[51] Section 104 of the AGOA indicates the eligibility requirements for African countries to benefit from the AGOA preferential regime. While a number of those requirements relate to the rule of law and human rights, Section 104 (a)(1)(C) refers to '*the elimination of barriers to United States trade and investment, including by […](i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;* […]'. The adoption of uniform trade laws may well be considered such a measure; it could also be considered a measure falling under section 104 (a)(1)(D), relating to, inter alia, poverty reduction policies and promotion of the development of private enterprises. In line with this approach, US development agencies have given attention to promoting trade law reform in Africa.

Finally, recent developments in international trade herald new commercial partnerships, which are particularly interesting in a South-South perspective. Certain emerging economies, such as Brazil, Russia, India, and China, are increasing their role in the global economy. Therefore, they may become more interested in a predictable legal framework for their trade with, and investments in, developing

[49] 'Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000', in: *Official Journal of the European Union* L 209/27 of 1.8.2005. See also KINGAH S., 'The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility', in: *Journal of African Law* 2006, pp. 59-71.

[50] See, lately, HAULE R./WEREMA F., 'EC-ACP Economic Partnership Agreements (EPAs) and their Economic Impacts on Developing Countries', in: *Journal of African and International Law* 2008, pp. 25-50.

[51] See text at <www.agoa.gov>, last visited on 1 January 2009.

economies, and, accordingly, in increasing their contribution to the promotion of that framework.

These countries currently have different levels of participation in international trade law. Among them, the position of China seems particularly relevant for African affairs. China is particularly active in trade with Africa, where it is widely perceived as an economic success story and as a political giant able to effectively defend and further African interests. This makes African countries particularly attentive to suggestions coming from China. Indeed, China's economic reform policy was based on the adoption of uniform trade law texts and the subsequent modernization of domestic law in line with their principles. Therefore, China could assist in promoting uniform trade law in Africa in a particularly effective manner, in light of its prestige, political influence, and expertise.[52]

To sum up, international actors active in the trade field should take into consideration the importance of trade law reform and mainstream it in their policies, if absent, or adopt a more systematic approach to its promotion. In particular, multilateral preferential trade agreements aiming at providing better conditions for African trade should provide for trade law reform as it is a necessary enabler to achieve the goals of the agreement. Opening up opportunities at the international level demands a robust domestic legal framework, both to reassure foreign investors and traders and to support cross-border operations of local business. African economic operators, in particular, may not be able to engage in global trade due to resource constraints, limited experience, and the overall weak institutional context.

II. Mainstreaming Global Trade Law in Africa

A. Benefits Arising from the Adoption of Uniform Trade Law Texts in Africa

The importance of trade law reform to improving Africa's trading conditions and promoting investment in the continent is undisputed, as is the relation between increased cross-border business and economic and social development. However, further reflections may assist in considering the complexity and breadth of the issues involved.

The relationship between trade and the rule of law is usually acknowledged in the sense that a strong rule of law is necessary to ensure predictability in trade and investment protection. Yet, this is not a one-way relationship, as further analysis indicates that trade and investment, economic development, and the rule of law tend to be mutually reinforcing.[53]

---

[52] CASTELLANI L. (note 46), pp. 83-86.

[53] See, for instance, also for further references, JESSEN H., 'Trade and Development Law', in: GEHRING M.W./CORDONIER SEFFER M.-C. (eds.), *Sustainable Development in World Trade Law*, The Hague 2005, pp. 88-89.

Due to the technical nature of trade law, uniform texts are a suitable source of inspiration for domestic reform in the commercial field, and may become a testing ground for broader reform, especially in the private law domain.[54] However, what counts the most is that the value of those legal principles necessary to achieve efficiency in the commercial legal sector, such as transparency, uniformity of interpretation, and efficient judicial review, may extend to all legal domains. Therefore, the improvements obtained through commercial law reform may spill over at a more general level, with an overall benefit for strengthening the rule of law at large.

In fact, successful implementation of trade law reform requires overhauling a number of institutions, from legal education to the judiciary. This is true for legal reform in any field, but in the commercial field the implementation process takes place under remarkably different terms than, for instance, in public law reform. Since the commercial sector has a strong interest in an efficient trade law framework, it may provide additional economic incentives to effectively implement commercial law reform. This process builds on actual legal market demand by progressively enhancing existing resources, thus ensuring the sustainability of the exercise and increasing the chances of its successful outcome. For instance, the young law student-to-be interested in trade law will seek admission in the most prestigious law schools with a view to building a strong qualification in order to be hired by a prominent (and financially rewarding) law firm, etc. The market will seek out specialized legal services, and will ensure adequate compensation. Social success will trigger imitation: good law schools will try to improve their ranking, and so will prominent law firms, etc.[55] The same could be repeated, *mutatis mutandis*, for other legal actors. In the end, more efficient legal actors will increase the rule of law overall, regardless of their actual dealing with commercial matters.

The possible contribution of trade law reform to conflict prevention should also be considered. As already mentioned, a more predictable commercial legal framework is a condition of increasing trade and investment, which may lead to economic development and thus improve social conditions. This contributes to preventing social conflicts, unrest, and instability, both at the domestic and the international levels.

An additional element, specific to regional trade, relates to the fact that artificial colonial borders cut across long-established commercial communities. Thus, the same trade perceived as local under traditional rules is actually international according to State law. Uniform trade law may assist in preserving such

[54] For instance, the UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended in 2006) has been enacted in a number of jurisdictions with a scope encompassing domestic arbitration, and arbitration of a non-commercial nature; the CISG has been used as source of inspiration for the reform of legislation on domestic contracts for the sale of goods; etc.

[55] This process has taken place in a number of countries after the introduction of a free market economy. Of course, the size of the change depends on the dimension of the demand, which relies on the size of the economy. The most telling example is provided by China.

trading webs and the communities they support, not only by keeping the uniformity of legal rules, but also by recognizing regional customs and trade practices.[56] In turn, significant regional trade may increase mutual trust and strengthen common economic interests. This may foster regional economic integration and eventually have a positive impact on political relations. This aspect is noteworthy given the importance of the regional dimension in conflict prevention in Africa.

Where conflict has already occurred, trade law reform is key to promoting economic recovery.[57] Indeed, enduring economic development, necessary to achieve economic and social stability, calls for increased trade and foreign investment. Therefore, the business environment becomes central in a post-conflict recovery strategy, as predictability of commercial law is of paramount importance to gain the confidence of foreign traders and investors.

Finally, from the standpoint of economic stability, the adoption of uniform trade law is supportive of economic reforms long-advocated for Africa, namely, the establishment of a network of small and medium-sized enterprises. In fact, small and medium enterprises typically do not possess the resources to access expert legal advice and to negotiate contracts in detail; however, they are particularly exposed to commercial disputes due to their limited assets. Therefore, they would particularly benefit from the availability, at no additional cost, of a predictable legal framework, applicable by default when the parties to the contract have not decided otherwise, such as the one provided by uniform trade law. In turn, the multiplication of small and medium business may assist in wealth redistribution as well as in the diversification of the economy, thus reducing the dependency on commodities and energy.

B. An Array of Strategies

Trade law reform may contribute considerably to a number of pressing issues, which go beyond the traditional boundaries of the commercial realm. Of course, trade law reform alone will not suffice, as its efficient implementation calls for a context of political stability, good governance and fair market rules. Yet, its contribution to economic development and to the strengthening of the rule of law may be significant.

---

[56] A common misunderstanding assumes that customary rules of traditional societies do not change. In fact, not only do they change incessantly, reflecting underlying social movements, but they may do so even more rapidly in the commercial field. Uniform trade law texts may take into account those customs through provisions such as art. 9(2) CISG. For a recent contribution on informal commercial practices, see TOHON C., 'Le droit pratique du commerce «informel»: un exemple de plurijuridisme au Bénin, in: KUYU C., *A la recherche du droit africain du XXIe siècle*, Paris 2005, pp. 245-264.

[57] In this line, it is not surprising that post-conflict African States have already undertaken (Liberia) or have announced their intention to undertake (Sierra Leone) significant steps in trade law reform.

However, the complex history of uniform trade law in Africa suggests that a number of steps, at all levels, may be required to ensure effective legal reform.

At the domestic level, the importance and the potential impact of trade law reform should be stressed, thus raising its profile on the political agenda. This may be done, in particular, by highlighting the complementary relationship between trade law and the global trade discussion carried out in the Doha Development Agenda and similar venues.

Country assessments need to be carried out with a view to identifying the priority areas for trade law reform in light of domestic necessities. The assessment to be conducted should be of all relevant legal instruments, regardless of their origin or nature, with a view to harmonizing them so as to prevent inconsistencies. This exercise should aim not only at mapping existing legislation and identifying gaps and conflicts, but also at connecting all relevant actors, ensuring their participation in the exercise, and defining their respective scopes and mandates. This is particularly important since trade law is at the crossroads of different fields and may fall under the jurisdiction of a number of offices.[58] The main purpose of this exercise should be the preparation of an action plan with a timetable for its implementation.

At the international level, the need for closer co-ordination among all actors seems clear. This demands, for instance, clarifying the relationship between the public and private aspects of trade law, including at the policy-making stage. It will entail further reflection on the importance of trade law reform in the context of multilateral preferential agreements. It will also demand consideration for trade aspects and the need for an efficient legislative framework when designing strategies for poverty reduction and for the prevention of political instability and other threats to peace and security.

Multilateral and bilateral donors active in this field should not only continue to exchange information in order to avoid the duplication of efforts, [59] but also ensure that the legal component is adequately taken into consideration in their proposals, including in trade facilitation initiatives. Thus, for instance, projects dealing with logistics and transport infrastructure should ensure that an adequate legal framework for carriage and warehousing is in place; initiatives on e-governance should at least verify that the needs of electronic commerce are taken into

[58] The fact that uniform trade law is prepared in multilateral bodies may add to the complexity. In light of this, it is not unusual that the leading office for trade law reform is a ministry competent for foreign affairs (and trade). Other concerned bodies may include: ministry of justice; ministry of communications; ministry of transport; investment promotion agency; law reform commission; academic institutions; bar association; etc. In this context, it seems particularly advisable to create a body dedicated to the coordination of the participation in legislative activities and law reform proposals. This was the choice, for instance, of Madagascar (Arrêté interministériel no. 12975/07).

[59] Experience in the field shows that a number of multilateral and bilateral agencies are ready to engage in technical assistance; for instance, the Development Assistance Group on trade in Ethiopia saw the participation of about twenty foreign agencies in early 2008.

consideration, to allow the use of the same information technologies in both the business and the government environments; and so forth.

In the end, trade law reform alone will not be sufficient to improve social and economic conditions in Africa; but it is also doubtful that sustainable growth may be achieved without comprehensive trade law reform, to be initiated and successfully completed at the behest and under the leadership of African governments and business communities.

COURT DECISIONS

TRANSLATION REQUIREMENTS UNDER THE EC SERVICE REGULATION: THE *WEISS UND PARTNER* DECISION OF THE ECJ

Pietro FRANZINA*

I. Introduction

Language is one of the key issues raised by the service abroad of judicial and extrajudicial documents. Provisions requiring the translation of the act to be served may be found in almost every legal instrument governing this area of judicial cooperation. The scope of such provisions, their practical operation and the consequences of their breach vary according to the legal regime applicable in the circumstances.

Generally speaking, two competing policies underlie 'language requirements' in this area: effectiveness of cooperation and protection of the addressee. While international cooperation demands service to be free from unnecessary burdens, so as to be carried out in an expedite way and have predictable outcomes, it is generally accepted that the addressee must be given a fair opportunity of becoming

* Researcher in International Law, University of Ferrara.

Yearbook of Private International Law, Volume 10 (2008), pp. 565-577

aware of both the contents and the legal implications of the document. Neither of these policies prevails *as such* over the other. Rather, a fair balance must be struck between them. Identifying the elements that affect this balance within a given regime – be it a State's internal legal system, an international convention or a Community instrument – is one of the elements that allows one to determine how existing rules should be applied to situations not specifically addressed by them.

The decision issued by the Court of Justice of the European Communities (ECJ) in *Weiss und Partner*,[1] following a referral for a preliminary ruling made by the German Bundesgerichtshof under Articles 68 and 234 of the EC Treaty, is an example of how these policies may be balanced within a particular framework, such as the 'area of freedom, security and justice' that the European Community ('EC') is progressively establishing after the entry into force of the Treaty of Amsterdam.

II. The Questions Referred to the Court and the Court's Answer

The decision deals with the interpretation of EC Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Service Regulation'),[2] and more particularly with its Article 8(1), according to which the addressee 'may refuse to accept the document to be served if it is in a language other than either of the following languages: (a) the official language of the Member State addressed […]; or (b) a language of the Member State of transmission which the addressee understands'.[3]

[1] ECJ, 8 May 2008, C-14/07, awaiting publication in the ECR.

[2] OJ 2000 L 160, p. 37.

[3] While the referral was pending, the Service Regulation has been replaced by Regulation (EC) No 1393/2007 of 13 November 2007 (OJ 2007 L 324, p. 79; 'the 2007 Service Regulation'), applicable as of 13 November 2008. Although the overall design and many provisions of the new act do not significantly differ from the previous ones, some of the rules examined by the Court in *Weiss und Partner* have undergone some changes. Article 8 of the 2007 Service Regulation clarifies that the addressee may refuse to accept the document to be served not only 'at the time of service', but also 'by returning the document […] within one week'. The 'new' Article 8 also provides that the addressee is entitled to refuse the document when it is neither in the language of the Member State addressed, nor in a language that the addressee understands (not necessarily a language *of the Member State of transmission* that he understands, as provided by the 2000 Service Regulation). According to Article 8(4) of the 2007 Service Regulation, the described 'language regime' also applies to the means of transmission and service of judicial documents provided for in Section 2 of the Regulation, such as service by diplomatic or consular agents and service by postal services. Nothing specific is said in the 2007 Service Regulation on the particular issues addressed by the ECJ in *Weiss und Partner*, *i.e.* on translation requirements in respect of items of evidence annexed to the application.

Doubts as to the interpretation of this provision arose in the framework of proceedings instituted in Germany by a German company against an English firm of architects regarding the allegedly defective design of a building. The English firm complained that service of the document instituting the proceedings was defective: while the application had been translated into English, some of the items of evidence annexed to it were written in German. The German company asserted that service was regular, as the architect's contract concluded with the defendant stipulated the services due by the latter would be 'provided in German' and that correspondence would also 'be in German'.

The ECJ, having noted that the Service Regulation applies to documents which can be very different in nature and having clarified that its ruling should be confined to documents instituting proceedings,[4] developed the following reasoning. Article 8 of the Service Regulation must be interpreted both in the light of the objectives of the Regulation (improving and expediting the transmission of documents between Member States) and of its context (in particular, of the role played by the service of documents instituting proceedings in respect of the recognition of default judgments under the 'Brussels I' Regulation).[5] According to the autonomous notion of 'document instituting the proceedings' that the Court had developed in its previous case-law,[6] such a document must consist of the document (or documents, where they are intrinsically linked) enabling the defendant to understand the subject-matter and the grounds of the plaintiff's application and to be aware of the existence of legal proceedings in which he may assert his rights.[7] It follows that documentary evidence which has a *purely evidential function* and is not intrinsically linked to the application in so far as it is *not necessary for understanding the subject-matter of the claim and the cause of action*, does not form an integral part of said document: thus, the addressee does not have the right to refuse to accept it under Article 8. It is for the national court to determine whether the contents of the application are sufficient to enable the defendant to assert his rights. This interpretation – the Court noted – is in line with the objectives of the Service Regulation, and is not inconsistent with the fundamental rights enshrined in Article 6 of the ECHR, which are part of the general principles of law the observance of which the Court ensures.[8] Concerning the parties' stipulations regarding the use of a given language in their relationship, the Court stated that the fact that the addressee of a document had previously agreed with the applicant that correspondence was to be conducted in the language of the Member State of transmission *does not give rise to a presumption of knowledge of that language*, but is evidence

[4] *Weiss und Partner*, para. 41 *et seq*.

[5] *Weiss und Partner*, para. 45 *et seq*. The 'Brussels I' Regulation is Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ 2001 L 12, p. 1).

[6] *Weiss und Partner*, para. 60 *et seq*., relying on ECJ, 13 July 1995, C-474/93, *Hengst Import*, ECR 1995, p. I-2113.

[7] *Weiss und Partner*, para. 64 *et seq*.

[8] *Weiss und Partner*, para. 57.

which the national court may take into account in determining whether the addressee understands the language of the Member State in question for the purpose of Article 8 of the Regulation.[9] However, a translation is not needed where it is apparent from the factual circumstances that the addressee of the document instituting the proceedings is familiar with the contents of said annexes: this is the case where the addressee is the author of those documents or can be presumed to understand the contents, for example because he signed a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of transmission, and the annexes concern said correspondence and are written in the agreed language.[10]

III. The Sources of the Court's Reasoning and Their Interplay

The decision of the Court has been commented upon by various authors.[11] The present paper focuses on one feature of the ruling, i.e. the attempt made by the Court to strike a balance between the competing policies mentioned above, *by combining elements from three different sources*: (A) the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'); (B) the principles underlying judicial cooperation in civil matters within the EC; (C) the Member States' domestic legal systems and the discretion vested in the national courts.

A. The European Convention on Human Rights

The Court's reasoning in *Weiss und Partner* refers extensively to Article 6 ('Right to a fair trial') of the ECHR, as interpreted by the European Court of Human Rights. The ECJ had already made reference to the ECHR when dealing with legal instruments governing judicial cooperation in civil matters, both before and after the 'communitarization' of private international law by the Treaty of Amsterdam.[12]

[9] *Weiss und Partner*, para. 88.

[10] *Weiss und Partner*, para. 91.

[11] See, among others, HESS B., in: *IPRax* 2008, p. 400 *et seq.*; RASIA C., in: *Int'l lis* 2008, p. 127 *et seq.*; RAYNOUARD A., in: *Revue de jurisprudence commerciale* 2008, p. 312 *et seq.*; SUJECKI B., in: *Europäische Zeitschrift für Wirtschaftsrecht* 2008, p. 37 *et seq.*

[12] See, *inter alia*, ECJ, 28 March 2000, *Krombach*, ECR 2000, p. I-1935, para. 39, regarding the 1968 Brussels Convention on jurisdiction and the recognition of judgments in civil and commercial matters; see also ECJ, 14 December 2006, C-283/05, *ASML Netherlands*, ECR 2006, p. I-12041, para. 28, regarding Regulation No 44/2001 of 22 December 2000. See, generally, on this topic, SALERNO F., 'Il diritto processuale civile internazionale comunitario e le garanzie processuali fondamentali', in: PICONE P. (ed.),

More generally, the ECJ stated on numerous occasions that 'fundamental rights form an integral part of the general principles of law the observance of which the Court ensures'.[13] In determining the scope and contents of such rights, the ECJ said that it 'draws inspiration from the constitutional traditions common to the Member States', as well as from 'the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories';[14] of course, the ECHR has special significance in this respect.[15] In addition, Article 6(2) of the EU Treaty provides that the Union shall 'respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States'.[16] The Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice, recognises fundamental rights that substantially correspond to those enshrined in the Convention.[17] On these grounds, fundamental rights affect both the validity and the interpretation of EC secondary law: the acts of the institutions must be interpreted consistently with the ECHR,[18] and when such an interpretation is impossible, so that a contrast emerges between a given act and the Convention, the former is subject to the ECJ's review of legality under Article 230 of the EC Treaty.[19]

As far as judicial cooperation is concerned, the ECJ had especially relied on the ECHR and on the Strasbourg Court's case-law, for the purpose of identifying the specific guarantees that form part of the 'right to a fair trial' enshrined in Article 6 of the ECHR (1), and ascertaining whether those rights are respected in the circumstances of the case (2). In both respects, *Weiss und Partner* follows the approach taken by the Court in its previous case-law.

Diritto internazionale privato e diritto comunitario, Padova 2004, p. 95 *et seq.*; GUINCHARD F., 'Procès équitable (Article 6 CESDH) et droit international privé', in: NUYTS A./WATTÉ N. (eds.), *International civil litigation in Europe and relations with third States*, Bruxelles 2005, p. 232 *et seq.*; FAWCETT J., 'The Impact of Article 6(1) of the ECHR on Private International Law', in: *I.C.L.Q.* 2007, p. 1 *et seq.*

[13] The statement occurs frequently in the case law of the ECJ: see, recently, ECJ, 18 December 2008, C-349/07, *Sopropé*, awaiting publication in the ECR, para. 33.

[14] See, *inter alia*, ECJ, 18 January 2007, C-229/05 P, *Ocalan*, ECR 2007, p. I-439, para. 76.

[15] See, *inter alia*, ECJ, 12 June 2003, C-112/00, *Schmidberger*, ECR 2003, I-5659, para. 71.

[16] Opinion 2/94, ECR 1996, p. I-1759, para. 33.

[17] OJ 2007 C 303, p. 1. Procedural guarantees are specifically dealt with by Article 47 of the Charter.

[18] ECJ, 26 June 2007, C-305/05, *Ordre des barreaux francophones et germanophones*, ECR 2007, p. I-5305, paras 28 and 29.

[19] See, recently, ECJ, 3 September 2008, C-402/05 P and C-415/05 P, *Kadi*, awaiting publication in the ECR, para. 284 *et seq*.

1. Identifying the Components of the 'Right to a Fair Trial'

Procedural fairness under Article 6 of the ECHR consists of various components. The particular guarantees laid down in this provision in connection with criminal proceedings[20] represent constituent elements of the general concept of a fair trial embodied in Article 6(1):[21] although important differences may exist between 'civil' guarantees and guarantees connected with a criminal charge (the latter being in principle more stringent than the former), it is generally accepted that 'criminal' guarantees contribute to the determination of the scope and contents of the 'general' right to a fair trial recognised by Article 6(1).[22] According to the European Court of Human Rights, one of the main elements of a 'fair hearing' under Article 6(1) is 'the right to adversarial proceedings': it implies that 'each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision'.[23] The right to adversarial proceedings must be read in conjunction with the 'principle of equality of arms', which 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent'.[24] On these grounds, the ECJ has recognised, with regard to judicial cooperation in civil matters, the existence of a general 'right

[20] Article 6(3): 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

[21] See, *e.g.*, European Court of Human Rights, 20 November 1989, *Kostovski v. The Netherlands*, in: *Publications of the European Court of Human Rights, Series A - No 166*, para. 39, and 21 January 1999, *Van Geyseghem v. Belgium*, in: *Reports of Judgments and Decisions* 1991-I, para. 27.

[22] The issue is dealt with extensively, for example, by CHIAVARIO M., 'Articolo 6 - Diritto ad un processo equo', in: BARTOLE S./CONFORTI B./RAIMONDI G., *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova 2001, p. 192 *et seq.*

[23] European Court of Human Rights, 18 March 1997, *Mantovanelli v. France*, in: *Reports of Judgments and Decisions*, 1997-II, para. 33. See also, *inter alia*, European Court of Human Rights, 20 February 1996, *Vermeulen v. Belgium*, in: *Reports of Judgments and Decisions* 1996-I, para. 33.

[24] European Court of Human Rights, 18 February 1997, *Niderošt-Huber v. Switzerland*, in: *Reports of Judgments and Decisions* 1997-I, para 23.

to be heard', including 'the right to be notified of procedural documents', and has interpreted the relevant EC provisions accordingly.[25]

The decision in *Weiss und Partner* followed a similar line of reasoning. If the defendant was not afforded a genuine opportunity to become aware of the contents and legal implications of the document instituting the proceedings, his right to adversarial proceedings would be largely ineffective. This does not mean that fairness, under Article 6 of the ECHR, implies an unconditional right to a translation of every element relied on by the plaintiff for his submissions. Article 6(3)(a) of the ECHR, as noted by the ECJ, requires, in criminal matters, that the indictment be such as to 'enable the person charged to be informed […] of the cause of the accusation against him' and 'of the detailed legal characterisation of those facts': the rights of the defence are nevertheless not undermined, according to the Convention, 'by the mere fact that the indictment does not include the evidence in support of the facts on which the accused stands charged'.[26] The ECJ also took note of the fact that the European Court of Human Rights, ruling in respect of Article 6(3)(e) of the ECHR, concerning the right to an interpreter for those who are charged with a criminal offence, held that 'that right does not go so far as to require a written translation of all items of written evidence or official documents in the procedure'.[27] The ECJ then concluded that said right should, *a fortiori*, not be interpreted as going so far *in civil and commercial matters*.[28]

2. Assessing Whether Procedural Rights Have Been Respected in the Circumstances

The European Court of Human Rights has frequently said that, in assessing whether procedural guarantees enshrined in Article 6 have been observed in the circumstances, one has to ascertain whether the proceedings 'considered as a whole' meet the fairness requirements established by this provision.[29] The ECJ has itself applied this test when dealing with legal instruments concerning judicial

[25] ECJ, 2 May 2006, C-341/04, *Eurofood IFSC*, ECR 2006, p. I-3813, para. 60 *et seq.*, concerning Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings.

[26] *Weiss und Partner*, para. 70, relying, in particular, on European Court of Human Rights, 25 March 1999, *Pélissier and Sassi v. France*, in: *Reports of Judgments and Decisions* 1992-II, para. 51.

[27] European Court of Human Rights, 19 December 1989, *Kamasinski v. Austria*, in: *Publications of the European Court of Human Rights, Series A - No 168*, para. 74.

[28] *Weiss und Partner*, para. 71.

[29] See, *inter alia*, European Court of Human Rights, 12 July 2008, *Schenk v. Switzerland*, in: *Publications of the European Court of Human Rights, Series A - No 140*, p. 29, para. 46 *et seq*.

cooperation.[30] Similar considerations have influenced the Court's case-law in the field of judicial cooperation *in civil matters*.[31]

The Court's decision in *Weiss und Partner* appears to be in line with this approach. Given that fairness must be assessed in light of the proceedings 'considered as a whole', and not in connection with the application taken alone, the right to a fair trial may not be infringed where the initial lack of a translation of an essential annex is remedied in a timely fashion by the applicant.[32] It is also worth recalling, from this point of view, that the 'language regime' examined by the ECJ in *Weiss und Partner* is the regime applicable to service of the document *instituting the proceedings*. This is, indeed, a crucial moment for the defendant, being the moment in which litigation strategies are usually elaborated. Yet, in order to assess the respect of fairness requirements, it may be appropriate to verify whether the defendant has subsequently been afforded – under relevant national rules and for reasons unrelated to service – a genuine opportunity of knowing, in a language he understands, the evidence submitted by the applicant so as to 'react' to it, as the case may be.

B. The Policies Underlying Judicial Cooperation in Civil Matters within the EC

The conclusion reached by the ECJ in *Weiss und Partner* appears to be influenced to a large extent by the objective of the Service Regulation of assuring efficiency and speed to cross-border judicial procedures between the Member States. While assuming that effectiveness of cooperation plays a prominent role in the interpretation of the Service Regulation (1), the Court recognised that special protection should be due, in this area, to parties in a particularly weak position (2). Both elements reflect general policies of EC law in the field of judicial cooperation in civil matters.

---

[30] ECJ, 16 June 2005, C-105/03, *Pupino*, ECR 2005, p. I-5285, para. 60.

[31] The Court, while stressing that 'proceedings culminating in judicial decisions' must be 'conducted in such a way that the rights of the defence are observed', held in *Denilauler* that EC rules on the enforcement of judgments are 'fundamentally concerned with judicial decisions which […] have been, or *have been capable of being*, the subject […] of an inquiry in adversary proceedings' (ECJ, 21 May 1980, C-125/79, ECR 1980, p. 1553 ss., para. 13; emphasis added). Having reiterated that a judgment cannot be recognized or enforced under the EC rules if the defendant has not had an opportunity of defending himself in the State of origin (ECJ, 16 June 1981, C-166/80, *Klomps*, ECR 1981, p. 1593, para. 9), the Court held in *Hengst Import* that such opportunity is not impaired where enforcement is sought for a payment injunction issued by a national court following an *ex parte* application, provided that the defendant is *subsequently* entitled to oppose the order before the expiry of a given time-limit (ECJ, 13 July 1995, C-474/93, ECR 1995, p. I-2113, para. 14 *et seq.*).

[32] *Weiss und Partner*, para. 77. The possibility of remedying an initial lack of translation had already been contemplated by the Court in interpreting the Service Regulation: ECJ, 8 November 2005, C-443/03, *Leffler*, ECR 2005, p. I-9611, para. 53.

1. The Prominent Role of Effectiveness of Cooperation

The interpretation of Article 8 followed by the Court in *Weiss und Partner* seems to satisfy the objective of effectiveness sought by the Regulation to the largest possible extent, while providing the addressee with a protection that barely exceeds the *minimum* level required by the ECHR.[33] The 'liberality' of the Court's approach is confirmed by the possibility afforded to the applicant of remedying the initial lack of translation by subsequently providing a translation of any 'essential' annex: although, as a principle, the date of service of a document is the date on which the document *accompanied by the translation* is served in accordance with the law of the Member State addressed, where a document has to be served within a particular period, the date to be taken into account with respect to the applicant is the date of the service of the *initial* document.[34]

The option taken by the ECJ appears to be in line with the general trends of EC law in this area. Relying on Article 65 of the EC Treaty, the institutions have decidedly pursued the goal of simplifying judicial procedures with cross-border implications, in order to assure the proper functioning of the internal market. Mutual trust of the Member States in their legal systems and judicial institutions has been seen as a general justification of such actions.[35] Simplification has touched upon several aspects of civil procedure, including aspects that call into question the preservation and effective enjoyment of fundamental safeguards, such as those relating to the use of language in judicial proceedings.[36] Regulation No

[33] The Court has repeatedly stated that although legal instruments in the field of judicial cooperation are intended to secure the simplification of formalities governing cross-border proceedings, that aim cannot be attained by undermining in any way the right to a fair hearing. See, *inter alia*, ECJ, 11 June 1985, C-49/84, *Debaecker*, ECR 1985, p. 1779, para. 10; ECJ, 3 July 1990, C-305/88, *Isabelle Lancray SA*, ECR 1990, p. I-2725, para. 21; ECJ, 16 February 2006, C-3/05 *Verdoliva*, ECR 2006, p. I-1579, para. 26. The Court's approach in *Weiss und Partner* does not itself contradict this statement, provided that the elements of the right to a fair hearing are regarded as 'minimum' requirements. It is beyond the scope of this paper to determine whether practical implications would ensue from the adoption of a different approach as to the relationship between judicial cooperation and fundamental rights, *i.e.* an approach that, instead of just avoiding the infringement of 'minimum' rights, was primarily intended to *promote* procedural values (good administration of justice, trust in judicial authorities, etc.) as part of a strategy aimed at achieving determined political or economical interests (market integration, enhanced freedom of movement, etc.).

[34] *Weiss und Partner*, para. 77, relying on ECJ, 8 November 2005, C-443/03, *Leffler*, ECR 2005, p. I-9611, para. 65. See, today, Article 8(3) of the 2007 Service Regulation.

[35] See, for example, ECJ, 2 May 2006, C-341/04, *Eurofood IFSC*, ECR 2006, p. I-3813, para 39 *et seq.* See also ECJ, 15 February 2007, C-292/05, *Lechouritou*, ECR 2007, p. I-1519, para. 44.

[36] Whether fairness is *adequately* assured by EC legislation aimed at simplifying transnational proceedings is debated. See, among others, on this topic SEATZU F., 'Le garanzie del diritto alla difesa del debitore nel Regolamento n. 805/2004 istitutivo del titolo esecutivo europeo per crediti non contestati', in: BOSCHIERO N./BERTOLI P. (eds.), *Verso un*

861/2007 of 11 July 2007, establishing a European Small Claims Procedure,[37] is illustrative in this respect. The Regulation aims at simplifying and speeding up litigation concerning small claims in cross-border cases, by offering an optional tool (*i.e.* a set of procedural rules adopted under Article 65(c) of the EC Treaty) in addition to the possibilities existing under the laws of the Member States. Article 6 of the Regulation deals specifically with translation requirements applicable to judicial documents issued in the framework of the new procedure, providing, *inter alia*, that the claim form by which proceedings are commenced 'and any description of relevant supporting documents' (*just* the description) shall be submitted in the language of the tribunal.[38] The provision allows the addressee to refuse to accept a document where it is not in the official language of the Member State addressed or in a language which the addressee understands. Yet the only consequence of such a refusal is that the tribunal shall inform the other party 'with a view to that party providing a translation of the document'.[39] The practical implications of this rule do not differ substantially from the interpretation of Article 8 of the Service Regulation provided in *Weiss und Partner*.

2. The Special Protection Due to Weaker Parties

The interpretation followed by the Court in respect of translation requirements laid down in the Service Regulation is, as has been seen, a 'liberal' one. Yet, it appears that the Court itself realised that some situations should fall outside the scope of its ruling. Stating that contractual stipulations regarding the use of a certain language may be treated as evidence for the purpose of determining whether the addressee is entitled to refuse to accept the act to be served for 'linguistic' reasons, the ECJ referred explicitly to the case of a contract concluded by the addressee 'in the course of his business'.[40] Thus, it seems that in applying the rule of interpretation developed in *Weiss und Partner*, one should ascertain whether the language agreement entered into by the parties relates to the 'commercial activity' pursued by the addressee, or not.[41] Where this condition is not met, special caution is required on the part of the national court in assessing whether minimum guarantees have been observed in the circumstances.[42]

'ordine comunitario' del processo civile: pluralità di modelli e tecniche processuali nello spazio europeo di giustizia, Napoli 2008, p. 45 *et seq.*

[37] OJ 2007 L 199, p. 1.

[38] Article 6(1).

[39] Article 6(3).

[40] *Weiss und Partner*, para. 88; see also para. 91.

[41] The expression 'commercial activity' is employed, in a different context, by Article 14(1) of Regulation No 864/2007 of 11 July 2007 ('Rome II') on the law applicable to non-contractual obligations (OJ 2007 L 199, p. 40).

[42] *Cf.* AG Trstenjak's opinion of 29 November 2007 in the framework of the ECJ's proceedings, para. 82.

Protection of parties regarded as being weaker is one the policies underlying judicial cooperation in civil matters within the EC. Special rules applicable to consumer contracts and individual employment contracts may be found, for example, in the 'Brussels I' Regulation,[43] as well as in Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ('Rome I').[44] It is therefore plausible that, in the Court's view, proceedings involving such parties (and possibly other 'weak' parties)[45] imply a high degree of protection as far as 'linguistic' guarantees are concerned, too.

C. The Member States' Legal Systems and the Margin of Appreciation Vested in National Courts

EC legislation in the field of judicial cooperation does not purport to replace national rules of civil procedure in their entirety. *Complete* uniformity of provisions governing proceedings with a cross-border element may in fact not always be necessary[46] and could sometimes prove to be unfeasible in practice. The Member States' legal systems thus retain important functions in this area. National provisions may in fact be required to 'supplement' EC law: in interpreting and applying domestic provisions, national authorities are under the obligation (according to Article 10 of the EC Treaty) to ensure the full effectiveness of the acts of the institutions, in compliance with their objectives.[47]

In *Weiss und Partner*, the ECJ recognized the importance of the role played by domestic law and national courts in ensuring that a fair balance is struck between effectiveness of cooperation and protection of the addressee under the Service Regulation. As a matter of fact, the Member States' rules of civil procedure differ significantly as to the issues dealt with by the decision,[48] and a relatively wide margin of appreciation must be considered to be vested in national judicial authorities. It is for the national court to determine whether the contents of the

[43] Articles 15-17 and 18-21.

[44] OJ 2008 L 177, p. 6. Articles 6 and 8.

[45] Special protection should also be due, for example, to individuals 'to whom maintenance is owed or is alleged to be owed' according to Regulation No 4/2009 of 18 December 2008 on maintenance obligations (OJ 2009 L 7, p. 1).

[46] Under the test of proportionality provided for by Article 5 of the EC Treaty.

[47] See generally on this issue, FRANZINA P., 'Il coordinamento tra *lex fori* e norme uniformi nell'accertamento del titolo di giurisdizione secondo il regolamento (CE) n. 44/2001', in: *Riv. dir. int.* 2004, p. 348 *et seq.*

[48] *Weiss und Partner*, para. 43: 'the number and nature of documents which must be annexed to a document instituting proceedings vary considerably according to the legal system concerned. Under some systems, such a document need only contain the subject-matter and a summary of the pleas of fact and law of the application, the documentary evidence being communicated separately, whereas under other legal systems, such as German law, the annexes must be produced at the same time as the application and form an integral part of it'.

document instituting the proceedings enable the defendant to identify the subject-matter and the cause of action; when the national court considers that the contents are inadequate in this regard, on the grounds that certain necessary information relating to the application is to be found in the annexes, it must endeavour to resolve the problem in accordance with its national procedural law, while 'according maximum protection to the interests of both parties to the dispute'.[49]

The ECJ does not state explicitly *how* discretion should be exercised in similar circumstances, apart from saying – as has been previously mentioned – that the applicant 'could' be afforded the opportunity of remedying the initial lack of translation of an essential annex by forwarding the said annex in the language provided for by Article 8. It is safe to assume that, in order to act consistently with the Regulation, State courts may take into account (and balance, as the case may be) values that appear to be shared by Member States generally as well by the EC, such as countering procedural bad-faith,[50] reducing costs[51] and avoiding undue delay in judicial proceedings.[52]

National courts' discretion may impair legal certainty, at least to a certain degree. This is probably inevitable, as long as EC rules governing judicial cooperation in civil matters are incomplete. It should nevertheless be stressed that a State court's discretion may provide a particularly fine-tuned balance of the different policies involved in litigation, in light of the particularity of the case and of the procedural rules applicable in the circumstances.

IV. Conclusion

The ECJ's decision in *Weiss und Partner* shows that rules governing cross-border service of documents within the EC may be applied practically and effectively without substantially impairing procedural fairness. National provisions and national courts' discretion play – within the guidelines provided by existing rules, as interpreted by the ECJ – an important role in striking a balance between competing policies in this field. A relatively wide margin of appreciation is afforded to national judicial authorities in order to secure the objectives of judicial cooperation, while preserving fundamental procedural safeguards, as understood and applied by

[49] *Weiss und Partner*, para. 76 *et seq.*

[50] *Cf.* ECJ, 8 November 2005, C-443/03, *Leffler*, ECR 2005, p. I-9611, para. 52.

[51] Reducing the costs of transnational litigation is one of the EC's concerns in this field: see, for example, Article 1(1)(a) of Regulation No 1896/2006 of 12 December 2006, creating a European Order for Payment Procedure (OJ 2006 L 399, p. 1), and Article 1 of the European Small Claims Procedure Regulation.

[52] Article 47(2) of the Charter of fundamental rights, using almost the same wording as Article 6(1) of the ECHR, recognizes the right 'to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal previously established by law' (emphasis added).

the Member States and the EC itself. Practice will tell whether this approach – based on the assumption that diversity of national rules and the discretion of national judicial authorities are not necessarily an obstacle to a balanced achievement of *supranational* goals – will actually improve fairness, effectiveness and legal certainty in the transnational service of documents.

REGULATION (EC) 2201/03 AND ITS PERSONAL SCOPE

ECJ, NOVEMBER 29, 2007, CASE C-68/07, *SUNDELIND LÓPEZ*[*]

Marta REQUEJO ISIDRO[**]

I. Introduction

Mrs Sundelind, a Swedish national, is married to Mr López Lizazo, a Cuban. While living together the couple resided in France. The wife still lives in France, whereas her husband resides in Cuba. Mrs. Sundelind filed for divorce to the Court of First Instance in Stockholm. She based her claim on the international jurisdiction rules applicable under Swedish law. Her petition was dismissed on the ground that, under article 3 of Regulation (EC) 2201/2003, the issue was within the sole jurisdiction of the French judiciary, and that, accordingly, article 7 of the Regulation prohibits the application of autonomous Swedish legislation. Mrs. Sundelind appealed the dismissal to the Högsta Domstolen (Swedish High Court), which in turn referred the following question to the ECJ for a preliminary ruling: 'Where the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, may the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of Regulation No 2201/03], even though a court in

[*] *O.J.*, C, n° 22, of January 26, 2008.

[**] Lecturer in Private International Law, Santiago de Compostela; member of the Group of Research *De Conflictu Legum*.

Yearbook of Private International Law, Volume 10 (2008), pp. 579-591

Printed in Germany

another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?'.

On November 29, 2007, the ECJ responded that 'Articles 6 and 7 of Regulation No 2201/2003 are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.'

With this response, the ECJ ended any argument concerning how articles 6 and 7 of Regulation (EC) 2201/03 are interconnected. The debate, however, still lingers. As was only to be expected, the ECJ's response is limited to the facts of the *Sundelind* dispute; other questions relating to the articulation of the referenced precepts remain unsolved (although possibly not for long).[1]

Before the ECJ ruling in *Sundelind*, there were several different views on the connection between articles 6 and 7. Some were consistent with the ECJ resolution,[2] while others were radically different. According to the opposing view, article 6 defines the personal scope of application of the Regulation, as does article 4 in Regulation (EC) 44/01.[3] A review of the impact and application of Regulation (EC) 2201/03 in the Member States confirms this general uncertainty.[4] The doubts surrounding the application of articles 6 and 7 were so great that some countries, such as Holland,

---

[1] *See infra* section V, on the future of arts. 6 and 7 of the Regulation in the *Commission Proposal amending Regulation (EC) 2201/2003*, COM 2006/0399 final.

[2] HAU W., 'Das System der internationalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht', in: *Zeitschrift für das gesamte Familienrecht* 2000, pp. 1333-1341, p. 1341; KOHLER Ch., 'Internationales Verfahrensrecht für Ehesachen in der Europäischen Union: Die Verordnung *Brüssel II*', in: *Neue Juristische Wochenschrift* 2001, pp. 10-15, p. 11; SCHACK H., 'Das neue Internationale Eheverfahrensrecht in Europa', in: *RabelsZ* 2001, pp. 615-633, p. 631; DE BOER TH. M., 'Jurisdiction and Enforcement in International Family Law: a Labyrinth of European and International Legislation', in: *Netherlands International Law Review* 2002, pp. 307-351, p. 321; ARENAS GARCÍA R., 'Nota al Reglamento núm. 1347/00', in: *Anuario Español de Derecho Internacional Privado* 2003, pp. 417-436, pp. 433.

[3] KENNETT W., 'Current Developments: Private Internacional Law', in: *I.C.L.Q.*, 1999, pp. 467-472, p. 468; BONOMI A., 'Il Regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori', in: *Riv. Dir. Int.* 2001, pp. 298-346, pp. 329-330, and footnote nº. 44. In Germany *see* DILGER J., *Die Regelung zur internationalen Zuständigkeit in Ehesachen in der Verordnung (EG) nr. 2201/2003*, Tübingen 2004, nº. 285. In Spain, SÁNCHEZ JIMÉNEZ M.A., 'Carácter exclusivo de los foros del Reglamento 1347/2000. La oscura redacción de sus artículos 7 y 8', in: *El derecho de familia en el siglo XXI. Aspectos internacionales*, ed. by CALVO CARAVACA A.L./CASTELLANOS RUIZ E., Madrid 2004, pp. 741-774, nº 5. For a critical comment on *Sundelind see* GARAU SOBRINO F., 'Nota', in: *REDI*, pending publication.

[4] *Brussels II bis: its Impact and Application in the Member States*, BOELE-WOELKI K./GONZÁLEZ BEILFUSS C. (eds.), Antwerpen-Oxford 2007.

adopted – for pragmatic reasons – residual fora rules identical to those established in the Regulation.[5]

The *Sundelind* decision clarifies – to some extent – the system's *modus operandi*. A domestic court that receives a divorce, annulment, or separation petition must determine whether it has international jurisdiction according to the Regulation only, without considering the nationality or habitual residence of the defendant. If the answer is 'no,' the court still has to verify whether another Community (domestic) court has jurisdiction under the Regulation. It is only if the response to this second question is also negative that the court may turn to its internal legislation to evaluate its jurisdiction; at this point, the defendant's personal characteristics become relevant (how, is another issue).[6] The ECJ has ruled out two the following two interpretations of the relevant provision of the Regulation: (1) one sustaining that the Regulation does not apply to nationals of non-Community States who do not habitually reside in the Community, and (2) a second in favour of using both Community *and* autonomous fora against those defendants.[7]

We will turn now to the arguments supporting this configuration of the system; a reference to the pending issues and an evaluation of the whole will follow. We will end with a quick look at some proposals for the future.

II. The Arguments of the ECJ – Rationale of the System

A. Free Movement of Individuals in the Community

The *Sundelind* decision is based on poor grounds. This might be because it was adopted without the contribution of an Advocate-General, which enables a faster decision, but based on weaker grounds.[8] These grounds are two-fold: the first (No. 22), general, refers to the weakness of any *a contrario* interpretation of legal provisions; in this case, of Article 6 of the Regulation. The second (No. 26), special – meaning limited to the Community sphere –, relates to the objectives established in recitals 4 and 8 of the Preamble to Regulation (EC) 1347/00: to enable people to

[5] MONSTERMANS P.M.M., 'Report on Holland', in: *Brussels II bis: its Impact* (note 4), pp. 217-235, pp. 223-225. What this means is the absence of residual fora when the circumstances of Art. 3 of the Regulation are not given. Consider the reason for maintaining national fora – to ensure access to European courts by citizens established in other States; has Holland failed to respect the principle of Community loyalty?

[6] *Infra*, section III.

[7] Option suggested by HAU W. (note 2), p. 1341; and possibly by Italy in its remarks on the *Sundelind* decision.

[8] BORRÁS-RODRÍGUEZ A., 'Exclusive and Residual Grounds of Jurisdiction on Divorce in the Brussels II bis Regulation', in: *IPRax* 2008, pp. 233-235.

move as widely as possible, which is a goal linked to the uniformity of 'jurisdictional conflict rules' and the simplification of the recognition and enforcement of judicial resolutions.

Bearing in mind the original meaning and scope of the freedom of movement of individuals,[9] an explanation based on it does not suffice.[10] It has been fairly said that 'the attempt to link the text to the free movement of persons is bound to fail when considering that said Regulation can be applicable to multiple cases in which the free intra-Community movement of persons is not involved.'[11] As an offspring of the personal scope of the Regulation, its jurisdictional rules will cover situations of 'external internationality':[12] that is, international cases lacking *trans-border* Community implications,[13] or indeed *any* Community implications.[14] Consider these

---

[9] FALLON M., 'Libertés communautaires et règles de conflits de lois', in: *Les conflits de lois et le système juridique communautaire*, dir. by FUCHS A./MUIR-WATT H./PATAUT E., Paris 2004, pp. 31-80, pp. 48-55, sets out the nuances acquired by this freedom having effect on the conflict of laws (also, in our opinion, in the field of jurisdiction). In ECJ jurisprudence, *see* ECJ Decision of October 2, 2003, C- 148/02, *García Avelló*, and our comments 'Estrategias para la comunitarización: descubriendo el potencial de la ciudadanía europea', in: *Revista Jurídica Española La Ley*, November 21, 2003, and ECJ Decision of October 19, 2004, C- 200/00, *Chen.*

[10] According to BOER TH.M. (note 2), p. 312, another objective for the field of Private International Law within the framework of the Amsterdam Treaty is 'Promoting the compatibility of the rules applicable in the member States concerning the conflict of laws and of jurisdiction.' It would probably better explain the personal scope of Regulation (EC) 2201/03 – except for the fact that the outcome is much more than the promotion of compatibility (it is pure and simple unification).

[11] ARENAS GARCÍA R. (note 2), p. 430; and later, 'it can affect cases with absolutely no connections to the free movement of persons.'

[12] We have borrowed the formula from BERGE J.S., 'La double internationalité interne et externe du droit communautaire et le droit international privé', in: *Travaux du Comité Français de Droit International* 2004-2005, pp. 29-51.

[13] Of course, it can be argued that these implications *potentially* do exist: one of the spouses might wish to move to another member State at any time, taking his/her status of 'married' with him/her. The argument is a dangerous one for obvious reasons. In this context of doubts concerning the rationale for the personal scope of the Regulation, *see* the 'Legal aspects' of the Commission Proposal amending Regulation (EC) 2201/2003, COM 2006/0399 final: 'The proposal refers to the provisions … which are only relevant in international situations, when the spouses live in different member States or have different nationality. *This meets the trans-border requirement established in article 65 (…)*'; the italics are ours. Also interesting, although with regards to Regulation (EC) 44/01, is PATAUT E., 'Qu'est-ce qu'un litige intracommunautaire. Réflexions autour de l'article 4 du Règlement de Bruxelles I', in: *Justice et droits fondamentaux, Mélanges J. Normand*, Paris 2003, pp. 365-385.

[14] One is tempted to conclude that the so called 'intra-Community' and 'extra-Community' categories did not exist prior to the Regulation; that is, that the Regulation *has created* them.

examples: (1) litigation between a European citizen who has always resided in the country of his/her nationality – State A – and the national of a non-Community country who moved to State A upon marriage and, after a crisis, either remains there or returns to his own country;[15] (2) the case of a Community national who married a foreigner and always lived with him outside Europe, but returns to her own country of origin when the marriage ends;[16] (3) litigation between two non-Community individuals who have lived in a member State for more than a year; (4)the case of a spouse, who is a national of a non-Community country, who has been living in a member State for a year after leaving the other spouse, also a non-Community national, in their country of origin and last common place of residence.[17] In these last two examples, the parties are not even the natural beneficiaries of free movement, which is defined by Article 17 of the EC Treaty as those who have European citizenship derived from the nationality of a member State.

Uniform rules of jurisdiction, then, do not limit their incidence to cases naturally related to the free movement of persons within the Community. The truth is that to establish a personal delimitation fully consistent with this freedom would have required a complex, meticulous differentiation between cases; in practice, this would require a case-by-case basis examination that would encumber the instrument's application. Another possibility for defining the Regulation's scope *ratione materiae* would have been to resort to a single personal criterion, along the lines of Article 4 of Regulation (EC) 44/01[18]: but, the difficulty inherent in getting a consensus regarding a point of reference for Community integration is understandable. Besides, the introduction of an element of personal delimitation such as the place of residence of the parties would greatly limit the operativity of jurisdictional criteria.

B. Free Movement of Decisions in the Community

In our opinion, there is only an indirect and partial correspondence between the free movement of persons and the personal scope of Regulation (EC) 2201/03. Its real basis lies in one of the cornerstones of the European Community: the idea of mutual trust, translated into the impulse to mutually recognize and enforce judicial decisions. Within the material limits of the Regulation, mutual trust has reached – so far – an

[15] The opposite case is also covered: the non-European resident stays in the Community while the European spouse moves out of Europe.

[16] This and the previous case could be classified as 'semi-Community,' in as much as they affect a European citizen.

[17] The meaning of 'residence' for the purposes of Art. 3 of the Regulation is evidently important here (in this respect, LAMONT R., 'Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law', in: *Journal of Private International Law* 2007, pp. 261-281).

[18] Expressly in favour, BOER TH.M. (note 2), p. 323.

uncommon scope. To do so, the Regulation reduces[19] the opportunities where exorbitant national fora can be use to a minimum.[20] The Regulation's chapter on jurisdiction, although suitable for operating independently from the rest of the provisions, owes its existence and also its delimitation to its relation with chapter III. The adoption of common fora is primarily justified by the aim to foster the rapid acceptance of judgments from one State in another. As a matter of fact, a personal delimitation such as that of Regulation (EC) 44/01 would not necessarily have hampered a member State's acceptance of the decision adopted in another member State according to an autonomous jurisdiction criterion: a rule parallel to Article 4 of Regulation (EC) 44/01 – a rule which indeed exists in Article 7 – would have sufficed for these decisions to benefit from the Community system of recognition.[21] However, this option would have lead to more domestic decisions profiting from the system, even if they were based on exorbitant fora.[22] Such an effect was too costly; this may be why Regulation (EC) 2201/03 also covers international, but not internal Community cases. We can only wonder whether the States were aware of what this meant, in terms of assignment of competences to the Community, at the time the Regulation was discussed.[23] Whether the principle of proportionality governing relations between the Community and States has been observed or surpassed is also an open question.[24]

In view of the above, Regulation (EC) 2201/03 is in line with other Community legislative measures also adopted in relation to the domestic market (although based on Article 95 of the EC Treaty). The ECJ has indicated, with regard to such measures, that '(...) recourse to Article 100a of the Treaty as a legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis,' inasmuch as what matters is 'that the measures adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market.'[25] The Commission Proposal amending Regulation (EC) 2201/2003 also says: 'The Community institutions have a certain margin of discretion in determining whether a measure is necessary for the proper functioning of the internal market

[19] To fully eliminate in a close future: *see* Commission Proposal… COM 2006/0399 final. The suppression of exorbitant fora is not a Community feature: its *extent* is.

[20] This reasoning can be found in passing in LAGARDE P., 'Informe al *Proyecto de Heidelberg*', in: *REDI* 1994, vol. 1, pp. 466-474, nº 3; HAU W. (note 2), p. 1341.

[21] LAGARDE P. (note 20), nº 8.

[22] Or to reintroduce the examination of the grounds of jurisdiction of the original judge: LAGARDE P. (note 20), nº 3.

[23] Accusing the ECJ of 'creating law', GARAU SOBRINO F. (note 3).

[24] POCAR F. formulates this question in relation to the proposal to reform Regulation (EC) 2201/03 ('Quelques remarques sur la modification du règlement communautaire nº. 2201/2003 en ce qui concerne la compétence et la loi applicable au divorce', in: *Mélanges en l'honneur de M. Revillard*, Paris 2007, pp. 245-252, p. 249). It is certainly applicable to the ECJ's interpretations of the legal texts.

[25] ECJ Decision of May 20, 2003, C-465/00, *Rechnungshof*, nº 41 and nº 42.

(…)', in which 'free movement of judgments' is presented in its own right, supporting another Community freedom.

III. Maintenance of Residual Fora

As we announced in the Introduction, the ECJ solves only some of the doubts surrounding the joint application of Articles 6 and 7 of Regulation (EC) 2201/2003. Pursuant to Article 7, some autonomous jurisdictional rules have survived within the Community system. There is a technical and a political reason for this survival. The technical reason is the need to ensure access to justice for European citizens residing in non-Community States.[26] The political reason is the attempt to ensure a certain degree of equilibrium in Community-State relations: 'le droit uniforme ne prétend pas supprimer toute liberté des États membres à l'égard des contentieux échappant clairement à l'espace commun (…) Si aucune situation internationale n'est exclue du champ du Règlement, toutes ne jouissent pas d'une égale protection au sein de l'espace commun contre le jeu résiduel du droit international privé propre des États membres.'[27]

The decision in case C- 68/07 tips the scales toward uniform law, restricting the number of cases in which national jurisdictional rules can be applied[28]: only when the jurisdiction of a member State, supported by the Regulation itself, has been ruled out. However, the scope of the autonomous rules remains uncertain. Particularly controversial is the situation of a defendant-Community national that lives in a non-Community country; whereas some authors would submit him/her to the entire weight of the residual rules,[29] others consider him/her fully protected by the privilege of nationality.[30] For a third group, such protection exists, but only in relative terms:

---

[26] *Report explaining the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Borrás Report)*, *ECJ*, C, nº 221, of July 16, 1998, nº 47. Some cases are still uncovered: *see* Green Paper on applicable law and jurisdiction in divorce matters, COM (2005) 82 final, example nº 4.

[27] ANCEL B./MUIR WATT H., 'La désunion européenne: le Règlement dit *Bruxelles II*', in *Rev. crit. dr. int. pr.* 2001, pp. 403-457, nº 6.

[28] What about the accompanying mechanisms? According to MCELEAVY P., 'Report on the United Kingdom', in: *Brussels II bis: its Impact* (note 4), pp. 309-322, p. 311, discretion, a typically British feature, will still be possible before 6 months are over; not afterwards.

[29] CALVO CARAVACA A.L./CARRASCOSA GONZÁLEZ J., *Derecho de familia internacional*, Madrid 2003, pp. 152-153. Critical and with multiple references for the opposite opinion, in ARENAS GARCÍA R., *Crisis matrimoniales internacionales. Nulidad matrimonial, separación y divorcio en el nuevo Derecho internacional privado español*, Santiago de Compostela 2004, p. 153.

[30] *See* references in DILGER J. (note 3), nº 272.

Article 6 prevents a Community national from being sued in *other* Community States; litigation against him/her according to residual fora could take place *only* in his/her own original country.[31]

Actually, this debate is of little consequence to the purposes of this Note; we would like nonetheless to express a personal view. We think that there are at least two elements speaking in favour of a limited resource to national fora: consistency with the thorough nature of Article 3 and the residual and *forum necessitatis* nature of autonomous fora. Residual fora should therefore not be used, for example, in cases when the defendant is living in a Member State but the time necessary to generate jurisdiction pursuant to Article 3 has not yet passed.[32]

Again in the context of the *Sundelind* decision, attention must be paid to the fact that in any of the aforementioned majority interpretations non-European defendants will suffer discrimination: not only because exorbitant jurisdictional criteria can be used against them, but also because according to Article 7.2, all 'European' claimants have expedite access to such fora, irrespective of the national system and the rationale of its fora (for instance, favouring its *own* nationals). This extension has been described by one author as an unnecessary provocation to other countries by the EU.[33] He also advises a restrictive interpretation of Article 7.2[34] or, better still, the suppression of exorbitant fora by the relevant (competent) legislator.

IV. Evaluating the System

A. Considering the 'European Integration' Objective

In the previous sections, we identified the reasons that Regulation (EC) 2201/03 does not provide for a complete resolution. The Regulation can be evaluated through its interpretation in *Sundelind*. Whether the process and grounds leading to this outcome are acceptable is a different issue. We have already seen discrepancies in the legal basis (and hence, competence) for adopting an instrument with a scope *ratione materiae* such as the Regulation's; disagreement with the 'channel' used to consolidate such an extension; uncertainties related to its necessity from an integration perspective; and criticism of its opportunity, in view of some of its implications, especially 'outside' of the Community. But this is not all.

[31] This idea is implicit in example 4 of the Green Paper, as indicated by GONZÁLEZ BEILFUSS C., 'Jurisdiction rules in matrimonial matters under Regulation *Brussels II bis*', in: *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, dir. by FULCHIRON H./NOURISSAT C., Paris 2005, pp. 53-67, pp. 59-60.

[32] SCHACK H. (note 2), p. 632.

[33] SCHACK H. (note 2), p. 632; HAU W. (note 2), p. 1341.

[34] *See* a proposal in MCELEAVY P., 'The Communitarisation Of Divorce Rules: What Impact For English And Scottish Law?', in: *I.C.L.Q.* 2004, pp. 605-642, p. 615.

The Regulation implies a cutback in the legislative faculties of autonomous legislators in favour of Community institutions in a wide range of situations. These cutbacks are experienced in cases of unquestionable Community interest; but they are also felt in cases connected to third States. Due to the number of fora in Article 3 and the way they work (alternatively), Regulation (EC) 2201/03 backs *favor divortii* – a result possibly not intended, at least not deliberately.[35] This outcome has received censure 'from within' the EU, in view of the differences between member States.[36] In our opinion, the *favor divortii* effect is even more censurable 'from without:' the philosophy of supporting marriage breakdowns applies also to international cases of little or no intra-Community significance as a result of the system's breadth.[37] It is true that the need to ensure Community policy has justified extending some jurisdictional rules scope of application: see for instance sections 3, 4, and 5 of chapter II of Regulation (EC) 44/01. But favouring the dissolution of marriage *is not* a Community policy. The absence of any rule similar to Article 16 of Regulation (EC) 1347/00 makes the situation even more delicate.[38]

B. Considering Access to Justice

A second criterion for evaluating Regulation 2201/03 focused on its status as a procedural instrument. As such, it has to obey a logic based on effective access to justice. In the field of international litigation this logic is two-fold: we talk of 'direct access' to justice and 'indirect access to justice,' meaning recognition and enforcement of a foreign jurisdiction's ruling.

'Direct access' to justice means that an individual can ask for jurisdictional action. In this respect, Regulation (EC) 2201/03 has earned a positive evaluation: it has been said that, as the situation (crisis) between the spouses cannot be solved out of court, they must be provided with access to justice. The Regulation provides such access.[39] This idea, however, again leads us to that of *favor divortii* and a certain

[35] The penchant *favor divortii* is now clear, in spite of some paradoxical results. With the interpretation of the ECJ in C- 68/07 there will be cases – *Sundelind* is one – in which the access to justice provided by the national system would have been more favourable to divorce.

[36] BARATTA R., 'Verso la comunitarizzazione dei principi findamentali del diritto di famiglia', in: *Riv. dir. int. pr. proc.* 2005, pp. 573-606.

[37] It should also be remembered that only favourable rulings (rulings awarding divorce, separation or nullity) benefit from the Regulation's recognition system.

[38] The goal of Article 16 [or Article 72 of Regulation (EC) 44/01] is to protect non-Community defendants from exorbitant fora, not from discrepancies regarding the material options; nevertheless, the provision will also display this effect.

[39] CARRASCOSA GONZÁLEZ J., 'Cuestiones polémicas en el Reglamento 1347/2000', in: *Mundialización y familia*, dir. by CALVO CARAVACA A.L./IRIARTE ÁNGEL J.L., Madrid 2001, pp. 213-239, p. 218, describing the plaintiff as the 'weak party'.

current of thought concerning family relations, thus taking us back to an argument previously discussed *supra*.

'Direct access' also means 'proximity' between the controversial situation and the competent jurisdiction, in order to guarantee (1) that both parties have true access to the Courts; (2) that the venues for such are foreseeable; and (3) that there is good administration of justice. The incorporation of the Regulation's fora has been welcomed from this perspective. For example, with regards to Spanish legislation, if we consider a petition for separation by two Paraguayan nationals, with the husband (the plaintiff) living in Spain and the wife (the defendant) in Paraguay, the Spanish courts have no jurisdiction over this petition according to Article 22 of the Judiciary Act (LOPJ). Thus, without the Regulation the plaintiff would be forced to litigate in Paraguay.[40]

But such an improvement is not always available. Regulation (EC) 44/01 requires a defendant be domiciled in a member State before it can be applied. This rule ensures procedural proximity when a claimant litigates in one of the 'special' fora (Article 5, Article 6).[41] This safety valve is missing from Regulation (EC) 2201/03. Pursuant to its delimitation, the instrument enables European jurisdictions to decide situations that, although linked to the Community to some degree, are clearly more closely related to third States. It also gives Member States jurisdiction over others of more than questionable proximity. Think about a case involving a European national and a third state national, both living in the third state. If the European spouse returns to his/her country of origin, the passage of six months will generate jurisdiction in Europe for any subsequent litigation.[42] The connection to Europe is also disputable when, after the break-up, the spouse (either a Community national or non-Community national) leaves the Member State where they had both been domiciled and moves out of Europe, while the other non-Community spouse moves to another Community State and resides there for more than a year.

All in all, it is defensible that the thoroughness of the Regulation's fora generally produce a comparatively better outcome than using Article 6 as the personal scope of the instrument. It certainly prevents non-European residents or non-Community nationals from being litigated against in a European country on autonomous – and their exorbitant fora – systems.[43] But, as a matter of fact, the autonomous rules are not always exorbitant: see Article 22.2 of the Spanish Judiciary Act (LOPJ) or

[40] CARRASCOSA GONZÁLEZ J. (note 39), p. 232.

[41] And there are reasons (either procedural or related to legislative policy) compensating for the potential lack of proximity in the fora which, like article 22, apply without considering the defendant's domicile.

[42] If the same couple lives in the Community and the non-Community national leaves after the break-up, the procedural 'sufficient connection' with Europe seems established. However, it is questionable whether the principle of 'access to justice with equality of arms' is being observed regarding the defendant. Equilibrium *inter partes* must be taken into account when establishing jurisdiction.

[43] *See* above section III, for this affirmation with regards to non-resident Community members and their privileged treatment.

Article 606ª, (1) 4 of the German ZPO.[44] Besides, hindering the use of unreasonable fora in terms of access to justice is not the Community legislator's responsibility. We have already contested whether he is responsible for cases of 'external internationality.' And finally, as we have also mentioned, the Regulation does not eliminate national fora: it includes them in the system by means of Article 7.1. Until one of the circumstances described in Article 3 is in place (or if it never arises), the claimant is able to make use of national legislation, to a greater or lesser extent depending on whether or not he is a Community national or not – *vid.* Art. 7.2 –, and whether or not the defendant is a Community national -Article 6. This possibility would also have existed without the Regulation. But it is due to the Regulation that the rulings made upon an exorbitant fora basis benefit from practically unconditional *ipso iure* recognition within the Community.

This leads us to the second aspect of the right of access to justice in the international arena: access through recognition and enforcement of foreign judgments. In this respect, Regulation (EC) 2201/03, as interpreted by the ECJ, clearly reinforces the free movement of decisions within the Community. But it also has another effect, one that has received no special awareness or concern: by covering cases with strong extra-Community links, the fact that 'access to justice by recognition' outside the Community has been ignored becomes more evident.[45] This shortcoming is likely to be a problem for individuals, Community citizens or not, who have asserted their claim before a European court pursuant to Article 3 of the Regulation. They run the risk of being involved in divorces (annulments and separations) that are valid in Europe but invalid elsewhere. This will also affect situations dependant on the success or failure of a marriage (alimony, dissolution and liquidation of the economic regime, succession, etc.).[46]

---

[44] Art. 22.2 LOPJ: 'En el orden civil, los juzgados y tribunales españoles serán competentes: 2. Con carácter general, cuando las partes se hayan sometido expresa o tácitamente a los juzgados o tribunales españoles, así como cuando el demandado tenga su domicilio en España'. Art. 606ª (1).4 ZPO: *'Für Ehesachen sind die deutschen Gerichte zuständig: (1) 4. wenn ein Ehegatte seinen gewöhnlichen Aufenthalt im Inland hat, es sei denn, dass die zu fällende Entscheidung offensichtlich nach dem Recht keines der Staaten anerkannt würde, denen einer der Ehegatten angehört'*.

[45] Are there no Courts outside the European Community? What should be the extent of protection against the risk of 'external internationality'? In this respect, *see* the Commission Communication entitled 'New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to court in «international» divorce proceedings' MEMO/06/287 of 17 July 2006, available on the Commission's website for the area of freedom, security and justice, which points out that the problem raised by the current text of Brussels II concerns the situation where no jurisdiction in the EU *or in a third State* has jurisdiction to deal with a divorce application' (the italics are ours).

[46] The fact that this could also occur under national systems does not remove this criticism.

C. Considering System Simplicity

Ultimately, could the delimitation of Regulation (EC) 2201/03 be justified by the system's 'smoother running'?[47] The lack of a *ratione personae* criterion in the style of Article 2 of Regulation (EC) 44/01 seems to ease the decision to apply Regulation (EC) 2201/03. Overall, however, not only is the system more complex in theory (there continues to be a need for distinctions): it is not being supported in practice. It has been said that as a result of delimitation operators will have to 'acquire the reflex of subjecting all litigation in matrimonial and parental matters to the filter of *Brussels II bis* before exploring other international or internal sources,' and take into account that the text's applicability depends on material, time, and space *but not personal* criteria.[48] Paradoxically, when the Brussels Convention was produced its rules were not extended to defendants who were domiciled outside of Europe to avoid 'surprising' unaccustomed judges.[49] A study conducted on practical application of Regulation 2201/03 reveals little awareness of its existence, little familiarity with its content, and a need for training.[50]

V. The Future

So far, we have described political, technical, and legal reasons for a certain degree of dissatisfaction with scope of application of European Union's jurisdictional and mutual recognition system regarding divorce, separation, and matrimonial annulment. None of our concerns, however, have been addressed in the Green Paper.[51] We

[47] The idea of enabling both the claimant to easily identify the court in which he may sue and the defendant to reasonably foresee the court in which he may be sued is often found in ECJ jurisprudence related to Regulation (EC) 44/01.

[48] NOURISSAT C., 'Le Règlement *Bruxelles II bis:* conditions générales d'application', in: *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, dir. by FULCHIRON H./NOURISSAT C., Paris 2005, pp. 1-9, p. 2.

[49] NUYTS A., *Study on residual jurisdiction (Final version dated 3 September 2007)*, <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>, No. 130, quoting P. Jenard.

[50] BOELE-WOELKI K./GONZÁLEZ BEILFUSS C., 'Summary report', in: *Brussels II bis: its Impact…*, pp. 23-40, p. 26. Categorical examples are also provided by NORD N., 'Règles de compétence en matière de divorce', within the framework of the discussion on *Dernières actualités en Droit International Privé*, Centre de Droit Privé Fondamental, Strasburg, April 13, 2007, <http://www-cdpf.u-strasbg.fr>.

[51] Except to a certain extent in question 12 ('Do you consider that... Article 7 of Regulation No. 2201/2003 should be deleted, or *at least limited to cases where no EU citizens are involved*? The italics are ours).

will not discuss the importance of 'making citizens' lives easier;'[52] and, of course, the desire to extend some advantages to non-citizens established in the Community is worthy of praise. We do not advocate radical change. But, as the European system has an impact on relations involving the 'world outside the Community,' we do believe that more attention should have been paid to the respective roles of Community institutions and member States in matters of 'external internationality.' In addition, attention should have also been paid to mechanisms capable of lessening some of the system's most controversial 'ad extra' effects (discrimination, lack of procedural proximity, lack of cooperation with third States). In this respect, we offer these proposals for consideration. First, we propose that the European (domestic) jurisdiction where the claim is brought be given the ability to abstain in favour of the 'more convenient forum' of a non-member State (for example, in the case of a mixed Community/non-Community couple that has always lived abroad, if jurisdiction is based solely on the Community citizen's return to his own State, where he remains for six months). To allege, as a factor against this proposal, the difficulties the European citizen will face in having the foreign court's decision recognised in Europe implies an unjustified, excessively protectionist attitude.

A second reasonable solution for cases with foreign implications would be for the Community to adopt a rule similar to Article 606ª (1) 4ZPO: in the case of a foreign couple, when one remains in Europe and the other returns to his country of origin, jurisdiction will not based on the spouse's habitual residence in Germany if the German decision will not be recognised in either of the States where the spouses are nationals.

The 2006 Proposal does not contemplate any of the described tools. It does, however, amend Article 6 and Article 7. Article 6 is deemed superfluous and a source of confusion and is, therefore, deleted. New article 7 introduces a uniform and thorough rule related to residual jurisdiction that eliminates national laws, guaranteeing access to justice for spouses who live in third States but maintain solid links with the Member State where they are either nationals or have lived for a period of time. The new text certainly improves the current state of things; at the same time some controversial aspects of the system are not only maintained: they are exacerbated.[53]

---

[52] In 1998, the European Council in Vienna emphasised the importance of a common judicial area to make life for EU citizens easier, in particular regarding matters that affect their 'everyday life,' such as divorce.

[53] With this article, the transfer of competence from the Member States to the Community in the field we have called 'external internationality' will be completely achieved. The tendency to export the *favor divortii* philosophy is also confirmed. From the perspective of private subjects who wish to judicially solve a matrimonial crisis (claimants), 'direct access' to justice is ensured; there are still, however, situations in which said access for non-residents (never having resided in Europe, either now or in the past) or non-Community individuals is questionable (see the extreme case in the second rule of residual jurisdiction in Article 7 of the Proposal – the requirement of 'not having the same Community nationality' is fulfilled precisely because one of the spouses is not a European citizen). The issue of access by recognition outside Europe is still pending.

THE FRENCH PLUMBER, SUBCONTRACTING, AND THE INTERNAL MARKET

Paola PIRODDI*

I. Introductory Remarks

France has notoriously been stalked by fear of the mythical Polish plumber invading the local labour market. This fear has barely been overcome when French plumbers in turn begin to menace both competition attorneys and private international lawyers. A thought-provoking judgment from the authoritative mixed Chambers of the French Supreme Court[1] stands as evidence that the fear of social dumping, which focused the Commission's debate on its first proposal for the services directive, still haunts the cross-border provision of services, which, especially in the construction industry, is increasingly effectuated through subcontracting.

The French Supreme Court employs Article 7(2) of the Rome Convention on overriding mandatory rules of the forum as its legal basis for applying French Law n° 75-1334 of 31st December 1975 on subcontracting.[2] The Supreme Court has recently applied Article 7(2) in four judgments, all concerning Law n° 75-1334, and particularly Article 12(1), which, failing the contractor's payment of the subcontractor, gives the subcontractor a direct legal action against the employer for

* Associate Professor at the University of Cagliari (Italy).

[1] Cour de cassation (Ch. Mixte) n° 260, 30 November 2007, n° 06-14.006, *Société Agintis v Société Basell Production France*, <http://www.courdecassation.fr/jurisprudence_2/ chambres_mixtes_2740/arrets_travaux_preparatoires_25/br_arret_11020.html>.

[2] For an English translation of this Law, see <http://www.legifrance.gouv.fr/html/codes_traduits/loi_st_e.htm>.

Yearbook of Private International Law, Volume 10 (2008), pp. 593-616

payment. The first judgment was issued by the first civil Chamber on the 23rd January 2007,[3] acknowledging that application of German law – which did not give the subcontractor a direct action – could not be restricted by a public policy exception under Article 16 of the Rome Convention, nor Article 12(1) of Law n° 75-1334 could apply as an overriding mandatory rule of the forum under Article 7(2) of the Rome Convention. Although the Court judgment was almost unanimously praised by scholarly literature,[4] it apparently created uncertainty within the Supreme Court's judges. In fact, in a second case issued on 30 November 2007 – that is commented here –, the authoritative mixed Chambers were appointed, sitting in an almost plenary assembly (absent the second Chamber only). The mixed Chambers unexpectedly reversed the first civil Chamber's judgment on the overriding mandatory nature of Law n° 75-1334 in a case identical to the first case heard, with the only distinction being a different subcontractor. A precedent was thus established. The third and fourth cases were two pronouncements from the third civil Chamber issued on 30 January 2008 and 8 April 2008 respectively.[5] These cases again concerned the same contractor, employer, and building site at issue in the first two cases and reaffirmed the leading case of the mixed Chambers.

II. The Facts of the Case

A French company, Basell Production France SA ('Basell'), the employer, engaged a Germany company, Salzgitter Anlagenbau GmbH ('SAB'), the contractor, to construct an industrial building in France. The agreement was submitted to German law. Subsequently, SAB subcontracted the plumbing work to a French-based subcontractor, Agintis SA ('Agintis'). The subcontracting agreement contained a clause that submitted the subcontracting agreement to German law, as the law applicable to the principal contract. When the works were finished, SAB refused to pay Agintis the subcontracting price. Agintis then obtained an arbitral award establishing its entitlement to compensation from the contractor for the

[3] Cass. civ., 1e, 23 January 2007, *Société Campenon Bernard Méditerranée v Basell Production France SA*, n° 04-10.897, in: *Dalloz* 2007, n. 28, p. 2008 *et seq.*, note BORYZEWICZ E./LONCLE J.-M., 'Sous-traitance internationale et loi du 31 décembre 1975: un mariage délicat'; *ibid*., p. 2568, note BOLLÉE S., 'Sous-traitance'.

[4] ROTH Ch./BRÜNNIG A., 'La sous-traitance à l'épreuve du droit international ou les limites de la loi du 31 décembre 1975', in: *Les annonces de la Seine*, 23 juillet 2007, n. 51, p. 4 et seq., at p. 6. See also BORYZEWICZ E./LONCLE J.-M. (note 3), p. 2008 *et seq.*, BÉSSIS M.-H., 'Ordre public international et lois de police. Une application en matière de sous-traitance internationale', in: *Banque & Droit*, n° 114/2007, p. 3 *et seq. Contra*, apparently, BOLLÉE S. (note 3), p. 2568. See also MAHINGA J.-G., 'Ordre public interne, ordre public international et lois de police', in: *Petites Affiches* 2007, n. 167, p. 8.

[5] Respectively, n° 06-14641 and n° 07-10763. The text of both judgments can be found in <http://www.legifrance.gouv.fr/initRechJuriJudi.do>.

subcontracting price. In the meantime, SAB was yet subjected to a collective insolvency proceeding opened in Germany, and could not pay the subcontractor's credit. Agintis therefore requested payment directly from Basell, the employer. Basell nevertheless declined to pay on ground that German law, which governed both the principal contract and subcontracting agreements, does not allow a subcontractor to claim payment directly from an employer in absence of contractual privity.

Agintis thus filed suit against Basell pursuant to Article 12(1) of Law n° 75-1334. The Tribunal of commerce of Nanterre, on first instance, and the Court of appeals of Versailles, on appeal, rejected the claim, again on grounds that the applicable German law did not allow a subcontractor to bring a direct action against an employer. According to the Tribunal of commerce, Article 12(1) of Law 75-1334 is not an overriding or internationally mandatory rule (*loi de police*) that must apply irrespective of the applicable law. The Court of appeals (the referring judge in the case at issue), although rejecting the claim as to the merits, stated in contrast that Law n° 75-1334 is a *loi de police* because it is an rule of economic public policy, establishing a statute protecting the subcontractor ('*une loi de police économique* (...) *instaurant un statut du sous-traitant*'). Accordingly, the court held that its provisions must be considered mandatory under Articles 3 and 7 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations and should therefore apply to the case, as the construction was localized in France, irrespective of the applicable law to the contract.

Faced with the rejection of its appeal, Agintis sought redress at the French Supreme Court. In its authoritative composition of mixed Chambers, the Supreme Court heard the case and held that in cases where construction was localized in France, Law n° 75-1334, insofar as its provisions protecting the subcontractor are concerned, is a *loi de police* under the combined provisions of Article 3 of the French civil Code and Articles 3 and 7 of the Rome Convention.

III. The Issues at Stake: The Preliminary Question of the International Nature of the Subcontract

The case is unusual. It does not concern the burning issues that are generally raised by international subcontracts or, especially, recourse subcontracts:[6] the international nature of the subcontracting agreement and the law applicable to the subcontractor's direct action against the employer for payment.

In the case at issue, although the subcontractor Agintis was established in France and had to execute its performance in France for an employer that was also established in France, the contractor SAB was established in Germany.

[6] *I.e.*, subcontracts that are governed by the same law governing the principal contract: see PIRODDI P., 'International Subcontracting in EC Private International Law', in: this *Yearbook* 2005, pp. 289 *et seq.*, at p. 331.

Furthermore, SAB had not been completely substituted by Agintis in the performance of the contract, as the plumbing was the only work that had been subcontracted in the building's construction. On account of the partial nature of the works subcontracted and the localization of the contractor's establishment in another State – which under the Rome Convention constitutes a foreign element by itself[7] – the subcontract between Agintis and SAB should be considered an international agreement under Article 3(3) of the Rome Convention. It is only in case where the entire works were subcontracted that the contractor SAB might possibly have been considered an interposed person, and the subcontract between Agintis and SAB, though apparently an international agreement, might eventually have been considered a domestic transaction.[8]

As a consequence, the parties legitimately elected the law of the contractor's establishment as the applicable law to the subcontract for purposes of Article 3(1) of the Rome Convention. Insistence on this obvious question by the Reporting Judge appointed for the case[9] can only be explained by her concern to eliminate any doubts created by the earlier judgment of the first civil Chamber of the Supreme Court.[10]

Furthermore, in analyzing the international nature of the subcontract, the Reporting Judge entirely failed to consider that the international nature of the principal contract might have been an element '*relevant to the situation*' for purposes of Article 3(3) of the Rome Convention, so as to establish the international nature of the subcontract.[11] Scrutiny of the functional and objective connections that the subcontract might have had with the principal contract is conspicuously absent in the Reporting Judge's reasoning. French scholarly literature on *ensembles*

[7] See Art. 4(2), that refers to the habitual residence of the party, or, in the case of a body corporate or unincorporated, the place of its central administration, or else, in case of a contract entered into in the course of that party's trade or profession, the country in which the principal place of business is situated.

[8] See LAGARDE P., 'La sous-traitance en droit international privé', in GAVALDA Ch. (éd.), *La sous-traitance de marché de travaux et de services*, Paris 1978, p. 186 *et seq.*; GLAVINIS P., *Le contrat international de construction*, Paris 1993, especially n° 532.

[9] Rapport de Mme Monéger, Conseiller Rapporteur, <http://www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/arrets_travaux_preparatoires_25/moneger_br_11031.html>,

[10] Cass. civ., 1ère, 4 October 2005, in: *Clunet*, 2006, p. 169, note JACQUET J.-M.; in: *Rev. crit. dr. int. pr*. 2006, p. 413, note AUDIT B.

[11] On the elements 'relevant to the situation' as a broader concept than merely 'relevant to the contract,' see DICEY A.V./MORSE C.G.J./BRIGGS A./COLLINS L. (eds.), *Dicey & Morris On the Conflict of Laws*, 13th ed., London 1999, para. 32-069. See also PLENDER R./WILDERSPIN M., *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts*, 2nd ed., London, 2001, p. 105. On the international character of even domestic recourse subcontracts, see PIRODDI P. (note 6), p. 305 *et seq.*

contractuels, and particularly *groupes de contrats*, could have been conveniently taken into account in this respect.[12]

IV. (Continue:) The Law Applicable to the Direct Action for Payment of the Subcontractor against the Employer

Also the second usually contentious issue for subcontracts – the law applicable to the subcontractor's direct action for payment against the employer – appears to make a purely virtual appearance in this judgment. Pursuant to Article 10(1)(d) of the Rome Convention, direct action should fall, irrespective of its non-contractual nature,[13] under the scope of the law applicable to the contract. Article 10 nevertheless does not indicate whether reference should be made to the law applicable to the subcontract or the principal contract. Neither Article 12 of the Rome Convention, on voluntary assignment of rights, nor Article 13(1), on subrogation by operation of law, can exactly resolve that question.[14] In the case at issue, however, the law applicable to the subcontract not only coincided with the law applicable to the construction contract (*i.e.*, German law), but it also denied the subcontractor

[12] See TEYSSIÉ B., *Le groupe de contrats*, Paris, 1975 and subsequently, within a large literature, FRÉMEUX S., 'L'action directe et les groupes de contrats internationaux', in: *Rev. dr. aff. int.* 2002, p. 155 *et seq.*; BACACHE-GIBEILI M., *La relativité des conventions et les groupes de contrats*, Paris, 1998; HEUZÉ V., 'La loi applicable aux actions directes dans les groupes de contrats: l'exemple de la sous-traitance internationale', in: *Rev. crit. dr. int. pr*. 1996, p. 243 *et seq.*

[13] The French Supreme Court, in its plenary assembly, established that the subcontractor is not under a contractual relation with the employer in the celebrated *Besse* case (Assemblée plen., 12.7.1991, in: *Dalloz* 1991, note GHESTIN). See for references D'AVOUT L., 'S'agissant de la construction d'un immeuble en France, la loi française sur la sous-traitance est une loi de police', in: *La semaine juridique*, éd. gén., n. 1, 2.1.08, II, p. 31 *et seq.*, at p. 33; FRÉMEUX S. (note 12), p. 163. Also, the Court of Justice has characterized direct action as having a non-contractual nature, under the scope of the 1980 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: see ECJ, 17.6.1992, C-26/91, *Handte*, in: *ECR* 1992-I, p. 3967 *et seq.*, § 15 (see GAUDEMET-TALLON H., 'Observations', in: *Rev. crit. dr. int. pr.* 1992, p. 730 *et seq.*, at p. 735); ECJ, 27.10.1998, C-51/97, *Réunion*, in: *ECR* 1998-I, p. 6511 *et seq.*, § 17 (compare also the opinion of Advocate General Cosmas, 5.2.1998, in: *ECR* 1998-I, *p.* 6527 *et seq.*, § 24); ECJ, 17.9.2002, C-334/00, *Tacconi*, in: *ECR* 2002-I, p. 7357 *et seq.*, § 23; ECJ, 1.10.2002, C-167/00, *Henkel*, in: *ECR* 2002-I, *p.* 8111 *et seq.*, § 35; ECJ, 5.2.2004, C-265/02, *Frahuil*, in: *ECR* 2004-I, p. 1543 *et seq.*, § 25. See also, the non-contractual qualification given to a direct action against the insurer of the person liable by Article 18 of the Rome II Regulation (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, in: *OJ* L 199 of 31.7.2007, p. 40 *et seq.*).

[14] See for references PIRODDI P. (note 6), p. 322.

any direct action for payment against the employer.[15] Therefore, the question of the law applicable to direct action has only academic relevance under the circumstances of the case.

The Reporting Judge nevertheless undertook a detailed (if not critical) appraisal of the broad variety of opinions that, in the absence of conclusive judicial decisions, have been conveyed by scholarly literature on this subject. According to the most credited opinion,[16] the admissibility of a direct action for payment should fall under the scope of the law applicable to the subcontract, as the governing law of the right of credit, which has been granted in the interest of subcontractor. In contrast, the substantive and procedural requirements for bringing a direct action against an employer should be ascertained in relation to the law applicable to the principal contract, as the governing law of the debt of the employer. Indeed, it would seem unreasonable to subject the direct action's admissibility, based on rights arising from the subcontractor's relationship with the contractor, to a legal system other than that which regulates the subcontract (being furthermore foreseeable for the employer).[17] As a consequence, direct action should be admitted even though the law applicable to the principal contract does not provide a subcontractor with such a right; but, lacking conditions of application equivalent to that provided for by the law applicable to the subcontract, enforcement of a direct action might actually face serious obstacles.[18]

---

[15] It is not a frequent case that States grant a direct action for payment to subcontractors against the employer when the subcontractor has not been remunerated by the contractor. In Europe, it seems that only a few States whose legal system has been inspired by the French legal system allow this action, namely Belgium (Article 1798 of the Belgian civil Code, as amended by Article 2 of Law 19 February 1990) and Luxembourg (Article 7 of Law 23 July 1991 on subcontracting). Furthermore, only in Spain, apparently, case law has occasionally inclined to give a direct action to subcontractors – a tendency that seems unsupported by the majority of legal scholarship. The recent Law 32/2006 of 18th of October 2006, regulating subcontracts in the construction sector, does not provide for financial rules. Subcontractors have a right of direct action against the employer also under certain Arab civil Codes, e.g., Article 565 of the Algerian Code, Article 662 of the Egyptian Code, Article 882 of the Iraqi Code, Article 682 of the Kuwaiti Code, Article 661 of the Libyan Code and Article 628 of the Syrian Code. See for a comparative analysis of subcontracting CHAIX F., *Le contrat de sous-traitance en droit suisse. Limites du principe de la relativité des conventions*, Basel/Frankfürt a.M. 1995, p. 35 *et seq.*; PULKOWSKI J.F., 'The Subcontractor's Direct Claim in International Business Law', in: *Int. Construction L. Rev.* 2004, p. 31 *et seq.*

[16] LAGARDE P. (note 7), p. 197 *et seq.* See also for the same opinion BISMUTH J.-L., 'Le contrat international de sous-traitance', in: *Rev. dr. aff. int.* 1986, p. 535 *et seq.*; COZIAN M., *L'action directe*, Paris 1969, n° 546.

[17] On this line also, apparently, Cass. civ., 1ère, 15 January 1991, in: *Rev. crit. dr. int. pr.* 1993, p. 46 *et seq.*, note MUIR WATT H.

[18] DUBISSON M., 'Quelques aspects juridiques particuliers de la sous-traitance de marchés dans la pratique du commerce international', in: *Dr. prat. comm. int.*, 1983, p. 479 *et seq.*

Separating the law applicable to the admissibility of direct action from the law governing its submission represents a complication that could reduce the scope of application of direct action in international transactions. Thus, another line of thought has endorsed in principle a competence of one law only, which should in principle be the law of the principal contract, because of the need to respect the employer's interests, as it is both debtor and defendant.[19] However, the law applicable to the subcontract could not be completely evinced, and under particular circumstances considerable restraint could also result from the law of the employer's habitual residence.[20]

Yet, after careful inquiry into the opinions that have been expressed on the law applicable to a direct action, the crucial question for the Reporting Judge remains: taking into account that German law, as the law applicable to both the subcontract and the principal contract, does not provide for a direct action, on what grounds can the direct action granted by Law n° 75-1334 apply?

V. The Overriding Mandatory Scope of the Law n° 75-1334. Its Content and Function

In response to that question, the Court stated that in cases concerning the construction of a building within the territory in France, the protective provisions of Law n° 75-1334 on subcontracting should apply as *loi de police*, irrespective of the law applicable to the subcontract, to the effect of the combined provisions of Article 3 of the French civil Code and Article 3 and 7 of the Rome Convention.

The mixed Chambers did not address the question of the possible contrast between German law and French public policy (*ordre public*). The Reporting Judge nevertheless supported the part of the above-mentioned first civil Chamber decision of the 23rd January 2007 that acknowledged that application of German law, although not providing a direct action for subcontractors, cannot be restricted under a public policy exception under Article 16 of the Rome Convention. Indeed, the scope of *ordre public*, which should always be restrictively construed, has been

[19] HEUZÉ V., 'La loi applicable aux actions directes dans les groupes de contrats: l'exemple de la sous-traitance internationale', in: *Rev. crit. dr. int. pr*., 1996, p. 243 *et seq.*, esp. p. 256 *et seq.*; P. LEVEL, 'La négociation du contrat international de sous-traitance', in: *Rev. dr. aff. int.* 1982, p. 137 *et seq.*, at p. 150 *et seq.*

[20] COZIAN M. (note 17), pp. 197, 288, 342 *et seq.* Article 18 of the Rome II Regulation (note 13), which provides for a direct action against the insurer of the person liable, cannot help, as it provides for alternative applicable laws: 'The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.'

progressively eroded in commercial matters and has further become an even increasingly shrinking concept amid Member States of the European Union.[21]

The part of the first civil Chamber's judgment that has been reversed in the case at issue only concerns the overriding mandatory scope of application of the protective provisions of Law n° 75-1334. As grounds for decision, the mixed Chambers outlined an assorted legal basis. To begin with, Article 3 of the French civil Code (to be understood as to Article 3(1)), which establishes a territorial scope of application for *lois de police et de sûreté* (literally '*public policy and safety of the State*'). Although at first glance this reference may appear redundant, it should be observed that Article 3 of the French civil Code frequently serves as a default legal basis in French case law whenever the provision that the court would retain as internationally mandatory lacks a connecting factor relating to its spatial application.[22]

Second, the mixed Chambers quoted Article 3 of the Rome Convention – presumably standing for Article 3(3). Reasons for including a reference to this rule as a legal basis for the judgment are unclear. As it has been commented above, taking into account that the contractor SAB's establishment was in Germany, not all of the '*elements relevant to the situation*' under the Rome Convention, other than the choice of law by the parties, were connected with only one State (*i.e.*, France).

The real legal basis of this pronouncement should be represented by Article 7 of the Rome Convention only – precisely Article 7(2), which consents to applying *lois de police* of the forum irrespective of the law applicable to the contract. Accordingly, the Reporting Judge tried to ascertain whether Article 7(2)'s requirements for application could be found under the circumstances of the case. She reminded the Supreme Court that the requirements of *lois de police* are its spatial scope of application, on the one hand, and its intended objective, on the other.[23] Beginning by ascertaining the spatial scope of application of Law n° 75-1334, the Reporting Judge however observed that the statute does not expressly or tacitly establish anything in this respect; in addition, Parliamentary proceedings and preparatory acts of the Law also fail to mention this issue. Thus, absent any

[21] Instances of application of *ordre public* in contracts are relatively old cases, concerning prohibition of expropriation without compensation and suspension of proceedings brought by individual creditors in bankruptcy: see COURBE M., 'Ordre public et lois de police en droit des contrats internationaux', in *Études offertes à Barthélémy Mercadal*, Paris, 2002, p. 99 *et seq.*, at p. 101. See also ECJ, 30.9.2003, C-167/01, *Inspire Art*, in: *ECR* 2003-I, p. 10155 *et seq.*, § 39; ECJ, 11.5.2000, C-38/98, *Renault*, in: *ECR* 2000-I, p. 2973 *et seq.*, § 30; ECJ, 28.3.2000, C-7/98, *Krombach*, in: *ECR* 2000 I, p. 1835, § 37.

[22] RIGAUX F./FALLON M., *Droit international privé*, 3e éd., Bruxelles 2005, p. 138.

[23] See, *e.g.*, GUEDJ Th.G., 'The Theory of the Lois de Police. A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories,' in: *Am. Journ. Comp. Law* 1991, p. 661 *et seq.*, at 670: *lois de police* contain a 'spatial' connecting factor that, contrary to private international law's connecting factors, which operates *ratione loci*, operates both *ratione loci* and *ratione materiae*, as it is '*function of the content and objective of the rules which contains it.*'

provision, the spatial scope of application of Law n° 75-1334 must be inferred through analysis of its substantive content and function, based on the concrete circumstances of the case, and under the strict standard of interpretation that should govern the construction of a statute as *loi de police*.

Trying to ascertain the function of Law n° 75-1334, the Reporting Judge conducted a brief survey of the (scarce) French case law on *lois de police*. This analysis lead her to emphatically declare, in a statement that is the core of the case, that giving an overriding mandatory scope to a national rule basically depends on the occurrence of two requirements of function: either *the protection of a weak party* or the protection of a general interest related to the safety of the State or its economic organization (‘*motif d'intéret général lié à la sécurité du territoire ou à l'organisation économique du pays*’).

The background of this statement resides in the case law of the French Supreme Court on *domestic* public policy. In fact, the *Cour de cassation* draws a distinction between public policy rules designed to organize society, ensure market regulation, and generally promote the essential general interests of the State (‘*règles d’ordre public de direction*’), and public policy rules intended to protect interests of a particular category of individuals, by reasons of their weak or inferior position, particularly as regards the internal balance of the contract (‘*règles d’ordre public de protection*’).

Nevertheless, insofar as rules protecting a weak party are included under the scope of Article 7(2) of the Rome Convention, this pronouncement of the mixed Chambers authoritatively contributes to the modern private international law doctrine on *lois de police protectrices*. Indeed, contemporary scholarly literature reflects a broad consensus for including rules pursuing an objective of individual protection into the category of *lois de police*.[24] This opinion is eroding a conventional doctrine contending that only rules enacted for furthering objectives of public interests or implementing a regulatory State policy related to the organization of the State (*Eingriffsnormen*) can in principle be characterized as *lois de*

[24] POCAR F., ‘La protection de la partie faible en droit international privé’, in: *Recueil des Cours*, vol. 188-V, 1984, p. 339 *et seq*., at p. 392 *et seq.*; BONOMI A., *Le norme imperative nel diritto internazionale privato. Considerazioni sulla Convenzione europea sulla legge applicabile alle obbligazioni contrattuali del 19 giugno 1980 nonché sulle legge italiana e svizzera di diritto internazionale privato*, Zürich 1998, p. 172 *et seq.*; JACQUET J.-M., *Principe d’autonomie et droit applicable aux contrats internationaux*, Paris, 1983, p. 283 *et seq.*; SINAY-CYTERMANN A., ‘La protection de la partie faible en droit international privé’, in: *Le droit international privé: esprit et méthodes: Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 737 *et seq.*; MAYER P./HEUZÉ V., *Droit international privé*, 9e éd., Paris 2007, n° 123 *et seq.*; RIGAUX F./FALLON M. (note 22), p. 823 et seq; LAGARDE P., ‘Les lois de police devant la Cour de justice des Communautés européennes’, in: SCHULZE R./SEIF U. (hrsg.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft*, Tübingen, 2003, 89 *et seq.*, at 91; FALLON M./FRANCQ S., ‘Towards Internationally Mandatory Directives for Consumer Contracts?’, in: BASEDOW J. *et al.* (eds.), *Liber Amicorum Kurt Siehr*, The Hague 2000, p. 155-178.

police under Article 7 of the Rome Convention.[25] Yet at present an increasing range of authors, in the wake of the Giuliano-Lagarde Report, asserts that the scope of application of Article 7 encompasses rules intended at preserving the private interests of individuals (*Parteischutzvorschriften*), *e.g.*, restoring the contractual negotiating balance by reasons of the weak position of a party (consumers, recipients of services, tenants, employees).[26] Some consider such rules as *per se* overriding mandatory provisions, taking into account that protection of interests of the weaker parties should itself be a paramount policy of the State. Others consider rules intended at preserving the private interests of individuals as indirect overriding mandatory provisions: as such rules, through strengthening the social protection of particular categories of individuals, eventually protect the collective organization of the society in its entirety.[27]

It is generally considered that even the Court of Justice has contributed to the doctrine of *lois de police protectrices*. Although outside of the Rome Convention's scope of application, the Court's settled case law has established that protective rules of harmonization directives relating to weak contractual parties (self-employed commercial agents, consumers, workers temporarily posted abroad) should apply as overriding mandatory rules.[28] It should nevertheless be taken into account that Article 9(1) of the recently enacted Rome I Regulation[29] establishes that '*overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country* for safeguarding its public interests, such as its

[25] DICEY A.V./MORSE C.G.J./BRIGGS A./COLLINS L. (note 11), para. 1-056 ('crystallised rules of public policy'); BATIFFOL H./LAGARDE P., *Droit international privé*, t. 1, 8e éd., Paris, 1993, no. 254, 428. See also MAGNUS U./MANKOWSKI P., *Joint Response to the Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation COM(2002)654 final*, <http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/university_hamburg_en.pdf>, p. 33 *et seq.*

[26] MAYER P., 'La protection de la partie faible en droit international privé', in: GHESTIN J./FONTAINE M. (éds.), *La protection de la partie faible dans les rapports contractuels*, Paris, 1996, p. 513 *et seq.* See GIULIANO M. / LAGARDE P., 'Report on the Convention on the law applicable to contractual obligations', in: *OJ* C 282, 31.10.1980, *sub* Article 7, para. 4, that expressly refers to consumer protection rules as applicable under Article 7(2).

[27] POCAR F. (note 24), p. 339 *et seq.*

[28] Respectively, ECJ, 9.11.2000, C-381/98, *Ingmar*, in: *ECR* 2000-I, p. 9305, § 20-23 (see also, as far as commercial agents are concerned, the judgment of the Italian Supreme Court Cass., 30.1.1999, in: *Riv. dir. int. priv. proc*. 2000, p. 741 *et seq.*, concerning the claim for indemnification upon termination of contract of agency); ECJ, 26.10.2006, C-168/05, *Mostaza Claro*, in: *ECR* 2006-I, p. 10421 et seq, § 38; ECJ, 18.12.2007, C-341/2005, *Laval*, in: *ECR* 2007-I, p. 11767, § 73 *et seq.*

[29] 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), in: *OJ* L 177, 4/07/2008, p. 6 *et seq.* See also recital (37) Rome I Regulation, according to which: '*Considerations of public interest* justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.(...)' (emphasis added).

political, social or economic organisation' – a concept largely sculpted along the lines of the Court of Justice's *Arblade* judgment,[30] which further dates back to the celebrated notion conceived by Phocion Francescakis.[31] Accordingly, only the interests that the State has taken control of could comply with the requirements for overriding mandatory scope of application, not private interests, considered either individually or collectively. In this respect, Article 9 of the Rome I Regulation apparently could not include '*rules such as those aimed at the protection of a party to the contract.*'[32]

Upon closer scrutiny, the contribution of this French Supreme Court judgment to the doctrine of *lois de police protectrices* appears to be considerably reduced by the fact that the Reporting Judge focused on ascertaining the requirements for protection of *both* private interests of weak parties *and* public interests of the State into Law n° 75-1334. In fact, she enquired whether the subcontractor could be considered a weak party needing protection *and furthermore* whether the subcontracting industry affects the functioning of the economic organization of the French State.

According to Reporting Judge's analysis (shared by the Advocate General),[33] subcontractors, though professionals bearing entrepreneurial risk, are frequently self-employed persons or small undertakings that are *structurally* the weaker party to the subcontract. The reason is not only their unequal bargaining power and the inability to negotiate or represent their own interests, which is obviously evidence for the need to recast the contractual balance of the subcontract, but especially their financial subjection to the contractor. The subcontractors' financial subjection to the contractor is the reason why subcontractors have been granted special legal protection, to avoid that non-completion of the contractor's obligation of payment obligation could entail, as a cascade effect, a succession of insolvency and bankruptcy among subcontractors in the construction industry.

---

[30] ECJ, 23.11.1999, C-369/96 and C-376/96, *Arblade*, in: *ECR* 1999-I, p. 8453, § 30.

[31] FRANCESCAKIS Ph., 'Quelques précisions sur les «lois d'application immédiate» et leurs rapports avec les règles sur les conflits de lois', in: *Rev. crit. dr. int. pr.* 1966, p. 1 *et seq.*, at p. 13 et seq; ID., 'Lois d'application immédiate et règles de conflit', in: *Riv. dir. int.. priv. proc.* 1967, p. 691 *et seq.*

[32] GARCIMARTÍN ALFÉREZ F.J., 'The Rome I Regulation: Much Ado About Nothing?', in: *EuLR* 2008, 2, p. I-1 *et seq.*, at p. I-16. Accordingly, WILDERSPIN M., 'The Rome I Regulation: Communitarisation and Modernisation of the Rome Convention', in: *ERA Forum*, 2008, 9, p. 259 *et seq.*, at 272. In compensation, the Rome I Regulation readjusts connecting factors provided for contracts agreed by weak parties, which might effectively reduce the need for intervention of *lois de police protectrices* (*e.g.*, subjecting, for instance, the contracts concluded by a weak party to the law of the habitual residence of that weak party: see e.g. Articles 4(1)(d), (e), (f), 5(2), 6(1), etc.): see SALAH MOHAMED MAHMOUD M., 'Loi d'autonomie et méthodes de protection de la partie faible en droit international privé', in: *Recueil des Cours*, vol. 315, 2005, pp. 141-264, at 227.

[33] Avis de M. Guérin Avocat Général, <http://www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/arrets_travaux_preparatoires_25/guerin_br_11032.html>.

Furthermore, because of the crucial role of subcontracting in the construction industry, *which is a sector of relevant weight in the economic system of France,* the protection granted by Law n° 75-1334 to the category of subcontractors simultaneously achieves the public policy objective of also protecting the economic organization of the French State. Yet, making the protection of public interests of the State an irrevocable requirement of Law n° 75-1334 considerably reduces the theoretical impact of the statement that mandatory rules protecting private interests can apply on grounds of *lois de police*

The postulated assumption that subcontractors are *structurally* the weaker party of the contract prevented the Reporting Judge from assessing whether Agintis had been concretely abused by the contractor SAB, based on a concrete analysis of the contractual force of Agintis by comparison to SAB and on the other circumstances of the case. In compliance with the functional approach to *lois de police* required by Article 7(2) of the Rome Convention,[34] the Reporting Judge should have ascertained whether Agintis's position under the subcontracting agreement could make it the weaker party to the contract, *e.g*. because it had no opportunity to reject the choice-of-law clause submitting the agreement to German law, which might have been imposed by SAB under its general conditions of contract or standard terms of agreement with the sole intention of depriving the subcontractor of the right of direct action. As a matter of fact, Agintis is not a small craftsman, but a corporation controlled by a group of companies that manufactures industrial pipelines as a subcontractor and also operates as a general contractor as well. The choice-of-law clause could possibly have been agreed to pursuant to the usual course of subcontracting practice that for reasons of coordination submits the subcontract to the same law governing the principal contract. This functional analysis is conspicuously absent in the legal reasoning of the Reporting Judge.

Furthermore, the protective function of *lois de police protectrices* requires rejection of the conventional approach that considers overriding mandatory rules as *règles d'application immédiate*.[35] *Lois de police protectrices* should not immediately apply to the situations that fall under their scope of application, regardless of the content of the law indicated by the conflict rule. To avoid *lois de police protectrices* from overriding a rule that hypothetically provides stronger protection to the weaker party's interests, the judge should compare the content of the rule of the law that would apply to the contract by effect of the conflict rule with the content of the *loi de police protectrice*. In reality, Article 7(2) of the Rome Convention does not provide for any comparison with respect to application of the forum's overriding mandatory rules. The comparison seems to be imposed by Article 7(1) only with respect to the effects of mandatory rules of a third State, which are subject to '*the consequences of their application or non application,*' other than by Article 16 of the Rome Convention, on the public policy exception.

[34] BONOMI A., 'Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment', in this *Yearbook* 1999, p. 215-247, at 230 *et seq.*

[35] *Inter alia*, GUEDJ Th.G. (note 23), p. 667.

Considering the circumstances of the case, the Reporting Judge did not need to compare the substantive content of German Law before applying Law n° 75-1334. Agintis could not recover its credit towards the contractor SAB, although it had previously exhausted local remedies available to subcontractors in Germany. Therefore, the fact that Law n° 75-1334 gave the subcontractor a direct action against the employer made French Law more protective of Agintis, on the one hand, and less apt to frustrate the policies pursued by Germany, on the other.

VI. (Continue:) The Spatial Scope of Application of Law n° 75-1334. A Protectionist Application of a Protective Measure

Through the analysis of the substantive content and function of Law n° 75-1334 it is possible to infer the spatial scope of application of the Law. The spatial scope of application of *lois de police* is indicated by means of a special connecting factor, depending on which *lois de police* should apply (applicability rule, *règle particulière d'applicabilité*).[36]

Individuation of the *règle d'applicabilité* of Law n° 75-1334 is not an easy task. It should be remarked that the scholarly opinion against the application of Law n° 75-1334 as *loi de police* has almost always been based on the problematic construction of its applicability rule. To summarize the varying opinions that have been expressed in this respect, one line of thought suggested that Law n° 75-1334 should apply to every subcontractor established in France.[37] A second view upheld that Law n° 75-1334 could only be applicable if the building site is located in the territory of France.[38] Another author observed that Law n° 75-1334 could apply only if French law is the law governing the subcontract.[39] And, a very recent view endorsed that both the contractor and the subcontractor must be established in France before Law n° 75-1334 could apply as *loi de police*.[40] Practically all the existing alternatives have been proposed.

At the outset, both the Reporting Judge and the Advocate General ruled out nationality of the subcontractor as an applicability rule of Law n° 75-1334. The stated reason was that, within the scope of application of the EC Treaty, Article 12 EC Treaty prohibits any discrimination on grounds of nationality among citizens of

[36] See RIGAUX F./FALLON M. (note 22), p. 125 *et seq.*

[37] LAGARDE P. (note 7), p. 192; BETTO J.-G., 'Sous-traitance internationale: comment écarter la loi française de 1975', in: *Rev. dr. aff. int*. 1999, p. 411.

[38] FOUCHARD Ph., 'Rapport français', in: *La responsabilité des constructeurs, Travaux de l'Association H. Capitant*, Paris 1993, p. 293 *et seq.*, at p. 310.

[39] BISMUTH J.-L., 'La sous-traitance internationale', in: *Travaux du Comité français de droit international privé*, 1984-1985, 1987, p. 23, n° 41 *et seq.*

[40] BOLLÉE S. (note 3), p. 2568; D'AVOUT L. (note 13), p. 34.

Member States. The Reporting Judge eventually asserted that the principle of non-discrimination and equality of treatment compelled granting the protection afforded by Law n° 75-1334 indistinctly to subcontractors working in the same building site *within the territory of France*, irrespective of their nationality. This applicability rule based on territory was finally retained by the mixed Chambers, which established that the protective rules of Law n° 75-1334 have an overriding scope of application in cases *relating to the construction of a building within the territory of France*.

Yet it should be observed that applying *lois de police protectrices* should require the abandonment of the conventional approach, which holds that overriding mandatory rules have a scope of application based on territoriality. Protection of a State's public interests, '*such as its political, social or economic organisation*,' requires application of overriding mandatory rules to the situations affecting the State, based on close connection to the territory.[41] To the contrary, *lois de police protectrices* promote purely private interests and tend to have a scope of application based on proximity instead of territoriality.[42] Particularly, proximity should be required for application of the *lois de polices protectrices* of the forum, under Article 7(2) of the Rome Convention.[43] In reality, contrary to Article 7(1), Article 7(2) does not subject the application of the *lois de police* of the forum to any spatial requirement. Nevertheless, contemporary literature has progressively inclined to require that even the *lois de police* of the forum be applied on grounds of a situation's close connection with the forum State. As a result, even though the text of Article 7(2) has no spatial restriction, proximity also comes into consideration under Article 7(2): thus, *lois de police protectrices* should apply in situations in which the forum requires that the interests that it intends to protect be effectively protected either within the territory of the forum or abroad, irrespective of the localization of the situation.[44]

Nevertheless, the protective function of Law n° 75-1334 – strengthening the protection of subcontractors as a relevant part of the construction industry and strengthening the protection of the construction industry represented by subcontracting as a relevant part of the French economy – does not compel application of the Law to every subcontractor working to construct a building *within the territory of France* irrespective of their nationality. Lack of payment, insolvency, or bankruptcy of a subcontractor established abroad, even though it carries out its activity in France or executes its performance at a French building site, cannot affect the interests of France (if not marginally). Law n° 75-1334's function of protection, as it has been individuated above, should indeed command its applica-

[41] NUYTS A., 'L'application des lois de police dans l'espace (Réflexions au départ du droit belge de la distribution commerciale et du droit communautaire)', in: *Rev. crit. dr. int. pr*. 1999, p. 31 *et seq.*, 245 *et seq.*, at p. 50.

[42] They incline to operate like an alternative conflict rule: NUYTS A. (note 41), p. 263.

[43] NUYTS A. (note 41), at p. 50.

[44] MAYER P. (note 26), p. 522; NUYTS A. (note 41), p. 50 *et seq.*

tion to all subcontractors *established in France*, as only their financial failure can affect the economy of France. Application as *loi de police* based on territory, regardless of subcontractor's establishment, determines that the effects of Law n° 75-1334 are not in the function of its content and underlying objective, as scholarship has almost unanimously commented.[45]

It can also be seen that giving Law n° 75-1334 a strictly territorial scope of application has evidentiary value for the mixed Chambers underlying intent in ruling out nationality, *i.e.*, avoiding any adverse effect on the French subcontractors and building industry's competitiveness. Employing to work in France foreign subcontractors that are not entitled to a direct action would not impose upon the contractor the administrative burden and financial cost of a French subcontractor, as a consequence of its right to a direct action under Law n° 75-1334.[46] In private contracts, Article 3(1) of Law n° 75-1334 indeed requires the contractor to request and obtain the employer's acceptance of the subcontractor itself, in addition to the employer's approval of the subcontractor's terms of payment and conditions. Also, the contractor must obtain either a financial guarantee from a reputable institution or an assignment of debt accepted by the employer in favour of the subcontractor as a guarantee of payment of its remuneration, '*up to the amount of the services executed by the subcontractor*' (Article 14).[47]

Conversely, applying Law n° 75-1334 on grounds of territoriality to both French and non-French subcontractors eliminates the competitive advantage enjoyed by foreign undertakings because of the application of foreign rules governing subcontracting which provide for lower standards, avoids social dumping,[48] and prevent any distortion of competition in the French construction market. It seems that application of the Law n° 75-1334 based on nationality was ruled out by the Reporting Judge, not only because it would infringe the principle of non-discrimination under Article 12 of the EC Treaty but mostly because it would consent that foreign subcontractors enjoy a competitive advantage over French subcontractors, which could possibly reduce French subcontractor's access to both national and international construction markets.

---

[45] See D'AVOUT L. (note 13), p. 32; BOYAULT W./LEMAIRE S., 'Protection du sous-traitant en matière internationale: La Cour de cassation fait volte-face', in: *Dalloz*, 2008, 11, p. 753 *et seq.*, at 754; DÖRNER H., 'Allemagne-France. Sous-traitance intenrationale et lois de police. Regard allemand sur l'arrêt du 30 novembre 2007 rendu par la Cour de cassation française (Chambre mixte)', <http://www.slc-dip.com>.

[46] Furthermore, lack of acceptance or approval, which prevents the subcontractor from taking direct action against the employer in the event of default by the contractor, constitutes a contractual offence by the contractor *vis-à-vis* the subcontractor and the employer, which in private contracts exposes the principal contract to termination of the subcontract or, respectively, the principal contract, and to liability for damages.

[47] Comparable provisions have been established for public contracts (Article 4 *et seq.*).

[48] See for references MISCHO J., 'Libre circulation de services et dumping social', in: *Mélanges en l'honneur de Philippe Léger*, Paris 2006, p. 435-443.

This line of reasoning, which connects the protection of a weaker party to conditions of undistorted competition in the market, may be traced in the European Court of Justice's case law concerning spatial application of harmonization directives having a protective scope, particularly in the *Ingmar* case.[49] As the Advocate General Léger observed in his conclusions in *Ingmar*, a legal framework not protecting the weaker party to a contract would adversely affect the position of that weaker party with respect to its competitors and would also give the stronger party a competitive advantage, thus distorting, solely for this reason, competition within the internal market.[50] To avoid this consequence, the Court of Justice ruled that the protective rules of the harmonization directive relating to self-employed commercial agents – which protects not only the agents *vis-à-vis* the principal but also the operation of non-distorted competition within the internal market – should apply to cases in which the commercial agent carries on his activity *in the territory of a Member State*. A *règle d'applicabilité* as to territory might have been inspired to the Mixed Chambers by *Ingmar*.

Nevertheless, the Court of justice ruled on a EC harmonization directive, obviously adopting a European standpoint, focused on the EC internal market. In contrast, the mixed Chambers adopt a national standpoint, focused on the French national market. From this standpoint, ascribing the objective of preserving conditions of non-distorted competition to a French statute having in itself the function of protecting French subcontractors as a category of weak parties and the construction industry as a relevant part of the organization of France, simply makes a protectionist application of a protective instrument – which, in a nutshell, is the outcome of this case.

VII. An Unjustified Restriction to Freedom of Providing Services?

Even though the conclusion reached by the mixed Chambers may not itself be objectionable, a perplexity may arise with respect to its compatibility with the European Community standpoint, which – except for observance of the non-discrimination principle under Article 12 of the EC Treaty – has not been addressed by the Reporting Judge. The question arises whether a special means of recovery of contractual credit through a direct action *vis-à-vis* the employer, as an additional protection of the subcontractor against non-payment by the contractor, could apply to all subcontractors working in France, irrespective of the fact that the

[49] See *supra* (note 28), § 20-23. See also the less celebrated case ECJ 4.10.2007, C-429/05, *Rampion*, in: *ECR* 2007-I, p. 8017 *et seq.*, § 58; ECJ, 23.3.2000, C-208/98, *Berliner Kindl Brauerei*, in: *ECR* 2000-I, p. 1741 *et seq.*, § 20; ECJ, 4.3.2004, C-264/02, *Cofinoga*, in: *ECR* 2004-I, p. 2157 *et seq.*, § 25.

[50] Opinion of Advocate General Léger, 11.5.2000, *Ingmar* (note 28), in: *ECR* 2000-I, p. 9305, § 50, 65 *et seq.*

contractor may be a national of another Member State or that the subcontract is governed by the law of another Member State. Or perhaps, the question should rather be formulated as follows: may the objective of protecting undistorted competition in the national market allow France to impose on contractors established in another Member State, where a direct action is not granted to subcontractors, the additional administrative and economic burden of having overriding scope of application that may prohibit, impede, or render it less advantageous to perform construction work in France by employing subcontractors? Neither the Reporting Judge nor the Advocate General addressed the question.

Indeed, neither national rules that are categorized as public policy rules (*ordre public*) nor overriding mandatory rules (*lois de police*) are exempt from having to comply with the provisions of the EC Treaty.[51] The primacy of Community law may affect indiscriminate ascription of overriding mandatory *status* to a national measure, and may have the effect of restricting its scope of application, should it be inconsistent with the provisions of the Treaty. Particularly, according to settled case law of the Court of justice, national *lois de police* can only have effect under the scope of application of the Treaty to the extent that their application does not constitute an unjustified restriction to the freedom of movement in the internal market.[52]

As a consequence, to the extent in which the obligations required by Law n° 75-1334 affect internal market freedoms, the policy underlying Law n° 75-1334 can be enforced in intra-Community relations only in terms of exception to those freedoms. Particularly, subcontracting, involving an activity performed by a self-employed person outside of a relationship of labour subordination falls under the scope of application of the provisions of EC Treaty on freedom to provide services (Article 49 et seq. EC Treaty). The requirements for application of the freedom to provide services are to be found in the case at issue: only nationals of Member States are involved and the cross-border element that is usually required under Article 49(1) EC Treaty is supplied by the establishment in Germany of the contractor, which provides services in a Member State other than that of its establishment for a French employer.[53]

---

[51] ECJ, 23.11.1999, C-369/96, *Arblade* (note 30), § 31. See also FALLON M., 'Libertés communautaires et règles de conflit de lois', in: FUCHS A./MUIR WATT H./PATAUT É. (dirs.), *Les conflits de lois et le système juridique communautaire*, Paris2004, p. 31 *et seq.*, at p. 66 *et seq.*

[52] FALLON M./MEEUSEN J., 'Private International Law in the European Union and the Exception of Mutual Recognition', in this *Yearbook* 2002, p. 37 *et seq.* See also AUDIT M., 'Régulation du marché intérieur et libre circulation des lois', in: *Clunet* 2006, p. 1333 *et seq.*; GKOUTZINIS A., 'Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services', in: *Common Market Law Rev*. 2004, p. 119 *et seq.*, at 153.

[53] See for references HATZOPOULOS V., 'Legal Aspects of the Internal Market for Services', in: PELKMANS J./HANF D./CHANG M. (eds.), *The EU Internal Market in Comparative Perspective. Economic, Political and Legal Analysis*, Bruxelles [etc.] 2008, p. 139 *et seq.*, at p. 145 *et seq.*

In this respect, the mixed Chambers, immediately ruling out the nationality of subcontractor as *règle d'applicabilité* of Law n° 75-1334, complied with the letter of Article 49(1) of the EC Treaty, which abolishes restrictions on freedom to provide services imposed on nationals of Member States that are established in a Member State other than that of the recipient of services. From the standpoint of Article 49(1), application of Law n° 75-1334 on grounds of the territorial location of the building site in France, irrespective of nationality of the subcontractor, constitutes an indistinctly applicable measure.

Yet, to the effect of Article 49(1) of the EC Treaty, the service provider whose activity in France could be restricted as an effect of the overriding nature of Law n° 75-1334 is the contractor who is not established in France. In this respect, the analysis of the Reporting Judge, which assessed the compatibility of Law n° 75-1334 as *loi de police* with the EC Treaty under the non-discrimination principle only, appears to be far from complete. Indeed, the Court of Justice has progressively interpreted Article 49 of the EC Treaty as requiring not only the elimination of all discrimination on the grounds of nationality against service providers but also the abolition of any restriction, even *indistinctly applicable* to national providers of services and service providers established in other Member States, which is apt to prohibit, impede, or render less advantageous the access to the market of the host State by cross-border service providers established in another Member State.[54] It might well be retained that the provision of services in France by SAB was restricted by reasons of the administrative requirements and the financial cost imposed on contractors by Law n° 75-1334 because of the employment of a subcontractor in France. As it has been mentioned above, Law n° 75-1334 requires the contractor to request and obtain the employer's approval of the subcontractor itself and the subcontractor's terms of payment and conditions, as well as a financial guarantee from a reputable institution or an assignment of debt accepted by the employer in favour of the subcontractor as a guarantee for payment of the subcontractor's remuneration. Indeed, the Court of Justice has established that also imposition of expenses and additional administrative and economic burdens, which render the provision of services in the host Member State less attractive and more onerous for undertakings established in another Member State, might

[54] Within a vast case law, see ECJ, 25.7.1991, C-76/90, *Säger*, in: *ECR* 1991-I, p. 4221 *et seq.*, § 12; ECJ, 9.8.1994, C-43/93, *Vander Elst*, in: *ECR* 1994-I, p. 3803 *et seq.*, § 14; ECJ, 28.3.1996, C-272/94, *Guiot*, in: *ECR* 1996-I, p. 1905 *et seq.*, § 10; ECJ, 12.12.1996, C-3/95, *Reisebüro*, in: *ECR* 1996-I, p. 6511 *et seq.*, § 25. More recently, ECJ, 19.1.2006, C-244/04, *Commission v Germany*, in: *ECR* 2006-I, p. 885 *et seq.*, § 30; ECJ, 18.7.2007, C-490/04, *Commission v Germany*, in: *ECR* 2007-I, p. 6095 *et seq.*, § 63. It is also irrelevant that the same requirement is imposed on operators established in France, because, in any event, indistinctly applicable obstacles to the freedom of establishment are prohibited in the same way as those to the freedom to provide services: see, *inter alia*, ECJ, 31.3.1993, C-19/92, *Kraus*, in: *ECR* 1993-I, p. 1663, § 32; ECJ, 30.11.1995, C-55/94, *Gebhard*, in: *ECR* 1995-I, p. 4165, § 37; ECJ, 26.10.2006, C-65/05, *Commission v Greece*, in: *ECR* 2006-I, § 48.

constitute a restriction on cross-border provision of services.[55] As a result, Law n° 75-1334, which affects a contractor's freedom to providing services when it is established in another Member State that does not require such compliance costs and administrative burdens, could very well restrict incoming undertaking's access to the French construction market.

To properly analyze the compatibility between European law and the application of Law n° 75-1334 as *loi de police*, the Reporting Judge should have started by stating that Law n° 75-1334 affects a sector that has not yet been harmonized at the Community level.[56] Directive 2006/123/EC of the European Parliament and Council of 12 December 2006 on services in the internal market[57] could not have been taken into consideration by the Court, as the term for its transposition by Member States had not yet expired at the time of the judgment. Absent harmonization at European level,[58] national measures that, although indistinctly applicable, may constitute a restriction to the exercise of fundamental freedoms guaranteed by the Treaty are admissible on grounds of exceptions to those freedoms, if they satisfy four requirements.[59] Those requirements should be restrictively construed and ascertained on a case-by-case basis.

First, national measures must be applied in a non-discriminatory manner. The test for non-discrimination, at least the only one observed by the Reporting Judge, requires that French Law n° 75-1334 be applied to subcontractors regardless of nationality. Nevertheless, the Reporting Judge could have added that, for the

---

[55] ECJ, 15.3.2001, C-165/98, *Mazzoleni*, in: *ECR* 2001-I, p. 2189 *et seq.*, § 24; ECJ, 24.1.2002, C-164/99, *Portugaia Construções*, in: *ECR* 2002-I, p. 787 *et seq.* § 18; ECJ, 3.4.2008, C-346/06, *Rüffert*, in: *ECR* 2008-I, p. 2189, § 37.

[56] Indeed, the only harmonization instrument that could be taken into account is Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (*OJ* L 200, 8.8.2000, p. 35). Though applying by overt statement to subcontracts (see 22nd and 19th recital), it nevertheless provides only a horizontal minimal harmonization, that, particularly, does not include debts that are subject to insolvency proceedings instituted against the debtor (Article 6(3). As it shall be recalled, the case at issue concerned a debt proposed by Agintis to the organs of the SAB's bankruptcy in Germany (*supra* para. 2).

[57] *OJ* L 376, 27.12.2006, p. 36.

[58] If harmonization (at least minimal harmonization) had been achieved, a hypothetical discriminatory application of Law n° 75-1334 could even be possible, on condition that it be based on grounds of requirements established by Article 46 of the EC Treaty (on reference by Article 55 EC Treaty) for exceptions to the freedom to provide services in the internal market, namely public policy, public security, or public health. Security or health being out of the question, discriminatory application of Law n° 75-1334 to French subcontractors could only be founded on public policy. The Reporting Judge nevertheless excluded public policy as grounds for refusal to apply German rules (*supra*, para. 5), so a discriminatory application of Law n° 75-1334 would infringe Article 49(1) of the EC Treaty.

[59] The principles focused upon by the ECJ have been restated in Article 16(1), *Freedom to provide services*, of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*OJ* L 376, 27.12.2006, p. 36 et seq). See also Article 4(8) of the Directive, and recital (40).

same reasons, the application of Law n° 75-1334 on grounds of establishment should also be ruled out. The Court of justice has indeed stated that establishment, although at first glance representing an objective connecting factor *affecting all persons subject to it in accordance with objective criteria and without regard to their nationality,*[60] might constitute indirect discrimination based on nationality. This occurs when it adversely affects nationals of other Member States, as non-residents established abroad normally are, even though they are operating in the local market.[61] For the same reasons, the place of (habitual) residence or, in the case of companies, the location of the registered office or principal place of business (Article 4(2) of the Rome Convention) may also constitute an indirect discrimination based on nationality. Conversely, only the application of Law n° 75-1334 indistinctly to all subcontracts governed by French law (pursuant to the relevant conflict rule) would have been non-discriminatory, according to the case law of the Court of Justice.[62]

Second, such national measure must be justified by imperative requirements in the general interest or imperative reasons relating to the public interest (*raisons impérieuses d'intérêt général*).[63] One may speculate as to whether the twofold objective of Law n° 75-1334, protecting subcontractors and the national construction industry, that justify the application of this statute as *loi de police*, could also justify its application as an imperative requirement in the general interest, on grounds of an exception to Article 49(1) of the EC Treaty. Scholarly literature has highlighted the equivalence between the function played by 'general interest' as a requirement for restrictions to the freedom to provide services, and by 'public interest' as a requirement for application of *lois de police*.[64] The Court of Justice has not yet had any opportunity to rule on this issue, so that in this respect one should speculate by way of analogy. In the above-mentioned *Ingmar* case, the Court recognized that protection of the interests of self-employed persons, who should be considered weaker by reason of their financial subjection to a counterparty, can constitute an imperative requirement in the general interest justifying a restriction on freedom to provide services.[65] Furthermore, the Court of Justice has consistently acknowledged that, on account of the peculiar conditions of the con-

[60] ECJ, 10.5.1995, C-384/93, *Alpine Investments*, in: *ECR* 1995-I, p. 1141 *et seq.*, § 35.

[61] ECJ, 7.5.1998, *Clean Car Autoservice*, C-350/96, in: *ECR* 1998-I, p. 2521; ECJ, 4.12.1986, *Commission v Germany ('Insurances')*, 205/84, in: *ECR* 1986, p. 3755, § 52 to 57. See also the text of Article 14(1), Prohibited requirements, of the Directive 2006/123/EC on services in the internal market.

[62] ECJ, 24.1.1991, C-339/89, *Alsthom*, in: *ECR* 1991-I, p. 107 *et seq.*, § 15.

[63] ECJ, 23.11.1999, C-369/96 and C-376/96, *Arblade* (note 30), § 33-34. Cf. HATZOPOULOS V., 'Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?', in: *Rev. trim. dr. eur.*, 1998, p. 191 *et seq.*

[64] FALLON M., 'Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne', in: *Recueil des Cours*, t. 253, 1995-III, p. 9 *et seq.*, at 257 *et seq.*

[65] See *supra* (note 28).

struction industry,[66] Member States may grant, based on an overriding reason relating to the public interest, special protection to employees in that sector, irrespective of the Member State of establishment, if that Member State of establishment does not provide comparable protection.[67] It is not unreasonable that, by way of analogy, protection of subcontractors as a category of weak self-employed persons in financial subjection working in the highly sensitive construction sector might justify application of Law n° 75-1334 as *loi de police*, on grounds of imperative requirements in the public interest.

However, it should be recalled that both the Reporting Judge and the Advocate General have explicitly construed Law n° 75-1334 as having the function of protecting the competitiveness of French subcontractors by preventing the social dumping that might result by the competitive advantage possibly enjoyed by subcontractors who are not subject to application of Law n° 75-1334. This objective is evidence of economic protectionism, not social protection, and cannot represent a basis for justifying the overriding mandatory application of Law n° 75-1334 as an imperative requirement relating to the public interest.[68]

The third and fourth conditions establish the test of proportionality, and the necessity test inherent thereto, requiring that application of Law n° 75-1334 as *loi de police* must be adequate to the purpose of attaining the objective being pursued and must not go beyond what is necessary in order to attain it.[69] In the case at issue, the question should be whether interests of France to the objective and function of Law n° 75-1334, and to its strictly territorial application, are proportionate by comparison to the competing Community interests in the freedom of providing services, or could be achieved as effectively by means of rules having a less restrictive effect on Article 49(1) of the EC Treaty.[70] By limiting *ratione materiae* the scope of the overriding application of Law n° 75-1334 to its protective provisions ('*...insofar as protective provisions concerning subcontractor are concerned*') and to contracts concluded in the construction industry (although Law n°

[66] ECJ, 28.3.1996 *Guiot*, (nota 54), § 16.

[67] See, *inter alia*, ECJ, 17.12.1981, 279/80, *Webb*, in: *ECR* 1981, p. 3305, § 19; ECJ, 3.2.1982, 62/81 and 63/81, *Seco*, in: *ECR* 1982, p. 223 *et seq.*, § 14; ECJ, 27.3.1990, C-113/89, *Rush Portuguesa*, *ECR* 1990-I, p. 1417, § 18; ECJ, 25.10.2001, C-49/98 et al., *Finalarte*, *ECR* 2001-I, p. 7831 *et seq.*, § 33; ECJ, 24.1.2002, C-164/99, *Portugaia Construções* (note 55), § 20.

[68] See, by analogy to the labour market, DE VOS M., 'Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?', in: *ERA Forum* 2006, 3, p. 356 et seq, at 366. On the fact that objectives of upholding undistorted competition, on the one hand, and ensuring workers' protection based on the 'prevention of social dumping,' on the other, may simultaneously be pursued: ECJ, 12.10.2004, C-60/03, *Wolff & Müller*, in: *ECR* 2004-I, p. 9553, § 42.

[69] See, in particular, ECJ, 25.7.1991, C-76-1990, *Säger*, in: *ECR* 1991-I, p. 4221, § 15; ECJ, 31.3.1993, C-19/92, *Kraus*, in: *ECR* 1993-I, p. 1663, § 32; ECJ, 30.11.1995, C-55/94, *Gebhard*, in: *ECR* 1995-I, p. 4165, § 37; ECJ, 28.3.1996, C-272/94, *Guiot* (note 54), § 11, 13; ECJ, 23.11.1999, C-369/96 and C-376/96, *Arblade* (note 30), § 35.

[70] ECJ, 15.3.2001, C-165/98, *Mazzoleni* (note 55), § 36.

75-1334 does not apply to construction industry only), the mixed Chambers seem to theoretically provide an adequate signal of proportionality.

Nevertheless, all the provisions of the Law n° 75-1334 are, as a matter of fact, protective rules. This fact casts doubt on the observance of the proportionality test.[71] In compliance with the strict standard of interpretation that should preside to the application of a statute as *loi de police* and as an exception to the freedom of providing services, the mixed Chambers should have taken into account Law n° 75-1334 not in its entirety, but rule by rule. Furthermore, the effects produced by overriding mandatory application of Law n° 75-1334 are inconsistent with its intended purpose of protecting the French construction industry, as it has been remarked above, taking into account that insolvency and bankruptcy of subcontractors established out of France cannot significantly affect the French construction industry and market. As a result, it should be retained that application of Law n° 75-1334 on grounds of *loi de police* goes beyond what is necessary to attain its intended objective, and that the requirements of the necessity test are not met.

In contrast, the last equivalency requirement (non-duplication), as a consequence of the necessity test inherent in the principle of proportionality, should be considered met. In fact, the imperative requirement in the general interest protected through Law n° 75-1334 is not adequately protected at a comparable level by the rules to which the contractor, as a service provider, is subject in the Member State of establishment, considering that German law does not provide for any direct action available to subcontractors.[72]

In conclusion, it should be retained that, even irrespective of the fact that requirements of proportionality and necessity have seemingly not been met, the protectionist objective of Law n° 75-1334 cannot justify its overriding mandatory application as an imperative requirement relating to the public interest, which may restrict the exercise of freedom to provide services under Article 49 et seq of the EC Treaty. As a consequence, Law n° 75-1334 should be regarded as a measure equivalent to quantitative restrictions on the free movement of services, therefore being unenforceable as *loi de police*, irrespective of the law applicable to the subcontract.

VIII. Concluding Remarks

Because subcontractors have an enduring financial subjection to contractors, they are an exceedingly vulnerable group in the highly competitive battle between the chain of undertakings in the construction industry. Strong incidences of insolvency and bankruptcy make subcontractors in the construction market highly sensitive to unfair competition and social dumping, which not only threatens employment, but

[71] See D'AVOUT L. (note 13), p. 33.

[72] Cf., *inter alia*, ECJ, 15.3.2001, C-165/98, *Mazzoleni* (note 55), § 36; ECJ, 10.5.1995, C-384/93, *Alpine Investments* (note 60), § 40.

also the capacity of local undertakings to compete on a level playing field with foreign subcontractors.

By eroding the obstacles to the cross-border provision of services, the European Community has exacerbated the subcontractors' position in the internal market, without providing for special protective rules.[73] The absence of a Community minimum standard can only leave the door open for Member States to provide individual systems of protection at the national level. The peculiarities of the local construction industry have made resulting subcontracting being intensively regulated in France through Law n° 75-1334, which, failing payment by the contractors, grants subcontractors a direct action for payment *vis-à-vis* the employer. This pronouncement of the authoritative mixed Chambers of the French Supreme Court, which grants a direct action to all subcontractors working in a building site localized in the territory of France irrespective of the applicable law to the subcontract, seems to establish a protectionist application of the protective rules of Law n° 75-1334. Although apparently intended to avoid discrimination based on nationality, application of Law n° 75-1334 based on territoriality effectively reduces the competitive advantage that subcontractors legally employed in France, though being nationals of other States or having their establishment abroad, might have with respect to French subcontractors. Foreign subcontractors' right to equal treatment in the host country is unquestionable, but it is doubtful whether concerns of unfair competition and social dumping by means of rules governing working conditions, which seems to be the disguised fears on which this judgment is founded, can be approved of in the internal market.

Indeed, the stated objective of strengthening the protection provided to subcontractors seemingly fails to comply with the requirements established by the Court of Justice for justified restrictions on cross-border freedom to provide services. Had the French Supreme Court not adopted an inward-looking approach, exclusively focused on the structure of the local construction industry and market, it should have considered that regulating the conditions of competition of an industry sector in a EC Member State can only lead to an affect on the free provision of services under the EC Treaty, and by implication the good functioning of the internal market. However, this judgment has evidentiary value in showing that the internal market requires not only consistent application of national protective standards but also a harmonization of Member States' fragmented systems of protection, not only in the sector of labour relations but also concerning self-employed persons. A contradiction between economic integration and the persistence of

[73] The subcontracting is only mentioned in documents having no compulsory nature: Communication from the Commission to the Council and the European Parliament on European contract law (doc. 2001/C 255/01); Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) EEC Treaty, in: *OJ* C1 3/1/1979, p. 2-3; Council Resolution of 26 September 1989 on the development of subcontracting in the Community, in: *OJ* C 254, 7.10.1989; Draft Council resolution on the development of subcontracting in the Community, doc. COM/89/402 final; Communication from the Commission on the development of subcontracting in the Community COM/89/402 final.

unequal protection for workers can only lead to reinforce arguments that the internal market would inevitably threaten social standards.

This pronouncement might have been retained as a contribution to the doctrine on *lois de police protectrices*, had the French Supreme Court not considerably reduced its impact by trying to read into Law n° 75-1334 requirements for the protection of not only the private interests of a category of weak parties, but also of the public interests of the State. The persistence of requiring the objective of protecting the public policy of the State casts doubts on the application of Law n° 75-1334 as *loi de police protectrice* or, rather, as a conventional overriding mandatory rule. In this respect, one should regret that the Court, dropping a suggestion hinted to by the Advocate General, did not seize the opportunity to request from Court of Justice a preliminary ruling on the requirements for application of *lois de police protectrices* under Article 7(2) of the Rome Convention.

The leading edge of this judgment can otherwise be found in the regulatory function that the French Supreme Court attributes to Article 7(2) of the Rome Convention. In the application granted by the Supreme Court, Article 7(2) overrides the governing law of the subcontract, which had been chosen by the parties, to establish the application of a mandatory statute to ultimately prevent restrictions of competition in the French construction market. The reason for overriding party autonomy is the intense regulatory policy of the French State in this construction market, which is an economic area in which State interests are deemed to be prevailing upon the interests inspiring party autonomy. Therefore, the peculiar application of Article 7(2) made by the Supreme Court in this judgment could be evidence for the accuracy of the reading recently proposed by scholarly literature about the regulatory function increasingly ascribed to overriding conflict rules, which, as a result, '*rather than attaching an appropriate connecting factor to an abstract category of issues,* (...) *identify the risk of distortion and seek the best way to correct it.*'[74]

[74] MUIR WATT H., 'European Integration, Legal Diversity and the Conflict of Laws', in: *Edinburgh Law Rev.* 2005, p. 6 et seq, at 20. See also ID., 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy', in: *Columbia Journ. Eur. Law* 2003, p. 383 *et seq.*; GARCIMARTÍN ALFÉREZ F.J., 'Regulatory Competition: A Private International Law Approach', in: *Eur. Journ. Law and Econ.* 1999, p. 251 *et seq.*, at 258 *et seq.*

TWO RECENT CROATIAN DECISIONS ON COPYRIGHT INFRINGEMENT: CONFLICT OF LAWS AND MORE

Ivana KUNDA*

I. The Two Decisions

This comment focuses on two recent decisions from the Croatian commercial courts, both of which concern copyright infringement claims with an international element. Besides the conflict-of-law issues raised in the proceedings, there are also certain questions on substance that merit discussion here.

A. *Sten Eric Odman v. Adris Grupa d.d.*

The first case, *Sten Eric Odman v. Adris Grupa d.d.*, was brought before the Commercial Court in Rijeka in 2002.[1] It concerned an alleged copyright infringement by a Croatia-based company through the unauthorised use and alteration of the

* Dr. sc. Ivana Kunda, LL.M. Chair for European and Private International Law, University of Rijeka, Faculty of Law. I would like to express my gratitude to the Directors of the Max-Planck Institute for Intellectual Property, Unfair Competition and Tax Law in Munich, Germany and the GRUR (*Gewerblicher Rechtsschutz und Urheberrecht*) for hosting and enabling my research related to this comment.

[1] *Trgovački sud u Rijeci*, P-749/2002 (unpublished). The decision discussed in this comment is the first-instance decision of 12 October 2007.

Yearbook of Private International Law, Volume 10 (2008), pp. 617-628

Printed in Germany

'Walter Wolf' logo on cigarette packages.[2] The plaintiff, a natural person of Swiss nationality and domicile, claimed that he held the copyright on a stylised letter 'W' combined with a drawing of a wolf in different colour variations. The plaintiff alleged that he designed the logo in the late 1970s.

According to the statement of claim, the design was commissioned by the Swiss company Alessia Parfumes S.A., which subsequently acquired the rights to use the logo on different cosmetic products and further licence it to others. The plaintiff also alleged that in 2000 he became aware that the defendant was producing and offering for sale cigarettes under the name of 'Walter Wolf' with the accompanying copyrighted logo without permission from him or Alessia Parfumes S.A. Furthermore, the plaintiff claimed to have noticed that the defendant altered the logo by removing the wolf drawing in certain promotional materials. Hence, the plaintiff alleged that both his moral and economic rights were infringed and demanded compensation in the form of damages.

The defendant contended that there was no infringement, because in 1989 it claimed to have obtained a licence to use the logo and the name through a contract with Mr. Walter Wolf and the Dutch company Womar B.V., as the author and holder of the copyright over the disputed logo, respectively. As an additional defense, the defendant invoked the presumption of authorship, pointing out the signature of Mr. Walter Wolf as a part of the logo. The plaintiff responded that it was not the actual signature, but a stylised signature forming an integral part of the design. As a result, the court had to first determine authorship before it could issue any ruling on the primary infringement claim.

Providing an elaborated and well-reasoned judgement on the substantive issues, the Rijeka Court nevertheless failed to scrutinize the conflict-of-law questions. It was only in the context of resolving the authorship issue that the Rijeka Court cited Article 8(2) of the former Croatian Copyright Act of 1978 and Article 8 of the Swiss Federal Copyright Act of 1922, both of which were in force at the time the work at dispute was created.[3] Interestingly, the Court's reasoning neither explained the need to consult both Acts nor contained any further traits of conflict-of-law analysis.

B. *Freistaat Bayern v. Croatiaknjiga d.o.o.*

The second case, *Freistaat Bayern v. Croatiaknjiga d.o.o.*, was initiated before the Commercial Court in Zagreb in 2007.[4] The State of Bavaria claimed to be the copyright holder of the Adolf Hitler's 'Mein Kampf'. Based on this claim, the State demanded that the Croatiaknjiga be ordered to cease printing, publishing, and

[2] The product appearance is accessible at the <http://www.tdr.hr/proizvodi/walter_wolf/walter_wolf.htm>.

[3] *Trgovački sud u Rijeci*, P-749/2002, judgement of 12 October 2007, p. 23.

[4] *Trgovački sud u Zagrebu*, P-2946/2007 (unpublished). The decision discussed here is the first-instance decision of 18 February 2008.

offering the book for sale in the German and Croatian languages and from taking any other similar actions that could infringe upon the State's rights. The State of Bavaria also requested that all copies of the book be destroyed and the publication of the court decision in Croatia and in Germany ordered at the defendant's expense.

The defendant challenged the State of Bavaria's right of action (*Aktivlegitimation*), claiming that copyright by its very nature belongs to a natural person who creates a work, and, hence, the State of Bavaria could not have had acquired a copyright on the basis of confiscation. The defendant further argued that even if such rights could have been lawfully acquired in Germany, the acquisition was contrary to Croatian laws and would thus prevent Bavaria's claim from being protected in Croatia. In addition, the defendant argued that the copyright expired on 29 April 1995, under former Croatian law, which provided for 50 years of copyright protection following the author's death.

Unlike *Odman v. Adris Grupa d.d.*, in this case the parties were mindful of the cross-border element. Early in the proceedings they attempted to gain a substantive advantage by claiming that the laws of different countries applied. Thus, the defendant claimed that Croatian law applied exclusively to the existence, duration, and enforcement of the copyright. Bavaria, however, claimed that German law applied to the existence and duration of the copyright, while Croatian law applied to only enforcement.

In an attempt to resolve these matters, the Zagreb Court's judgement first addressed the governing law issue, concluding that the defendant was correct in stating that Croatian law applied to the entirety of the proceedings. The Court's reasoning invoked the Berne Convention for the Protection of Literary and Artistic Works, which is part of the Croatian legal order as a result of succession of international treaties concluded by former Yugoslavia.[5] To be precise, the Court relied on Article 6bis(3), which, as the Court explained, provides that 'the means of redress for safeguarding the granted rights are governed by the legislation of the country in which protection is claimed.'[6] The Court further held that according to Article 7(8) of the Berne Convention 'the term of protection is governed by the legislation of the country in which protection is claimed.'[7] What is very interesting is the Court's final conclusion on the applicable law. The Court held that 'the application of national law in copyright cases with an international element is a generally accepted principle of all international treaties and conventions.'[8] However, the Court probably intended to refer to the application of domestic (forum) law rather than simply any national law.

[5] *Official Journal SFRY* no. 14/1975, *Official Journal SFRY: International Treaties* no. 4/1986; *Official Gazette RC: International Treaties*, nos. 12/1993, 3/1999 and 11/1999.

[6] *Trgovački sud u Zagrebu*, P-2946/2007, judgement of 18 February 2008, p. 3.

[7] Loc. cit.

[8] Loc. cit.

III. Commentary on the Two Decisions

A. General Account

These two first-instance judgements were both resolved in favour of plaintiffs, finding for infringement. Both cases are also currently pending on appeal before the High Commercial Court. Regardless of the fact that neither case is final and both decisions may be altered, they offer plenty of motives for scientific analysis. An additional reason for analysis is that appeal proceedings are not expected to be completed earlier than year or so subsequent to the appeal. In fact, typical first-instance proceedings before the Croatian courts generally take several years, as did *Odman v. Adris Grupa d.d.*, whereas the surprisingly short proceedings in *Freistaat Bayern v. Croatiaknjiga d.o.o.* are an exception in Croatian case law. The latter decision, bearing obviously political implications, may not be a perfect conflict-of-law study. In the light of these circumstances, it is surely remarkable how the Zagreb Court upheld the defendant's argument on the application of Croatian law to rule in favour of the plaintiff on the substance. Precisely due to the specific facts of the case, it raises issues that are atypical yet still valuable for both practical and scientific purposes.

Another problem with the two judgements is the effectiveness of the substantive rulings. The Rijeka Court judgment is more convincing than the Zagreb Court judgment in this respect. This is partially due to a thorough examination and establishing of relevant facts, so that the Rijeka Court's substantive conclusions were better elaborated. Yet, the conflict-of-law analysis was omitted by the Rijeka Court, and, where it might have been developed, the identity of competing substantive laws would have enabled the Rijeka Court to leave this issue unresolved. The Zagreb Court should be complimented for starting with the conflict-of-law issue and seriously attempting to resolve it, although that was probably triggered by the parties' active role in trying to prove the applicability of certain laws. However, its judgment still shows a profoundly insufficient understanding of conflict-of-laws in copyright field and, to a certain extent, a lack of consistency in some of its substantive determinations.

Viewing the two sets of fact patterns as a whole, the following issues were raised before the courts: (1) copyright infringement, (2) authorship, (3) the right of action, (4) transfer of the right, and (5) the term of a copyright. The above enumerated issues will be given separate consideration from a conflict-of-law perspective. In addition, certain substantive law problems will be given proper attention to give the reader a full insight into the judgments. The jurisdictional issues, which really posed no problems in the two cases, will not be dealt with in the present paper.

B. Infringement

At the outset, it is necessary to define a crucial notion for understanding the conflict-of-law rules relevant to intellectual property rights – the principle of territori-

ality. Territoriality, as used in this note, means that the effects of a certain intellectual property right in an individual country are regulated under that country's laws. Hence, an intellectual property right in one country is independent from other parallel rights that might exist in other countries.[9] This principle can be traced back to early international treaties in the field of intellectual property. The Berne Convention is the particularly relevant here. Its provisions on national treatment, notably Article 5(2), have been the object of vigorous debate, dividing the scholars into two groups: the materialists and the conflictualists. The materialists believe that the national treatment clause is only a mechanism for ensuring equal treatment of foreigners in relation to protection of their copyrighted works in countries other than the country of origin. The conflictualists believe that the national treatment clause also embodies a conflict-of-law rule requiring application of the law of the country in/for which protection is claimed. For reasons beyond the scope of this article, the materialist's position is very convincing.[10] Nevertheless, it seems that the Zagreb Court favoured the conflictualist approach when attempting to determine the applicable law using the Berne Convention rules. However, the Court's reasoning would have been more credible if, instead of Article 6bis(3), which deals with moral rights, it had invoked Article 5(2). That is because the act of publishing and offering for sale 'Mein Kampf' can be characterised as an unauthorised exercise of economic rights rather than a violation of moral rights.

Aside from this imprecision, and even if one accepts the conflictualist approach, a lawyer will instantly notice the use of the expression 'in which the protection is claimed' (in Croatian: '*u kojoj se zaštita traži*') in the Zagreb Court's judgment. This is in fact the correct translation of the original French text of the Berne Convention ('*où la protection est réclamée*'), which today is commonly interpreted as 'for which the protection is claimed.' The move against a purely linguistic interpretation of this provision seems to be induced by the same development that narrowed the previously strict territoriality concept that served as a barrier to international jurisdiction in matters of intellectual property right infringement. Under this development, the concept of territoriality now enables the courts of one country to decide infringement cases concerning an intellectual property right protected in another country, yet it still bars the application of the law of the first country to the infringement of an intellectual property right protected in the other country. As a consequence of its literal reading of the Berne Convention, the Zagreb Court concluded that its own domestic law applied. Reference to the *lex fori* under these circumstances, to the best of this commentator's knowledge, has no precedence in Croatian case law or Croatian scholarly opinions. When interpreting Article 5(2) of the Berne Convention, scholars in Croatia construe it as

[9] This is one of essentially four meanings of territoriality identified in scholarship. See, CORNISH W./LLEVELYN D., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London 2003, pp. 26-27; WADLOW CH., *Enforcement of Intellectual Property in European and International Law*, London 1998, p. 9.

[10] See, e.g., VAN EECHOUD M.M., *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis*, The Hague/London/New York 2003, especially pp. 48 and 92.

calling for the application of the law of the country for which the protection is claimed (*lex loci protectionis*).[11] Coincidentally, in the case at hand the Zagreb Court's conservative, territorialistic approach did not produce a result any different from a hypothetical application of the *lex loci protectionis* rule, because under the cases' facts both rules refer to Croatian law. Yet, it might have been that the plaintiff's claims also referred to copies of the book offered for sale by the defendant in one or more countries other than Croatia (in Bosnia and Herzegovina, for instance) where the Court's *lex fori* approach would have violated the territoriality principle.

These notes may not be as pertinent to the Rijeka Court's reasoning, since the Court never revealed how the application of Croatian law was justified. The fact that the Court referred to Swiss law in relation to authorship reveals the Rijeka Court's awareness of the international element to the case and the conflict-of-laws issues begging for resolution. Perhaps due to parties' failure to develop the conflict-of-law potential of the case, the Rijeka Court opted for a more lenient approach and only slightly touched upon the issue. Unlike in the matter before the Zagreb Court, the parties before the Rijeka Court did not discuss the applicability of Croatian law. The question that instantly comes to mind – whether Croatian law upholds *fakultatives Kollisionsrecht* as some case law might suggest, or requires the application of conflict-of-law rules *ex officio* as the scholars unanimously agree – is beyond the scope of this comment. It may be concluded that, perhaps coincidentally, the Rijeka Court's application of Croatian law to infringement is in line with the country of protection rule, given that the statement of claim concerns the defendant's actions in only Croatia.

C. Authorship

Authorship was disputed before the Rijeka Court, and the predominant part of the Court's reasoning was devoted to it. The Court began by stating that the author is the person who creates the work, and by the act of creation he or she becomes the original holder of the copyright. It is interesting that when the Court cites the wording contained in the provisions of the Croatian Copyright Act of 2003, and the previous version of 1999, it does not mention any law, but generally refers to legal scholarship. According to the general position in Croatian law, legal scholarship is not a direct source of law. Hence, it would have been safer for the Court to find grounds for its authorship decision in a relevant provision of law. Since the person whose authorship is to be determined is a foreign citizen and the work was created in a foreign country, the governing law question is the first to be resolved. Indeed, when dealing with the presumption of authorship the Rijeka Court simultaneously referred to the Croatian Copyright Act of 1978 and the Swiss Federal Copyright Act of 1922. The Court stated that these two acts, which were in force at the time the work was created, provide exactly the same rule on the presumption of authorship: the author shall be the person whose name and surname or pseudonym

[11] See SAJKO K., *Međunarodno privatno pravo*, Zagreb 2005, p. 279; HENNEBERG, I., *Autorsko pravo*, Zagreb 1996, p. 34.

appears on the work, unless proven otherwise. Being identical, the provisions practically eliminate the need to decide between them. The Court embraced this as a way out, leaving the conflict-of-law analysis at the initial level. In principle, the Rijeka Court was faced with the question of applicable law. It looked into Swiss law and Croatian law, but it is possible to only hypothesize which law the court used to decide the case. Most probably Swiss law was taken into consideration as the *lex originis*, while the Croatian law was considered either as the *lex fori* or the *lex protectionis.* It is almost certain that the Court would not consider both laws as applying cumulatively, and the fact that the Court actually looked into the Swiss law at all may be seen as an indication of its preference for the *lex originis*. If so, this would not be an isolated court decision in that direction in the comparative case law.

There are authorities supporting *locus origins* as a connecting factor for issues of authorship, such as some French and U.S. decisions. On the other hand, the country of origin principle (*Ursprungslandprinzip*) is strongly opposed by German case law and directly conflicts with the provisions of the Swiss Federal PIL Act of 1987. The position against the application of the *lex originis* is strengthened with the argument on legal certainty, which is claimed to be endangered if objects of intellectual property right protection in a single country fall under different legal regimes. It is supported by that fact that it is becoming increasingly difficult to ascertain the facts relevant for establishing the place of origin.[12] The *locus protectionis* approach is considered to offer a more suitable solution, as the coherence of a national intellectual property law may be weakened by *dépeçage*. The Rijeka Court eventually decided correctly on the applicable substantive rule, but it remains unclear what would have been the result if the substantive rules of Swiss and Croatian laws differed.

D. Right of Action and Transferability of Intellectual Property Rights

An interesting point in relation to the Zagreb Court's judgment is the issue of the law applicable to the right of action: the Court simply applied the Croatian Copyright Act to ascertain whether the State of Bavaria can take the role of the plaintiff in this particular dispute. Bavaria presented itself as the copyright holder, and copyright holders under Croatian law are entitled to an action for unauthorised copyright use. In order to decide on the defendant's objection, the Court had to answer the question whether the State of Bavaria became a holder of copyright over 'Mein Kampf', i.e. whether it lawfully acquired a copyright on the basis of

[12] This is even more so given the difference in connecting the unpublished and published works. Thus, e.g. TROLLER K., 'Chapter 22: Industrial and Intellectual Property', in: LIPSTEIN K. (ed.), *Volume III: Private International Law, International Encyclopaedia of Comparative Law*, Tübingen/Dodrecht/Boston/Lancaster 1994, p. 9.; GOTTSCHALK E., 'The Law Applicable to Intellectual Property Rights: Is the *Lex Loci Protectionis* a Pertinent Choice-of-Law Approach?', in: GOTTSCHALK E. ET AL. (eds.), *Conflict of Laws in a Globalized World*, New York 2007, p. 205.

confiscation. This issue was characterised as falling under the broader notion of transferability of copyright. The judgment's substantive reasoning follows the conflict-of-law reasoning but it mentions only the means of legal redress and the copyright term. Therefore, absent the Court's express statement on this point, the application of Croatian law to the right of action and the legality of transfer might be understood as a consequence of either the *lex fori* rule or the *lex causae* rule. A likely construction would be that the Court considered these matters so closely related to the means of redress that they fell under the same conflict-of-law rule.

In conflict of laws, nonetheless, there is no straightforward solution for the right of action issue. It is different from the capacity to sue (*locus standi*), which is by its very procedural nature governed by the forum's law. Conversely, the right of action or *Aktivlegitimation* is substantive in nature, i.e. deriving from the substantive rules defining the rights. When an intellectual property right is granted through a legislative act, there is a person with whom this right is vested; this person is usually given a legal remedy to protect its right before the courts. For these reasons, the right of action issue should be decided under the same applicable law rule as the main issue (the *lex causae*, i.e. in intellectual property cases the *lex protectionis*).

The issue of intellectual property right transferability is also an important one in conflict-of-laws. Due to the implications and significance for the country of protection, transferability of an intellectual property right, and the legal grounds for transfer in particular, are often said to be governed by the *lex protectionis*.[13] One may conclude that although it did not explicitly resolve these matters, the Zagreb Court unintentionally succeeded in properly subjecting the issue of whether the confiscation is a permissible mode of copyright transfer to the Croatian law, because under the facts of the case Croatian law is both the *lex fori* and the *lex protectionis*.

Whether the Court gave good reasons for its substantive ruling on who held the copyright is another theme. Bavaria's claim was based on an alleged 1925 publishing contract between Adolf Hitler, as the author, and the Franz Eher Nachfolger GmbH, as the publisher. Bavaria was not in possession of the contract and tried to prove its existence with a 1964 statement from Mr. Berg, certified by the Bavarian State Ministry of Finance. The transfer of publishing rights to the State of Bavaria was effectuated through a Document of the State of Bavaria administrative body of 1948 (*Übertragungsurkunde Nr. 1918*). A second line of proof included two documents: (1) a Munich court judgment from 1948 (*Spruch der Spruchkammer München I-3568/48*) ordering the expropriation of all Hitler's property in Bavaria that was unidentified at that time, and (2) a transfer document (with the attachment) issued by the Munich administrative body in 1965 (*Übertragungsurkunde Nr. 86; Anlage zur Übertragungsurkunde Nr. 86*) whereby

[13] In a case with a similar fact pattern in Sweden, the Swedish Supreme Court held that the question of the extent to which a copyright might be transferred by confiscation was to be decided under the law of the country for which the protection was sought. See, *Högsta Domstolen*, B 4367-97, decision of 21 December 1998, *GRUR Int.* 1999, no. 7, pp. 625-626.

the Hitler's copyright to 'Mein Kampf' was expressly mentioned as a part of the property confiscated and retroactively transferred to Bavaria as of 24 January 1949.

The Zagreb Court was obviously convinced by Bavaria's claim that all mentioned documents were public documents with apostilles having legal effect in the Republic of Croatia. Doing nothing more than simply listing these documents, the Court concludes that they provide sufficient grounds for finding that the State of Bavaria held the copyright to 'Mein Kampf'. It fails to address the issue of whether foreign documents have legal effect in the proceedings before the Croatian court.

The Court might have reached a different conclusion by analysing the actual legal effects and contents of these documents. From a formal point of view, the effect of an apostille under the Hague Apostille Convention, which applied to the documents in question, is to certify the authenticity of the signature, the capacity in which the person signing the document has acted, and the identity of the seal or stamp that it bears; it does not extend to the content of the public documents.[14] Under Croatian law, the foreign apostilled document is presumed to be truthful, unless proven otherwise under the condition of reciprocity. Nonetheless, pursuant to the Croatian PIL Act of 1982 that is presently in force, foreign court judgements are subject to a special recognition procedure before they have any legal effect in Croatia. The recognition procedure also pertains to decisions by authorities other than courts, provided that in the country of origin these decisions have the same legal effect as court decisions and they regulate matters of private law (including property matters). Some Croatian scholars argue that probative value should be given to legalized or apostilled foreign court decisions even if they have not been formally recognized.[15] It is our opinion however that recognition, as a preliminary question, would be required for all aforementioned documents, with the exception of the statement by Mr. Berg. Because this is not the proper place to develop this argument in much detail, if suffices to say that a ruling creating, changing, or terminating certain legal relationship, such as that in the case at hand, needs to be verified against the conditions for recognition before it can have effect in Croatia. Otherwise, even rulings not recognizable in Croatia would still affect parties' rights and obligations by being back-doored through other proceedings.

As for Mr. Berg's statement, its relevance for these proceedings depends on whether Croatian law, applicable to modes of copyright transfer, allows publishing contracts to be proven with oral statements. Even if the answer is yes, which is by no means established, the persuasiveness of Mr. Berg's statement is questionable. Specifically, his claims that such a cumbersome contract transferring exclusive publishing right for all present and future editions in all languages was actually made is extremely suspect, taking into consideration Hitler's absolutely uncontrol-

[14] The Conclusions and Recommendations of the Special Commission of the Hague Conference on Private International Law on the Practical Operation of the Hague Legalization Convention (2003), http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf, point 22.

[15] VUKOVIĆ Đ / KUNŠTEK E., *Međunarodno građansko postupovno pravo*, Zagreb 2005, p. 200.

lable character and his political powers, as noted by a 1971 Italian court case with similar facts. Moreover, the Italian court pointed out that the statement did not reveal the duration of the contract or the content of its 1935 modifications, thus leaving several relevant facts unproven.[16] Again, even if the existence of the publishing contract is deemed established, it has to be verified whether the subsequent 1948 administrative decision offends the Croatian public policy. The defendant has emphasised in its appeal that the 1978 Croatian Copyright Act, used by the Court for the purpose of proving that confiscation is admissible, does not prescribe any other grounds for acquiring copyright except by virtue of a contract or succession. Invoking the Croatian Constitution might have added some persuasiveness to the argument against giving effect to the document in question.[17] According to the Constitution, the inviolability of ownership is one of the highest values in the Croatian legal order, and property may, in the interest of Croatia, be restricted or expropriated by law upon payment of compensation equal to its market value. Against this background, one could argue that the confiscation of a copyright is contrary to the Croatian public policy. This argument also applies to the two other documents that formed the plaintiff's second line of proof. Contrary to what the Zagreb Court ruled and the defendant claimed, the Croatian Copyright Act of 1978, in force at the time of the first publication in Croatia (in 1999), should be irrelevant. Because the content of public policy may change over time, it requires that the values shared by the society at the time the recognition decision is rendered are taken into account. Hence, the Court would have to look to the Croatian Constitution in addition to the Copyright Act currently in force.

E. Term of Protection

Regarding the term of the copyright, the Zagreb Court employed a technique analogous to what it used to resolve the infringement issue. Satisfied that the conflict-of-law solutions were provided by the Berne Convention, the Court invoked Article 7(8) and concluded that Croatian law, as the *lex fori*, was applicable. As a result, the Court rejected the defendant's contention that this issue should be governed by German law. This again seems to be correct only in its outcome because of the simple fact pattern in the case at hand. Together with the existence and scope of the copyright, the term of protection is actually a core copyright issue, and as such is said to be governed by the *lex loci protectionis*. In addition to applying Croatian law, the Court verified through Article 7(8) of the Berne Convention that the term of protection under Croatian law, which it found to be 70 years *post mortem auctoris*, was not longer than the term under German law.

In relation to the term of protection, the Court made a peculiar argument to hold that protection will terminate in 2015. Namely, the Court held that under the

[16] *Pretura di Bologna*, decision of 20 April 1971, *GRUR Int.*, no. 2, 1972, pp. 57, 58.

[17] *Official Gazette RC*, no. 41/2001 (consolidated version), *Official Gazette RC* no. 55/2001 (corrigendum).

Croatian Copyright Act of 2003, which is in force today, all works that had copyright protection at the time the Act became effective enjoy 70 years of protection following the author's death. According to the former Copyright Act of 1978, the term of protection expired 50 years after the author's death. Consequently, under the 1978 Act the copyright over 'Mein Kampf' would have expired at the beginning of 1996. This was specifically provided in Article 81 of the 1978 Act, which was amended only once in 1993 without relevance to the copyright term.[18]

The modification of the Act that affected a copyright term occurred through an amendment that went into force on 19 July 1999.[19] The 1999 Amendment extended the term of protection (for economic rights) to 70 years *post mortem auctoris*, at the same time providing in Article 29 that this extension applied to the works that still had copyright protection when the Amendment entered into force. Applying these rules to the facts of the case, the copyright term in relation to 'Mein Kampf' expired at the end of 1995, and, consequently, the 1999 Amendment could not have extended the copyright term. However, the Zagreb Court's conclusion went the other way and, quite unexpectedly, relied on the provisions of 1978 Act, as amended in 1993, to conclude that moral rights are perpetual and never ceased to exist in relation to 'Mein Kampf'. Hence, the economic rights still subsisted in Hitler's universal successor in title – the State of Bavaria.

The Court further stated that unlike the Copyright Act amended in 1999, which did not intend to retroactively apply the Act to works that no longer enjoyed protection, the 2003 Copyright Act intended to provide such retroactive effect.[20] It is an odd conclusion since the wordings of both provisions are exactly the same. The Court found its support in the provisions that retroactively cover rights of phonogram producers and database rights, which do not impose the requirement that the rights were still valid when the 2003 Act entered into force. Stating that it is unlikely that the legislator would have provided absolutely retroactive protection to such neighbouring rights and only limited retroactivity to 'copyright, by its nature a superior right'[21] to the two other rights, the Court held that that the legislator must have intended the same treatment for copyright. To uphold this assertion the Court cited the Explanations to the Final Proposal of the Copyright and Related Rights Act of 2003.[22]

There are at least three fundamental mistakes the Court made. The first is that the Court confused the moral and economic aspects of copyright. It is inconsistent to claim that because moral rights subsist in a book its author has economic rights under the new act, even though those economic rights had previously terminated and the new act only extends the terms of works still protected by economic

[18] The Amendment Act is published in *Official Gazette RC* no. 58/1993; the consolidated version is published in *Official Gazette RC*, no. 9/1999.

[19] *Official Gazette RC*, no. 76/1999.

[20] *Trgovački sud u Zagrebu*, P-2946/2007, judgement of 18 February 2008, pp. 5-6.

[21] Ibid., p. 5.

[22] The Explanations are published in GLIHA I., *Zakon o autorskom i srodnim pravima*, Zagreb 2004, pp. 101-192.

rights at the time it entered into force. This holding is not only the result of misunderstanding of the fundamentals of copyright, but also a purely unreasonable mistake. Because, if economic rights are linked with moral rights in their duration, why would one then need the special provision on duration of economic rights, let alone a transitory provision to that effect.

Second, an equally unacceptable mistake is the Court's statement that the moral rights in 'Mein Kampf' had been transferred to the State of Bavaria. Croatia is one of the legal systems that recognize the moral rights of an author, and it has always been extremely protective of them. Croatia not only invalidates any attempted transfer of moral rights (it is only admissible to a limited extent if occurring *mortis causae*), but it also renders any act of waiver on the part of the author without legal effect.

Finally, the Court's third problematic premise is its claim that the Explanations to the Final Proposal of the Copyright and Related Rights Act of 2003 reveal the legislator's intent to retroactively protect all works, regardless of when their original term expired. In fact, the Explanations to the transitional provision in Article 202 claim the exact opposite: they simply restate the provision related to the copyright and emphasize the condition that the works must not have entered into the public domain. Besides, the Explanations clarify the fact that the special retroactivity provided to rights of phonogram producers and database rights is due to international obligations owed by the Republic of Croatia because of Article 14(6) of the TRIPS Agreement and Article 14 of the European Union Directive 96/9/EC on the legal protection of databases. This plainly distinguishes the rationale behind the unlimited retroactivity given to those two rights from the limited retroactivity for other copyrights. Therefore, the Croatian law currently in force does not enable the revival of any economic rights related to 'Mein Kampf'.

IV. Final Remarks

The two cases discussed here pose rather difficult conflict of laws questions that courts of many countries struggle with. This is especially so because of the very old convention rules and non-adapted statutes, on the one hand, and the increasingly growing market for intellectual property rights that has been boosted by technological progress, on the other. Although the two fact-patterns discussed here are not among the most complex ones, the basic dilemmas remain the same. It is to be hoped that the appellate courts will shed light on the problematic and vague segments of the lower courts' reasoning and, thus, bring more understanding in Croatian law not only to conflict-of-law issues in general, but also to those issues related specifically to copyright.

FORUM

THE RECOGNITION OF TRUSTS AND THEIR USE IN ESTATE PLANNING UNDER CONTINENTAL LAWS

Julien PERRIN*

* Ph.D. (Lausanne University), Lenz & Staehelin. The views expressed herein are the author's personal opinions and are not necessarily the views of Lenz & Staehelin. The author wishes to thank Mark Barmes for his useful advice, comments, and suggestions on the present paper, as well as Heather Tabor and Olivia Perrin for all the help that they kindly provided in the final reading of the text.

Yearbook of Private International Law, Volume 10 (2008), pp. 629-666

I. Introduction

The trust is a typical construction of common law jurisdictions, derived from the development of two separate bodies of rules (the common law *stricto sensu* and equity) that were first applied by two different kinds of jurisdictions.

Continental lawyers often misunderstand the peculiarities of trusts, mainly because their legal system has evolved in a different manner, without similar needs to introduce a parallel body of rules. As a result, although trusts have been used in common law jurisdictions for centuries, the continental lawyers' interest in this instrument has emerged only in the past few decades, as trusts began to reach their latitudes.

Indeed, the increasing mobility of persons and assets fuelled the use of trusts in circumstances connected to civil law countries. Given the conceptual differences between the common law and continental legal traditions, the confrontation between trusts and continental legal systems may create some problems. This is especially true in succession law, where the continental systems may have some difficulties dealing with trusts, particularly when they are designed for estate planning.

This ever-growing interest was behind the adoption by the Hague Conference's on the 1st of July 1985 of the Convention on the Law Applicable to Trusts and on their Recognition (the 'Hague Trusts Convention'). This Convention, which has now been ratified *inter alia* by Switzerland and Luxemburg, but not by France, has helped continental lawyers to understand the trust concept, heavily contributing to the recognition of trusts beyond common law jurisdictions.

The aim of the present paper is to briefly present some of the core elements of the analysis that we conducted about the relations between trusts and the laws of succession in Switzerland, France, and Luxemburg.[1] This presentation shall however be focused on issues arising under Swiss succession law, with some comparisons being drawn between the laws of France and Luxemburg. Given that these laws take their roots in the Roman law tradition, the developments below should easily be adaptable, *mutatis mutandis*, to the laws of other countries of civil law tradition.

Because none of these countries has introduced the trust, as understood in common law jurisdictions, into its substantive law, it is necessary to briefly present the mechanisms of trust recognition in those jurisdictions (II) and to further explain the possible problems encountered by a trust within the context of an estate governed by continental succession law (III).

II. Recognition of Trusts

Even though trusts are generally unknown to the substantive law of continental jurisdictions, this does not prevent trusts from having some links with such jurisdictions, *e.g.* in the event that the settlor, the trustee, one of the beneficiaries, or part of the trust's assets become located in a continental jurisdiction. In such cases, the need to deal with trusts on the private international law level arises, entailing particularly complicated problems in countries where the trust concept is largely unknown.

As will be seen below, the Hague Trusts Convention has considerably simplified continental judges' task of dealing with trusts, enabling them to recognise a trust for what it is, without having to make it fit within the concepts of their domestic substantive laws.

Before scrutinising the recognition of trusts as provided for by the system of the Hague Trusts Convention and its implementing legislation in Switzerland (B), it is worth describing briefly how Swiss courts managed to recognise such construction before this treaty entered into force (A). We shall then briefly give some comparative elements with the French and the Luxemburg situations (C).

A. Recognition of Trusts in Switzerland prior to the Ratification of the Hague Trusts Convention

Prior to the ratification of the Hague Trusts Convention, the Swiss conflicts rules had no provision relating specifically to trusts. Consequently, Swiss judges had to

[1] *Le* trust *à l'épreuve du droit successoral en Suisse, en France et au Luxembourg – Etude de droit comparé et de droit international privé*, Ph.D. study Lausanne 2006, Comparativa n° 77 (Librairie Droz), Geneva 2006.

consider trusts within their own legal concepts and try to make them – or at least part of their elements – fit within the framework of Switzerland's domestic concepts. Although such an approach does not enable the consideration and observance of every facet of the trust, Swiss judges have regularly taken a pragmatic approach, trying to recognise the effects of the trusts they had to deal with in the best possible way.

Indeed, even before the Swiss Private International Law Act of 18 December 1987 (the 'SPILA') entered into force, the Swiss Supreme Court had issued two important decisions in which trusts were given effect in Switzerland.

As early as 1936, the Swiss Supreme Court had recognised the effects of a trust, constructing it as a three-party legal relationship similar to mandate, and submitted it to the Swiss substantive law.[2] In its decision, the Swiss Court did not bother to analyse the particulars of the trust in detail, but merely considered that (1) it faced a question related to the execution of a contractual obligation ('*Erfüllung einer obligatorischen Verpflichtung*'), and (2) that the obligation's place of execution was Switzerland, so that, failing a specific indication about the applicable law, Swiss law applied.[3]

In 1970, the Swiss Supreme Court confirmed this method of dealing with trusts in the well-known *Harrison* case.[4] Even though this decision went into more detail than the 1936 case, it still analysed the trust at hand within the framework of contractual rules and, failing any choice of law clause, applied Swiss law in view of the trustee's seat in Zurich.[5]

In Switzerland, the legal framework of conflicts of law was deeply modified in 1989, when the SPILA entered into force. Although this Act contained no specific trust provisions until July 2007, its preparatory works (dated 1982) suggested that its provisions regarding companies and organised estates (Art. 150 *et seq.* of the SPILA) could be applied to sufficiently organised trusts.[6] Even though the level of organisation in a trust needed to invoke Article 150 *et seq.* of the SPILA was not crystal clear,[7] the conflicts rules regarding companies and organised estates allowed for the recognition of the majority of trusts. Indeed, because the SPILA

[2] Decision of the Swiss Supreme Court of 26 May 1936 in *Re Aktiebolaget Obligationsinteressenter vs Bank für Internationalen Zahlungsausgleich*, ATF 62 II 140.

[3] *Ibidem.*

[4] Decision of the Swiss Supreme Court of 29 January 1970 in *Re Harrison vs Credit Suisse*, ATF 96 II 79.

[5] *Ibidem*. The decision in *Re Harrison* gave rise to numerous comments at the time it was rendered; see *e.g.* REYMOND C., 'Le Trust et l'ordre juridique suisse', in: *Journal des Tribunaux* 1971 I 332; LALIVE P., in: *Clunet* 1976, pp. 695 *et seq.*; VISCHER F., 'Observations sur l'arrêt Harrison', in: *Annuaire Suisse de Droit International* 1971, pp. 237 *et seq.*

[6] Explanatory Report of the Swiss Federal Council of 10 November 1982, in: *Feuille fédérale* 1983 I 425, No. 292; see *also* PALTZER E.H./SCHMUTZ P., 'Switzerland', in: *Trusts in Prime Jurisdictions*, KAPLAN A. (ed.), 2nd ed. 2006, pp. 299 *et seq.*, at p. 300.

[7] MAYER T.M., *Die organisierte Vermögenseinheit gemäss Art. 150 des Bundesgesetzes über das Internationale Privatrecht, Unter besonderer Berücksichtigung des Trust*, Ph.D. study Basle, Basle etc. 1998, pp. 26-27.

employs the incorporation theory, Article 154 provides for the application of the law under which the estate is organised, regardless of the place where it is effectively administered.[8]

The recognition of trusts under the SPILA system thus generally enabled the application of the law according to which they had been set up.[9] In practice, this allowed a settlor to choose the law according to which the trust was to be created.[10]

Even though the number of published decisions dealing with trusts has been low, Articles 150 *et seq.* of the SPILA have been applied to trusts on several occasions. For example, Zurich Courts applied the laws of Guernsey to a trust that had been established in writing, considering it to be sufficiently organised.[11] Also, in a case related to a trust established under the laws of Jersey, the Swiss Supreme Court considered that the (written) trust deed and the trust laws of Jersey were sufficient to qualify the trust as an organised estate.[12]

On the other hand, in the case of a constructive trust, the Swiss Supreme Court preferred to apply the law applicable to the original contractual relationship between the parties, without going into much detail about the trust relationship itself.[13]

In sum, the recognition of trusts in Switzerland between 1989 and June 2007 occurred generally – with regards to sufficiently organised trusts – under the rules of Articles 150 *et seq*. of the SPILA. Although the trust situation in Switzerland was to a significant extent satisfactory, it left ample room for uncertainty, particularly with regards to the scope of application of these provisions; it was indeed very difficult to decide *in abstracto* what was necessary for a trust to be deemed sufficiently organised.[14]

Furthermore, the links the trust structure was required to have with a foreign country (such as the country whose law was to apply to the trust) was not clearly defined by the Swiss courts. As a result, the possibility of establishing trusts whose most significant elements would be linked to Switzerland ('domestic trusts') was not unanimously admitted,[15] even if the *fraus legis* exception as regards companies and organised estates seemed to have been excluded by the SPILA.[16]

---

[8] Decision of the Swiss Supreme Court of 17 December 1991 in *Re C. Inc. vs F. Inc., X. and Y.*, ATF 117 II 494, para. 4b.

[9] PALTZER E.H./SCHMUTZ P. (note 6), p. 301; PERRIN J. (note 1), No. 237.

[10] VISCHER F., in: *Zürcher Kommentar zum IPRG*, Zurich 2004, No. 14 *ad* Art. 150 SPILA.

[11] *Re Werner K. Rey*, in: *Blätter für Zürcherische Rechtsprechung* 98 (1999), No. 52, pp. 225 *et seq.*

[12] Decision of the Swiss Supreme Court of 3 September 1999 in *Re Chiltern Trust*, in: *Semaine Judiciaire* 2000 I 269.

[13] Decision of the Swiss Supreme Court of 19 November 2001 in *Re X. vs USA*, case 5C.169/2001.

[14] PERRIN J. (note 1), No. 238.

[15] See *e.g.* PERRIN J.-Fr., 'Les sociétés fictives en droit civil et en droit international privé', in: *Semaine Judiciaire* 1989, pp. 553 *et seq*., at pp. 564 *et seq*.; PERRIN J.-Fr., 'Théo-

As a result, even though a large part of the different possible trust structures was already widely welcomed by the Swiss legal system, there was room for uncertainty, leading to an unsatisfactory situation. In addition, the SPILA system did not allow trusts to be treated and recognised as trusts, but made it necessary to (mis)use continental law concepts.

B. Recognition of Trusts in Switzerland under the Hague Trusts Convention

On the 1st of July 2007, the Hague Trusts Convention entered into force in Switzerland. In addition, the Swiss Parliament also enacted specific provisions to further specify the treatment of trusts in Switzerland. It is thus necessary, in order to have a complete overview of the current recognition of trusts in Switzerland (3), to not only present the system of the Convention (1) but also the relevant new provisions of Swiss law (2).

1. Overview of the Hague Trusts Convention

a) The Motives and the Goals of the Hague Trusts Convention

In view of the differences between the structures of the different legal systems, particularly regarding the differences between the common and civil law, the Hague Conference on Private International Law decided '*to include with priority in the Agenda of work of the Fifteenth Session the question of the international validity and recognition of trusts*'.[17]

Without introducing the trust concept into the (continental) contracting States' substantive law, the Convention tries to harmonise the solutions on the

rie de l'incorporation et cohérence de l'ordre juridique', in: *Mélanges P. Lalive*, Basle etc. 1993, pp. 141 *et seq*., at pp. 142 *et seq.*

[16] Decision of the Swiss Supreme Court of 17 December 1991 in *Re C. Inc. vs F. Inc., X. and Y.*, ATF 117 II 494, para. 6. See *also* PERRIN J., 'Le droit international privé de la société anonyme', in: *Aspects actuels du droit de la société anonyme – Travaux réunis pour le 20ème anniversaire du CEDIDAC*, DESSEMONTET F. *et al.* (eds.), Lausanne 2005, pp. 673 *et seq*., at pp. 689-690.

[17] *Acts and documents of the Fourteenth Session – Tome I – Miscellaneous matters*, p. 64 and pp. 167 *et seq*.

conflicts of law level,[18] greatly increasing the legal certainty in international trust matters.[19]

b) The Scope of Application of the Hague Trusts Convention

Even if the Hague Trusts Convention's primary goal was to favour the recognition of the trust concept as developed in common law countries, its authors preferred to set out independent criteria to circumscribe the object of the Convention,[20] thus raising the issue of its scope of application.

According to Article 2(1) of the Hague Trusts Convention, '*the term "trust" refers to the legal relationships created* – inter vivos *or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose*'.

The second paragraph of Article 2 further underlines some core elements of trusts, emphasising the fact that the trust assets should be held by the trustee or on his/her behalf, but should be separated from his/her own estate, as well as the fact that the trustee has the power and the duty to manage the trust assets according to the terms of the trust and the special duties imposed upon him by law.[21] Finally, the third paragraph indicates that the settlor's ability to reserve to himself/herself certain rights and powers and the trustee's ability to also be named as a beneficiary is not considered *per se* inconsistent with the existence of a trust.

Even if the Hague Trusts Convention's notion of trusts reveals certain differences from the usual common law conception, particularly in view of the absence of any mention of equitable or legal ownership rights over the trust assets,[22] the essential points of the trust structure, such as the clear segregation between the trust assets and the trustee's own estate, as well as the trustee's duty to manage the

---

[18] GUTZWILLER P.M., *Schweizerisches Internationales Trustrecht*, Basle 2007, p. 13; THÉVENOZ L., 'Purpose, content and implementation of the Hague Convention on Trusts: Contracting States' room for manoeuvre', in: *Das Haager Trust-Übereinkommen und die Schweiz*, MARKUS A. *et al.* (eds.), Zurich etc. 2003, pp. 3 *et seq.*, at p. 7; VOGT N.P., in: *Basler Kommentar – Internationales Privatrecht*, Basle etc. 2007, No. 5 *ad* Vor Art. 149a-e SPILA.

[19] GUTZWILLER P.M. (note 18), p. 13.

[20] GAILLARD E./TRAUTMAN D.T., 'La Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance', in: *Rev. crit. dr. int. pr.* 1986, pp. 1 *et seq.*, at pp. 6-7.

[21] HARRIS J., *The Hague Trusts Convention – Scope, Application and Preliminary Issues*, Oxford, Portland 2002, pp. 116-117, who argues that it would not be sufficient for a given structure to fulfil the criteria of Article 2 HTC to qualify as a trust under the Convention. From our point of view (see PERRIN J. (note 1), No. 127), such opinion shall not be followed and the fulfilment of the requirements set out by Article 2 of the Hague Trusts Convention shall be sufficient to entail the application of this treaty.

[22] BARRIÈRE F., *La réception du* trust *au travers de la fiducie*, Ph.D. study Paris II 2004, pp. 187-188.

trust in accordance with the settlor's intent, can be found in the elements described in Article 2. One of the consequences of Article 2's divergence from the traditional English model is that its description also encompasses other legal constructions,[23] such as the *fiducie* of Luxemburg or the *Anstalt* of Liechtenstein. This has driven Professor Lupoi to depict the construction described by Article 2 of the Hague Trusts Convention as a 'shapeless' trust,[24] and to further note that the rules of this treaty, primarily developed on the basis of the traditional English model, have been extended to other structures.[25]

According to Article 3, the Hague Trusts Convention only applies '*to trusts created voluntarily and evidenced in writing*'.

The writing requirement – which is not foreseen by the traditional English trust model – should not be seen as implying that the trust deed must be in writing in order for the trust to fall within the Hague Trusts Convention's scope; the fact that a trust can be merely evidenced in writing is sufficient.[26] As will be seen below, Switzerland has extended the scope of the Hague Trusts Convention to trusts that are not evidenced in writing (Art. 149c(2) SPILA).

Furthermore, the concept of 'voluntarily created' trusts is a creation of the Hague Trusts Convention, which is considered by the majority of scholars as different from the concept of express trusts.[27] Indeed, if it seems quite clear that express trusts shall be considered as voluntarily created and shall thus fall within the Hague Trusts Convention's scope,[28] the situation is not as clear regarding other trusts, some of which can also be voluntarily created. Without entering into details that lie beyond the scope of the present paper, it should be underlined that the Hague Trusts Convention should essentially apply to trusts that reflect the settlor's intent.[29] In this regard, the Convention excludes trusts imposed by the courts against the settlor's will as well as trusts created directly by operation of law.[30] On the other hand, a trust created voluntarily to comply with a judicial decision (*e.g.* to

[23] See *e.g.* BARRIÈRE F. (note 22), pp. 186-187.

[24] LUPOI M., *Trusts: A comparative study*, Cambridge 2000 (transl. from Italian by DIX S.), pp. 333 *et seq*. See however GUTZWILLER P.M. (note 18), pp. 35 *et seq*.

[25] LUPOI M. (note 24), p. 334; see also GODECHOT S., *L'articulation du trust et du droit des successions*, Ph.D. study Paris II 2004, p. 176, according to whom Article 2 of the Hague Trusts Convention shall be seen as a reference provision for the international treatment of trusts, and GUTZWILLER P.M. (note 18), p. 15.

[26] GUTZWILLER P.M. (note 18), pp. 43-44; PERRIN J. (note 1), No. 134.

[27] HARRIS J. (note 21), p. 125; LUPOI M. (note 24), p. 341; *contra* BARRIÈRE F. (note 22), p. 180.

[28] LUPOI M. (note 24), p. 342; GUTZWILLER P.M. (note 18), p. 42.

[29] For further details, see PERRIN J. (note 1), Nos. 130 *et seq*.

[30] VON OVERBECK A., 'Explanatory Report', in: *Proceedings of the Fifteenth Session (1984) – Tome II – Trusts – Applicable Law and Recognition*, The Hague 1985, pp. 370 *et seq.*, at p. 380.

transfer assets to a former spouse under divorce proceedings) should be seen as falling within the scope of Article 3 of the Hague Trusts Convention.[31]

With regard to trusts declared by judicial decisions (which are in principle excluded from the Convention's scope to the extent they are not voluntarily created), Article 20 provides for the possibility for the contracting States to extend the application of the Hague Trusts Convention to such structures.[32] Even if such extension would allow for a wider range of constructions to fall within the scope of the Hague Trusts Convention, it does not seem to encompass trusts implied by law that would not already have been somehow recognised through a judicial decision.[33]

According to Article 4, the Hague Trusts Convention does not apply to preliminary issues relating to the validity of the acts by virtue of which the assets are transferred to the trustee. Accordingly, the law applicable to the trust will govern the questions relating to the trust's creation, but not the question of the validity of the act transferring the assets to the trustee.[34] It is thus only provided that the transfer of assets is valid under the relevant applicable law (as reserved by Art. 4) that the question of the trust validity should be scrutinised (under the law applicable to the trust).[35]

Article 5 of the Hague Trusts Convention foresees that this treaty shall not apply if its conflicts rules would lead to the application of a law that does not provide for trusts or the category of trusts involved.[36] As will be seen below, Switzerland has also widened the scope of the Hague Trusts Convention here, by declaring that it shall nevertheless apply the Convention in the circumstances contemplated in Article 5 (Art. 149c(2) SPILA).

Further, it should be mentioned that, as a matter of principle, the Hague Trusts Convention applies irrespective of the law applicable to the trust, without any condition of reciprocity,[37] even if Article 21 of the Convention permits a contracting State to limit its scope to trusts governed by the law of another contracting State.[38] Lastly, according to Article 22, the Hague Trusts Convention applies to trusts even if those trusts were created before the Convention entered into force in the relevant contracting State, unless the relevant State provides otherwise, as specifically allowed under the second paragraph of Article 22.

---

[31] VON OVERBECK A. (note 30), p. 380.

[32] For further details about Article 20 of the Hague Trusts Convention, see PERRIN J. (note 1), Nos. 135 *et seq.*

[33] HARRIS J. (note 21), pp. 402-403.

[34] VON OVERBECK A. (note 30), p. 381; GUTZWILLER P.M. (note 18), p. 45.

[35] GODECHOT S. (note 25), pp. 177 *et seq.*; GUTZWILLER P.M. (note 18), p. 49.

[36] For further details about this provision, see *e.g.* GUTZWILLER P.M. (note 18), pp. 50 *et seq.*

[37] GUTZWILLER P.M. (note 18), pp. 16-17.

[38] GUTZWILLER P.M. (note 18), p. 17.

c) The Rules of Conflicts of the Hague Trusts Convention

As a matter of principle, Article 6(1) of the Hague Trusts Convention states that '*[a] trust shall be governed by the law chosen by the settlor*'. According to this provision, it is unnecessary for such a choice to be made expressly; it is sufficient that the settlor's choice be somehow evidenced and/or implied through the material evidencing the trust and in light of the circumstances of the case.[39] The Convention has further taken a very liberal approach concerning the law to be chosen by the settlor, since there is no requirement whatsoever for the trust to have any link with the chosen law.[40]

In the event that the chosen law does not provide for trusts or the category of trusts involved, Article 6(2) requires the choice of law to be disregarded[41] and foresees the application of the law applicable under the objective criteria of Article 7.

In such cases, as well as in the absence of a choice of law within the meaning of Article 6(1), the applicable law shall be determined pursuant to the system of Article 7, which provides for the application of the law most closely connected to the trust.[42] Article 7's list for determining the applicable law is not exhaustive and does not prohibit a judge from considering other factors to determine the law applicable to the trust.[43] This system gives a judge important manoeuvrability in determining the law applicable to the trust, room that in our view must be used, whenever possible, to favour the validity of the trust structure at hand.[44]

According to Article 17 of the Hague Trusts Convention, the law designated by Article 6 or 7 must be the substantive law in question, without its conflicts rules. Further, by using the phrase '*rules of law in force in a State*', Article 17 makes it clear that the Convention does not authorise the choice of a non-State law, such as the Principles of European Trust Law.[45]

Article 8, which also contains a non-exhaustive list, describes the scope of the law applicable to the trust.[46] In this regard, it shall be mentioned that the Hague

[39] BÉRAUDO J.P./TIRARD J.M., *Les trusts anglo-saxons et les pays de droit civil – Approche juridique et fiscale*, Genève 2006, p. 377; GUTZWILLER P.M. (note 18), pp. 59-60.

[40] BÉRAUDO J.P./TIRARD J.M. (note 39), pp. 376-377; GAILLARD E./TRAUTMAN D.T. (note 20), p. 17; HARRIS J. (note 21), p. 179.

[41] VON OVERBECK A. (note 30), p. 385.

[42] HARRIS J. (note 21), p. 215; JAUFFRET-SPINOSI C. 'La Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance (1er juillet 1985)', in: *Clunet* 1987, pp. 23 *et seq*., at p. 46; THÉVENOZ L., *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers*, Zurich 2001, p. 197.

[43] BÉRAUDO J.P./TIRARD J.M. (note 39), p. 377; HARRIS J. (note 21), p. 218; GUTZWILLER P.M. (note 18), p. 68.

[44] PERRIN J. (note 1), No. 148.

[45] HARRIS J. (note 21), pp. 185-186; PERRIN J. (note 1), No. 150.

[46] THÉVENOZ L. (note 42), pp. 198.

Conference decided that the formal validity of the trust should not be governed by the Convention.[47]

Article 9 of the Hague Trusts Convention provides for the possibility of applying different laws to different aspects of the trust, such as matters related to its administration.[48]

As regards the question of whether the applicable law could be modified, Article 10 indicates that the law applicable to the validity of the trust also governs this issue.[49]

d) The Recognition of Trusts under the Hague Trusts Convention

Articles 11 and 12 of the Hague Trusts Convention indicate the elements of a trust that a contracting State must recognise. First, Article 11(1) requires that '*a trust created in accordance with the law specified by the preceding chapter shall be recognized as a trust*'. Indeed, the main goal of the Convention is to avoid any transformation, adaptation, translation, or other conversion of trusts into a different construction known by the *lex fori*[50] and to ensure that trusts would be recognised as trusts.[51]

The second paragraph of Article 11 establishes minimum consequences that must arise from the recognition of trusts, which must be granted by the contracting States regardless of whether or not such consequences are provided for by the law applicable to the trust.[52] Such minimal consequences are (1) the recognition of the segregation of the trust assets from the trustee's own estate and (2) the fact that the trustee may act in his/her own capacity in judicial proceedings and before authorities or persons acting in an official capacity.[53]

Article 11(3) further provides that the recognition of the trust shall also imply the recognition of other consequences, to the extent that they are provided for or required by the law applicable to the trust at hand.[54] This provision – which is not exhaustive[55] – emphasises the separation of the trust assets from the trustee's own estate, making it clear that such segregation has to be recognised by the con-

[47] VON OVERBECK A. (note 30), p. 388.

[48] HARRIS J. (note 21), pp. 281 *et seq.*

[49] THÉVENOZ L. (note 42), p. 198.

[50] GUTZWILLER P.M. (note 18), p. 88.

[51] BÉRAUDO J.P./TIRARD J.M. (note 39), p. 383.

[52] HARRIS J. (note 21), p. 313; LUPOI M. (note 24), p. 354; PERRIN J. (note 1), No. 158. Article 11(2) of the Hague Trusts Convention should therefore be seen as a material provision, with the consequence that, provided the trust falls within the Convention's scope, the trust assets will constitute a separate fund and that the trustee shall be able to act in his/her capacity as trustee.

[53] GUTZWILLER P.M. (note 18), pp. 91 *et seq.*

[54] JAUFFRET-SPINOSI C. (note 42), pp. 56 *et seq.*; LUPOI M. (note 24), p. 354.

[55] GUTZWILLER P.M. (note 18), p. 93; PERRIN J. (note 1), No. 159.

tracting States, to the extent provided for under the applicable law. If letters (a) to (c) of Article 11(3) are self-explanatory,[56] it is worth mentioning that Article 11(3)(d) provides for the recognition of tracing, indicating however that the rights and obligations of any third party who holds trust assets (such as a bank) is not to be governed by the law applicable to the trust, but by the law determined by forum's conflicts rules, even as regards its non-mandatory provisions.[57] Accordingly, tracing is recognised by the contracting States to the extent provided for by the applicable law, but its effects on third parties remain limited.[58]

Article 12 of the Hague Trusts Convention further entitles the trustee to register trust assets in his/her capacity as trustee or in another way that discloses the trust's existence.[59] As will be seen below, Switzerland has enacted a specific provision in this regard, allowing the trust relationship to be mentioned in the relevant registers (Art. 149d of the SPILA).

In the event that the significant elements of a trust would be more closely connected with '*States which do not have the institution of the trust or the category of trust involved*', Article 13 gives the contracting States the option not to apply the rules of the Hague Trusts Convention to such a construction.[60] In this regard, it should be mentioned that even if the application of Article 13 may lead to difficult questions,[61] the provision merely provides for the possibility for the contracting States to deny recognition to trusts that would be more closely connected to a non-trust State; on the other hand, each contracting State also remains free not to make use of such provision,[62] be it by way of a specific provision (such as Article 149c(2) of the SPILA in Switzerland) or through case law (like in Italy). More generally, it is to be noted that the Convention applies even without a true international dimension of the structure at hand, as soon as it is qualified as a trust.[63]

In opposition to the rule in Article 13 of the Hague Trusts Convention, Article 14 clearly expresses the goal of the Convention, namely to promote the recognition of trusts, by allowing each contracting State to provide for more favourable rules on this issue.

---

[56] GUTZWILLER P.M. (note 18), p. 93.

[57] VON OVERBECK A. (note 30), p. 401.

[58] JAUFFRET-SPINOSI C. (note 42), pp. 58-59.

[59] JAUFFRET-SPINOSI C. (note 42), p. 59.

[60] GAILLARD E./TRAUTMAN D.T. (note 20), p. 12; HAYTON D.J., 'International Recognition of Trusts', in: *International Trust Laws*, GLASSON J. (ed.), 1: Commentary, C3 – 1 *et seq.*, Update 31, July 2007, p. 10 ; JAUFFRET-SPINOSI C. (note 42), pp. 62-63.

[61] GUTZWILLER P.M. (note 18), pp. 99 *et seq.*

[62] GAILLARD E./TRAUTMAN D.T. (note 20), p. 12.

[63] GUTZWILLER P.M. (note 18), p. 16.

e) General Clauses

Under the title 'General clauses', the Hague Trusts Convention contains various provisions affecting the recognition of trusts.

In particular, Article 15(1) makes it clear that trusts cannot be used to circumvent the mandatory provisions of the law designated by the forum's conflicts rules to apply to other subject matters.[64] Indeed, this provision explicitly states that the Convention shall not prevent the mandatory provisions of the designated law from applying, listing particular laws encompassed by this rule, such as the law relating to the personal and proprietary effects of marriage (lit. b) and succession rights, both testate and intestate (lit. c). According to Article 15(2) of the Hague Trusts Convention, in the event that the recognition of a trust would be prevented by the application of Article 15(1), the judge shall try to give effect to the objects of that trust by using other means.

Article 16(1) of the Hague Trusts Convention further preserves the application of *lex fori*'s provisions that must be applied in international situations, irrespective of the rules of conflicts (so-called '*lois de police*').[65] The second paragraph of Article 16 also allows for the application of foreign *lois de police* where the circumstances of the case are connected to such law.[66] Finally, Article 16(3) enables a contracting State to indicate that it will not apply the second paragraph of Article 16.

As regards public policy ('*ordre public*'), Article 18 of the Hague Trusts Convention foresees that the Convention's provisions are not to be applied if the result would be manifestly incompatible with public policy.[67]

Article 19 provides that the Convention shall not prejudice the powers of the contracting States in tax matters.[68]

---

[64] HAYTON D.J., 'The Hague Convention on the Law applicable to Trusts and on their Recognition', in: *I.C.L.Q.* 1987, pp. 260 *et seq*., at pp. 277-278.

[65] This provision is very similar to Article 18 of the SPILA or Article 7 of the Rome Convention of 1980.

[66] In a similar way than what is done by Article 19 of the SPILA and Article 7 of the Rome Convention of 1980, this provision is aimed at avoiding that the decision taken in a country would be deprived of its effects in the country with which the case is connected; BUCHER A./BONOMI A., *Droit international privé*, 2nd ed., Basle etc. 2004, No. 502.

[67] HAYTON D.J. (note 60), p. 18.

[68] The present paper is not intended to cover tax issues, which are however of primary importance in the field of estate planning; in this regard, it should be mentioned that the Swiss Tax Conference (on the level of the Cantons) issued a Circular Letter on 22 August 2007 to deal with the taxation of trusts; this Circular has been extended to the Federal Level by Circular Letter of 27 March 2008 of the Swiss Tax Administration.

Among the numerous publications written on this subject, see *e.g.* CRETTI S.G., *Le trust – Aspects fiscaux*, Basle etc. 2007; DANON R.J., 'L'imposition du private express trust – Analyse critique de la Circulaire CSI du 22 août 2007 et proposition d'un modèle d'imposition de lege ferenda', in: *Archives de droit fiscal suisse* 2008, pp. 435 *et seq.*

As mentioned above, Article 20 of the Hague Trusts Convention provides for the possibility for the contracting States to extend the scope of application of the Convention to 'trusts declared by judicial decisions'.[69]

As indicated above, Article 21 allows the contracting States to limit the Convention's scope to trusts governed by the law of another contracting State, whereas Article 22(2) authorises States to limit the Convention's application to trusts created after it entered into force in the relevant country. According to the information available to us, none of the contracting States to the Hague Trusts Convention has made use of any of these two provisions as of today.[70]

Articles 23 and 24 of the Hague Trusts Convention deal with issues related to States having several territorial units, each of them having its own trust law.

Article 25 reserves the application of other international instruments on matters governed by the Convention.

Lastly, Articles 26 *et seq*. contain the final clauses of the Convention, which are self-explanatory, and shall therefore not be treated herein.

f) Recognition of Trusts Falling Outside the Scope of the Hague Trusts Convention

As seen above, the Hague Trusts Convention does not apply to all trusts, even if its scope would have been extended under Article 20. With regard to trusts falling outside such scope of application, the question of their recognition thus arises. This is especially the case for non-trust jurisdictions, where the national rules of conflicts do not generally contain any provision as regards trusts. Fundamentally, the contracting States would be at liberty to extend the conventional provisions to other trusts (Art. 14 HTC), but they could also apply their former case law in this regard.[71]

g) Conclusion on the Hague Trusts Convention

Even though it does not solve every problem and does not have a clear scope of application, the Hague Trusts Convention's major advantage is the introduction of specific provisions related to the international treatment of trusts in the private international laws of the (non-trust) contracting States, with the result that it is no longer necessary for such States to distort trusts, thus clearly improving legal certainty.[72]

---

[69] For further details on this provision, see *e.g.* GUTZWILLER P.M. (note 18), pp. 127 *et seq*.

[70] See also GUTZWILLER P.M. (note 18), pp. 131 and 132.

[71] PERRIN J. (note 1), No. 180.

[72] GAILLARD E./TRAUTMAN D.T. (note 20), pp. 22-23.

When compared to the prior system of Swiss private international law, which already largely provided for the recognition of trusts, the Hague Trusts Convention offers numerous advantages in legal certainty, offering increased predictability for the use of trusts in Switzerland.[73]

2. The Swiss Implementing Legislation to the Hague Trusts Convention

As seen above, the Hague Trusts Convention entered into force in Switzerland on the 1st of July 2007. To ensure that the application of the Convention could take place in an effective manner, the Swiss Parliament also amended the SPILA as well as the Swiss Debt Enforcement and Bankruptcy Act (the 'SDBA').[74] The purpose of the present section is to briefly present these new provisions to provide a complete overview of the international private law treatment of trusts in Switzerland.

a) Overview of the New Provisions of the SPILA

The entry into force in Switzerland of the Hague Trusts Convention paralleled the introduction of a new Chapter 9a into the SPILA and a modification of its Article 21, which introduced the concept of the 'seat' of a trust, defining it in a similar manner as is provided for with regards to companies.[75] As a matter of principle, Article 21(3) of the SPILA provides that the seat of the trust shall be deemed to be located at the place of management of the trust, as defined in writing in the trust instrument (or in another form that can be evidenced in writing) or, failing such designation, at the place where the trust is effectively managed.

The first provision of the new Chapter 9a of the SPILA, Article 149a, intends to define the trust in the perspective of the Swiss rules of conflicts and to this effect refers to the definition given by the Hague Trusts Convention, regardless of whether or not the trust can be evidenced in writing. In this regard, Switzerland considered that it would not have been a reasonable solution to have different outcomes at the private international law level on the basis of whether or not a trust was evidenced in writing.[76] As a consequence, Chapter 9a of the SPILA has widened the scope of the Convention in Switzerland, without however extending it to trusts created by judicial decisions. Given this extension, the rules of the Convention will also apply to orally set up trusts.[77]

---

[73] SWISS FEDERAL COUNCIL, *Message concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, in: *Feuille fédérale* 2006, pp. 561 *et seq.*, at pp. 584 *et seq.*

[74] GUTZWILLER P.M. (note 18), p. 146.

[75] SWISS FEDERAL COUNCIL (note 73), pp. 597-598.

[76] SWISS FEDERAL COUNCIL (note 73), pp. 598-599; GUTZWILLER P.M. (note 18), p. 154.

[77] On this point, see GUTZWILLER P.M. (note 18), pp. 157-158.

As indicated above, the practice prior to the Convention's effectivity in Switzerland allowed sufficiently organised trusts to fall under the system of Articles 150 *et seq*. of the SPILA; as a consequence, it is highly probable that the majority of the constructions falling within the scope of Article 149a of the SPILA (and thus consequently under the scope of the Hague Trusts Convention) would also meet the criteria of Article 150 of the SPILA. In such a case, the rules of the new Chapter 9a (together with the Hague Trusts Convention) will take precedence, as *lex specialis*, in trust matters.[78]

Further to the opinion expressed by Dr Gutzwiller, one should consider that when a given structure meets the criteria of Articles 2 and 3 of the Hague Trusts Convention (together with those of Art. 149a of the SPILA), it shall be considered as a trust for the purposes of Swiss private international law, even if it could be compared to constructions relating to (Swiss) succession or property laws; it is here to be recalled that such qualification shall not prevent the application of the mandatory provisions of the applicable succession or property laws (*see* Art. 15 of the Hague Trusts Convention).[79]

Since the Hague Trusts Convention does not contain provisions regarding jurisdiction in trust law related matters, it was necessary to determine the conditions under which the jurisdiction of Swiss courts would be given in cases not covered by the Lugano Convention of 16 September 1988.[80] Article 149b of the SPILA is focused on the internal relations within the trust, but does not apply to jurisdiction issues regarding the rights of third parties (such as heirs, creditors, etc.), except as regards Article 149b(3)(c) and Article 149b(4) of the SPILA.[81]

Article 149b(1) of the SPILA allows a settlor to make a written choice of jurisdiction in trust law related matters, which shall be deemed exclusive unless otherwise provided.[82] Article 149b(2) indicates that the designated court may not deny its jurisdiction if certain elements (one of the parties, the trust, the trustee, or a large portion of the trust assets) are linked to Switzerland.[83] In the absence of any choice of jurisdiction (or in the event where such choice would not be exclusive), Article 149b(3) provides that the Swiss courts at the defendant's domicile (or habitual residence) or at the seat of the trust (or to a given extent at its place of establishment) shall have jurisdiction in trust law related matters. Finally, para-

[78] GUTZWILLER P.M. (note 18), p. 155; VOGT N.P. (note 18), No. 4 *ad* Art. 149a SPILA.

[79] GUTZWILLER P.M. (note 18), pp. 155-156; VOGT N.P. (note 18), Nos. 9 *et seq. ad* Art. 149a SPILA.

[80] The Lugano Convention contains provisions in respect to trusts at its Articles 5(6), 17(2 and 3). As regards the relationships between the Lugano Convention and Article 149b of the SPILA, see *e.g.* GUTZWILLER P.M. (note 18), pp. 164 *et seq.*

[81] GUTZWILLER P.M. (note 18), pp. 160-161 and 166.

[82] SWISS FEDERAL COUNCIL (note 73), pp. 600 *et seq.*

[83] SWISS FEDERAL COUNCIL (note 73), p. 601; GUTZWILLER P.M. (note 18), pp. 163-164.

graph 4 of Article 149b of the SPILA contains an additional forum for liability linked with public offering of securities or debt instruments.

In this context, it is worth mentioning that the question of arbitration of trust disputes should be worth scrutinising, in particular in view of the discretion of such proceedings.[84]

As regards the law applicable to trusts, Article 149c(1) of the SPILA refers to the provisions of the Hague Trusts Convention, whose Articles 6 and 7 shall apply in this regard. Article 149c(2) further extends the application of the Hague Trusts Convention to cases where, pursuant to Article 13 of the Hague Trusts Convention, Switzerland would have the ability to deny recognition to trusts and where, in application of Article 5 of the Hague Trusts Convention, the Convention would in principle not be applicable.

The extension provided for as regards Article 13 of the Hague Trusts Convention makes it clear that Switzerland shall not deny recognition to a trust on the basis that its main elements would be connected to a non-trust State.[85] In view of the private international law solutions prevailing with regards to companies,[86] the application of Article 13 of the Hague Trusts Convention by Swiss authorities would have lead to the undesirable result that recognition would have been denied to trusts that would have been recognised under the former system.[87] During the consultation procedure, the question of whether trusts whose elements would be linked only to Switzerland ('domestic trusts') should also be recognised was an important point of discussion. In this regard, the first governmental project, issued in 2004, suggested a variant in which the recognition of domestic trusts would not be encompassed in the scope of the Convention. This variant, however, was suppressed, mainly because of the fact that Articles 4, 15, 16, and 18 of the Hague Trusts Convention have been considered to be a sufficient protection against the possibility of eluding the application of Swiss law.[88] Consequently, there is no longer any doubt as regards the admissibility of domestic trusts in Switzerland.[89]

---

[84] WÜSTERMANN T., 'Arbitration of Trust Disputes', in: *New Developments in International Commercial Arbitration*, MÜLLER C. (ed.), Zurich 2007, pp. 33 *et seq.*; VOGT N.P. (note 18), Nos. 72 *et seq. ad* Vor Art. 149a-e SPILA, noting that it could be argued that an arbitration clause contained in the trust deed could be seen as sufficient to bind the beneficiaries, which should take the benefit granted to them with a possible charge. Expressing doubts, GUTZWILLER P.M. (note 18), pp. 166-167.

[85] VOGT N.P. (note 18), Nos. 8-9 *ad* Art. 149c SPILA.

[86] Decision of the Swiss Supreme Court of 17 December 1991 in *Re C. Inc. vs F. Inc., X. and Y.*, ATF 117 II 494; in this decision, the Swiss Supreme Court clearly decided that there was no room for the theory of the fictive registered office.

[87] THÉVENOZ L. (note 42), p. 300.

[88] SWISS FEDERAL COUNCIL (note 73), p. 605; GUTZWILLER P.M. (note 18), p. 171.

[89] PALTZER E.H./SCHMUTZ P. (note 6), p. 304; VOGT N.P. (note 18), Nos. 41-42 *ad* Vor Art. 149a-e SPILA and No. 10 *ad* Art. 149c SPILA.

On the other hand, the application of the Hague Trusts Convention in cases where its Article 5 would in principle render it inapplicable is less understandable and may lead to absurd consequences.[90]

As regards immovable assets (or other registered assets) that are to be placed in a trust, Article 149d of the SPILA provides for a mechanism where the trust relation would be mentioned in the relevant register. Even if such mentioning is not mandatory, its absence shall entail the protection of *bona fide* third parties (Art. 149d(3) of the SPILA).[91] Article 149d does not however deal with the question related to the protection of third parties when unregistered (movable) assets are involved. As a consequence, pursuant to Article 11(3)(d) of the Hague Trusts Convention, such a question is governed by the law designated by the ordinary rules of conflicts. In the event where Swiss law would apply on this matter, Articles 933 and 973 of the Swiss Civil Code (hereinafter: the 'SCC') would govern the protection of *bona fide* third parties.[92]

A further problem that arises in connection with real estate located in Switzerland relates to the rules pertaining to the acquisition of such real estate by foreigners, which generally requires authorisation. As regards trusts, this may entail some serious difficulties in the event that one of the (potential) beneficiaries would not be able to acquire real estate in Switzerland without authorisation and could become entitled to a benefit in a trust related to such real estate. In such a case, there is a strong risk that the inscription of the transfer of title to the trustee would be denied by the competent authority.

Finally, Article 149e of the SPILA relates to the recognition in Switzerland of foreign judgments in trust law related matters, a problem that is not dealt with by the Hague Trusts Convention. This provision contains a self-explanatory list of foreign jurisdictions admitted by Switzerland for recognition purposes. In this context, it should not be forgotten that the relevant provisions of the Lugano Convention (whenever applicable) should take precedence over the rules of Article 149e of the SPILA.[93]

---

[90] See further the opinions of GUTZWILLER P.M. (note 18), pp. 169-170 and of VOGT N.P. (note 18), Nos. 3 *et seq. ad* Art. 149c SPILA.

[91] On this matter, see the Guidelines regarding the treatment of matters related to trusts issued by the Swiss Federal Office for Land Registry and Land Law on the 29th of June 2007, available (in French) at <http://www.registre-foncier.ch/download/fr/Trust_lignes _directrices.pdf>.

[92] PERRIN J. (note 1), No. 261. See also VOGT N.P. (note 18), Nos. 18 and 21 *ad* Art. 149d SPILA.

[93] GUTZWILLER P.M. (note 18), p. 179; VOGT N.P. (note 18), Nos. 2 *et seq. ad* Art. 149e SPILA.

b) A Look at the New Provisions of the Swiss Debt Enforcement and Bankruptcy Act

The primary goal of the new provisions of the SDBA is to ensure the segregation of the trust assets from the trustee's own estate.[94]

Consequently, Article 284a of the SDBA foresees that, as regards the debts for which the assets of a trust are liable,[95] the enforcement proceedings shall be directed against a trustee as the 'representative' of the trust (para. 1),[96] and that they shall be continued by way of bankruptcy,[97] which shall be limited to the trust assets (para. 3). As a matter of principle, the enforcement proceedings have to be initiated at the seat of the trust (as per Art. 21 of the SPILA) or, failing a seat in Switzerland, at the place where the trust is effectively managed (Art. 284a(2) of the SDBA).[98]

Article 284b of the SDBA further protects the trust assets from enforcement proceedings directed against the trustee personally. In the event of the trustee's bankruptcy, the segregation of the trust assets from the trustee's own estate shall occur *ex officio*.[99] Even though it is not expressly foreseen in the SDBA, a similar segregation also occurs when the trustee would not be subject to bankruptcy but to seizure proceedings, pursuant to Articles 2(2)(a) and 11(3)(a) of the Hague Trusts Convention.[100]

3. Recognition of Trusts in Switzerland Today

Even though the recognition of trusts was to a large extent already ensured under the former Swiss rules of conflicts (in particular through Art. 150 *et seq.* of the

---

[94] For further details on this point, see PEYROT A./BARMES M., 'Les trusts et l'exécution forcée en Suisse', in: *Journée 2007 de droit bancaire et financier*, Zurich 2008, pp. 129 *et seq.*

[95] As pointed out by GUTZWILLER P.M. (note 18), p. 182, the question whether a liability has to be borne by the trust or by the trustee personally has to be solved according to the (foreign) law applicable to the trust; see further PEYROT A./BARMES M. (note 94), pp. 132 and 137.

[96] In the event that there would be several trustees, the wording of the provision would enable the creditors to direct the proceedings against one of them; PEYROT A./BARMES M. (note 94), p. 142.

[97] See, critical about the choice to use the bankruptcy way, THÉVENOZ L., 'L'avant-projet suisse de ratification de la convention sur les trusts', in: *Le trust en droit international privé – Perspectives suisses et étrangères – Actes de la 17ème journée de droit international privé du 18 mars 2005 à Lausanne*, Geneva etc. 2005, pp. 93 *et seq.*, at pp. 97 *et seq.*

[98] PEYROT A./BARMES M. (note 94), pp. 142-143.

[99] GUTZWILLER P.M. (note 18), p. 187. See also PEYROT A./BARMES M. (note 94), p. 136, considering that this is a direct consequence of the segregation between the trust assets and the trustee's own estate.

[100] VOGT N.P. (note 18), No. 85 *ad* Vor Art. 149a-e SPILA.

SPILA), the entry into force of the Hague Trusts Convention in Switzerland has clearly enhanced the level of legal certainty in this context. The most significant change is, probably, that Switzerland will now recognise trusts as trusts, without any need to translate them into national concepts.

Furthermore, Article 149c of the SPILA's exclusion of the application of Article 13 of the Hague Trusts Convention makes it clear that domestic trusts will be recognised by Swiss authorities, which is a further element favouring legal certainty, and is particularly justified in view of the fact that trusts are often set up for an important period of time, with the result that their elements often move during the existence of the trust.[101]

The other provisions of the Swiss implementing legislation, in particular those regarding debt collection proceedings, also ensure a clear recognition of the segregation between the trust assets and the trustee's own estate.

However, specific legislation was not adopted or introduced in fields similar to trusts, such as the *fiducie*, or to deal with the relations between trusts and matrimonial or succession issues. Even if that probably allowed a quick ratification of the Convention, many problems remain unsolved, in particular concerning the articulation of trusts and other fields of Swiss law.

C. Elements of Comparison with France and Luxemburg

The private law of both France and Luxemburg is still today governed to a large extent by the *Code Napoléon*, although each of these countries have of course modified and updated this text as well as enacted new laws. In particular, both of these countries have recently introduced in their substantive law the concept of the *fiducie*; however, it is here to be noted that if the Luxemburg structure is quite open-ended, the French is very limited and not available for gratuitous acts.

On the private international law level, neither of these countries have a specific set of provisions dedicated to the conflict of laws, with the result that their private international law is more case law driven than in Switzerland. As regards the recognition of trusts, this is however no longer the case in Luxemburg, which ratified the Hague Trusts Convention, but has driven French courts to deal with trusts by trying to adapt them to French legal concepts.

1. Overview of the Recognition of Trusts in France

Even if French law does not have specific rules regarding the recognition of trusts, French authorities could be described as quite friendly towards them.[102] Even if it was one of the very first non-trust law countries to sign the Hague Trusts Convention, France has not ratified it as of today. As a result, the treatment of trusts in

[101] THÉVENOZ L. (note 42), p. 298.

[102] BÉRAUDO J.-P./TIRARD J.-M. (note 39), p. 333.

France depends upon the circumstances of each case, and occurs in most of the occurrences without an analysis of the trust construction as a whole, but merely by giving effects to the feature that was important in the case before the court.[103]

The French decisions dealing with trusts have sometimes analysed the trust according to the rules of conflicts relating to contracts, with the result that the principle of autonomy of the parties ('*loi d'autonomie*') could be applied in the particular case.[104] This approach has the advantage of generally submitting the trust relationship to the law according to which the trust was set up and recognising (some of) the effects of the particular trust under such law, even if such treatment cannot be seen as completely satisfactory in view of the unilateral nature of trusts.[105]

In some cases, the French courts had to deal with trusts set up either in a matrimonial or in a succession context and were thus tempted to analyse them in view of their goal, rather than autonomously.[106] Even if such an approach is not perfectly satisfactory, it has generally driven the courts to recognise the main effects of the relevant trust, as shall be seen below with regards to French succession laws.

Further, trusts have also given rise to inconsistent decisions on the question of whether the trustee or the beneficiaries were to be considered as the owner of the trust assets, either in cases of enforcement of debts proceedings or in cases where the question arose about who was entitled to sell trust property.[107]

As can be seen from the above, the recognition of trusts in France is generally quite satisfactory, even if it is not governed by homogeneous rules and therefore allows room for uncertainty. In this regard, the ratification of the Hague Trusts Convention would certainly be an important step in favour of trusts. The argument of the French Government, according to which the Convention should not be ratified failing a comparable institution introduced in French substantive law,[108] has no further relevance because of the introduction of the *fiducie* in the French Civil Code (Art. 2011 *et seq.* FCC) by the law No. 2007-211 of the 19th of February 2007,[109] even if the scope of the new *fiducie* is limited, (not allowing *e.g.*

---

[103] BÉRAUDO J.-P./TIRARD J.-M. (note 39), p. 333; GODECHOT S. (note 25), pp. 50-51.

[104] See *e.g.* the decision of the Paris Court of Appeal of 10 January 1970, in *Re de Ganay*, in: *Clunet* 1973, p. 207; and the decision of the *Cour de Cassation* of 20 February 1996, in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

[105] For further details, see PERRIN J. (note 1), Nos. 274 *et seq.*

[106] For further details, see BÉRAUDO J.-P./TIRARD J.-M. (note 39), pp. 347 *et seq.*; PERRIN J. (note 1), Nos. 278 *et seq.*

[107] See PERRIN J. (note 1), Nos. 287 *et seq.*; see also BÉRAUDO J.-P./TIRARD J.-M. (note 39), pp. 334 *et seq.*, analysing the situation under the view of the recognition of the trustee's powers.

[108] BARRIÈRE F. (note 22), p. 174.

[109] Published in the *Journal Officiel* of 21 February 2007, pp. 3052 *et seq.*, and recently modified by the law No. 2008-776 of the 4th of August 2008, which widened the circle of persons allowed to set up a *fiducie.*

gratuitous acts, see Art. 2013 FCC).[110] This notwithstanding, there does not seem to be any current steps taken towards ratification of the Convention by France.[111]

2. Overview of the Recognition of Trusts in Luxemburg

Even if the private international law of the Grand Duchy of Luxemburg remains to a large extent uncodified, the situation regarding the treatment of trusts has become much clearer when this country ratified the Hague Trusts Convention (as of the 1st of January 2004), pursuant to the law of the 27th of July 2003 on Trusts and Fiduciary Contracts (Art. 1 of the law),[112] which also introduced new rules on *fiducie* in Luxemburg law (Art. 4 *et seq.* of the law).

Making use of Article 20 of the Hague Trusts Convention, Luxemburg has extended the scope of the Convention to trusts declared by judicial decisions (Art. 3(3) of the law of 27 July 2003). Luxemburg has also declared that it would not apply Article 16(2) of the Convention (Art. 3(2) of the law).[113]

Consequently, Luxemburg authorities must apply the Hague Trusts Convention to trusts falling within its scope of application. As regards Article 13, even if Luxemburg did not mention anything about its applicability, it shall be noted that Luxemburg should no longer be considered as a non-trust State within the meaning of this provision, given that the *fiducie* introduced by the 27th of July 2003 law shall be seen as falling within the scope of Article 2 of the Hague Trusts Convention.[114]

Even if the range of the Hague Trusts Convention has been widened by the Grand Duchy, it cannot be seen as covering every situation in which a trust may arise. As regards trusts not covered by the Convention, it could be admissible in view of Article 14 of the Hague Trusts Convention to also apply the solutions of

---

[110] On this law, see the *Dossier* coordinated by BARRIÈRE F., in: *Recueil Dalloz* 2007, pp. 1347 *et seq.* According to WITZ C., 'La fiducie française face aux experiences étrangères et à la convention de La Haye relative au «trust»', in: *Recueil Dalloz* 2007, pp. 1369 *et seq.*, at p. 1374, the French *fiducie* would meet the criteria of Article 2 of the Hague Trusts Convention.

[111] However, it is to be noted that the French Senator Philippe Marini requested the French Minister of Justice to examine the possibility of ratifying the Convention; see written question No. 06210, published in the *Journal Officiel Sénat* of 13 November 2008, p. 2258.

[112] Published in the *Mémorial A* - No. 124 of 3 September 2003, pp. 2619 *et seq.*

[113] Critical on such declaration, see PRÜM A./REVET T./WITZ C., 'La ratification de la Convention de La Haye par le Grand-Duché de Luxembourg', in: *Trust et fiducie – La Convention de La Haye et la nouvelle législation luxembourgeoise*, PRÜM A./WITZ C. (eds.), Paris 2005, pp. 53 *et seq.*, at pp. 60-61.

[114] HAYTON D.J., 'The distinctive characteristics of the Trust in Anglo-Saxon law', in: *Trust et fiducie – La Convention de La Haye et la nouvelle législation luxembourgeoise*, PRÜM A./WITZ C. (eds.), Paris 2005, pp. 1 *et seq.*, at pp. 12 *et seq.*

this treaty, but it cannot be excluded that the courts of Luxemburg would prefer applying other rules.[115]

D. Conclusion on the Recognition of Trusts

The specific nature of trusts has been the source of many difficulties for civil lawyers attempting to understand them. For many decades, this has driven to the need to translate or adapt trusts into different civil law concepts, often with the intention of giving effects to them, but in a quite unsatisfactory and uncertain way.

The Hague Trusts Convention offers uniform rules for the recognition of trusts, enhancing the legal certainty both in civil and common law jurisdictions. Its ratification by non-trust countries enables them to recognise trusts in a satisfactory manner, without however preventing them from applying mandatory rules in other fields of law. Luxemburg and Switzerland have well understood the importance of enhancing the recognition of trusts and have thus recently ratified the Hague Trusts Convention, becoming attractive jurisdictions for trusts. Even though numerous scholars and some politicians agree that the ratification would also be a step forward in France, this country as yet has not ratified the Convention.

III. Relations between Trusts and Continental Succession Laws

The flexibility of the trust makes it a very useful and effective instrument in estate planning. Consequently, the usage of trusts in a familial context has always been important, in particular within trust jurisdictions. Within the framework of a liberal succession law, such as the laws of England and Wales, such usage did not cause major problems, mainly due to the absence of strict protective provisions in favour of the heirs of the deceased. On the other hand, the confrontation of trusts with continental laws very rapidly gave rise to difficulties in certain areas, especially in succession law.

A. Trusts and Swiss Succession Law

To study the articulation between trusts and Swiss succession law, it should first be determined when Swiss law applies to succession matters (1); this would allow us to determine whether the construction of the trust could be used in connection with the provisions of Swiss succession law (2). Further, the effects of limitations on the tying up of property (3), of the rules related to inheritance agreements (4), and of the provisions pertaining to forced heirship (5) shall be scrutinised.

[115] PERRIN J. (note 1), Nos. 308 *et seq.*

1. Applicability of Swiss Succession Law

In the event that Swiss courts have jurisdiction in succession matters,[116] Article 90(1) of the SPILA provides that, as a matter of principle, Swiss law shall govern the succession of a person having his/her last domicile (within the meaning of Art. 20 of the SPILA) in Switzerland.

However, Article 90(2) enables foreign nationals (who do not have Swiss nationality) to submit their succession to their national law, thus avoiding the application of Swiss law to their estate. This applies even with regards to the mandatory provisions of Swiss inheritance law, such as rules about forced heirship, and without any requirement for such persons to have any real link with the country of their nationality.[117]

Further, Swiss law should not in principle apply as regards real estate located in countries claiming to have exclusive jurisdiction over such real estate (Art. 86(2) of the SPILA).[118]

---

[116] Pursuant to Article 86(1) of the SPILA, Swiss authorities shall regard themselves as having jurisdiction over the estate of persons dying with their last domicile in Switzerland. As a matter of principle, this jurisdiction shall extend to all the assets of the estate, wherever located; however, Article 86(2) of the SPILA provides that the exclusive jurisdiction claimed by given countries (such as France or Canada) over real estate located in their territories shall be observed, with the consequence that Swiss authorities shall not deal with such immovable assets. Article 87 of the SPILA further provides for the jurisdiction of Swiss authorities as regards the succession of Swiss citizens living abroad, under given circumstances, whereas Article 88 of the SPILA deals with the jurisdiction of Swiss courts regarding assets located in Switzerland. Finally, Article 89 of the SPILA deals with the jurisdiction of Swiss authorities as regards interim measures.

[117] In this regard, it is worth mentioning that the *professio juris* can even occur implicitly, case law and scholars considering it to be sufficient for the testator's will to appear unambiguously, *e.g.* through the use of a specific institution of his/her national law; see the Decision of the Swiss Supreme Court of 3 September 1998 in *Re B. vs A.*, ATF 125 III 35, para. 3c. Further, the fact that the *professio juris* leads to inapplicability of the provisions regarding compulsory shares and thus to the failure to protect the heirs has been considered by the Swiss Supreme Court (albeit under the former law) not to be contrary to Swiss public policy (see the Decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 4; WILHELM C./PERRIN J., 'Le trust et le droit suisse des successions internationales – Utilisation multiple d'une institution juridique étrangère', in: *L'Expert-comptable Suisse* 9/2006, pp. 683 *et seq.*, at p. 684). It should be underlined that the possibility to submit one's succession to one's national law exists only for foreign citizens that do not have (and do not acquire until death) Swiss nationality (see *e.g.* CHAPPUIS B., 'L'utilisation de véhicules successoraux dans un contexte international et la lésion de la réserve héréditaire', in: *Semaine Judiciaire* 2005 II 37 *et seq.*, at pp. 50-51). On the other hand, in the event that a testator has various foreign nationalities, he/she would be entitled to choose freely among them, without the need to have an effective link to the country in question (see the Decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 3a).

[118] In such cases, even if the solution is not clear, several scholars express the view that even though Swiss courts do not have jurisdiction over such real estate, they should take

Lastly, in the event that Swiss authorities have jurisdiction pursuant to Article 87 of the SPILA, Article 91(2) provides, as a matter of principle, for the application of Swiss law.[119]

2. Availability of the Trust Structure

As has been seen above, Swiss conflicts rules in succession matters are mainly based on the criterion of the last domicile of the deceased. In view of the ever increasing mobility of persons, it is therefore possible that a person whose succession will be governed by Swiss law has set up a trust during his/her lifetime or wishes to set up such a trust by will. Given that the question of admissibility of *inter vivos* trusts has to be treated differently from the question of the admissibility of *mortis causa* trusts, where specific problems may arise due to the application of Article 4 of the Hague Trusts Convention, it is first necessary to distinguish between these two categories from the standpoint of Swiss succession law.

a) Distinction between inter vivos *and* mortis causa *Trusts in the Eyes of Swiss Succession Law*

The flexibility of the trust structure can lead to difficulties concerning its qualification under Swiss succession laws. Indeed, if it seems clear that a trust set up during the settlor's lifetime, without any possibility for him/her to revoke it or to benefit from such structure, would be qualified as an *inter vivos* act and a trust established by will would be qualified as a testamentary act, there are also many variants between these two opposites, where the qualification issue could appear to raise more difficulties.

However, it is our opinion that the fulfilment of a formal criterion should suffice to entail the *inter vivos* qualification of a trust; indeed, as soon as the settlor's estate is modified by the establishment of a trust during his/her lifetime, the trust should be qualified as an *inter vivos* settlement.[120] In this context, the mere fact that the settlor is to be one of the beneficiaries of the trust or retains certain rights or powers, such as the ability to revoke the trust, should not alter the fact that the settlor's estate is modified during his/her lifetime, with the result that the trust shall become independent and thus be qualified as an *inter vivos* act. However, the cases where the trust structure is abused to create a 'sham' trust will, of course, be treated differently.[121] In conclusion, only a trust that would have no effect what-

into account the way such real estate is dealt with abroad as regards the division of the (remaining) assets submitted to Swiss jurisdiction; see *e.g.* DUTOIT B., *Droit international privé Suisse – Commentaire de la loi fédérale du 18 décembre 1987*, 4th ed., Basle etc. 2005, No. 4 *ad* Article 86 SPILA.

[119] See PERRIN J. (note 1), No. 462.

[120] PERRIN J. (note 1), Nos. 466 *et seq.*

[121] PERRIN J. (note 1), No. 471.

soever over the settlor's patrimony during his/her lifetime shall be deemed – in the eyes of Swiss succession law – to be a *mortis causa* trust.[122]

b) Admissibility of inter vivos *Trusts*

In view of the Hague Trusts Convention's effectivity and implementing legislation in Switzerland, there is no longer any room for uncertainty as regards the availability of an *inter vivos* trust as an option in estate planning from a Swiss perspective. In this regard, the mere fact that Swiss law may govern the settlor's succession should not impact on the availability of this option during the settlor's lifetime, since Article 4 of the Hague Trusts Convention would not entail the application of Swiss succession law to the act that transfers the assets to the trustee.

On the other hand, given that Article 15 of the Hague Trusts Convention preserves the application of the mandatory rules of the law applicable to the settlor's succession, it is clear that the relevant provisions of that law may be decisive in given circumstances. This is particularly true for forced heirship rights and could limit the effectiveness of a trust structure, as shall be seen below.

c) Admissibility of mortis causa *Trusts*

Even though trusts are not specifically testamentary acts, they may also be set up by will. In the event that a trust only produces its effects upon the death of the settlor, the law applicable to the succession shall determine whether or not the establishment of such a structure is admissible (Art. 4 of the Hague Trusts Convention and 92(1) of the SPILA).[123] In the event that the succession of the settlor is governed by the law of a trust State and the relevant assets are in a jurisdiction that allows a property transfer through a trust, no particular problems should arise; on the other hand, in the event that the succession is governed by the law of a non-trust State (such as Swiss law), difficulties can occur.

Under Swiss succession law, scholars generally consider that possible testamentary dispositions are exhaustively listed in the Swiss Civil Code, with the result that it is not possible to admit other *mortis causa* dispositions.[124] Given the fact that trusts are unknown under Swiss substantive (succession) law, this has lead several authors to express the opinion that it would be impossible to establish a testamentary trust within the framework of a succession governed by Swiss law.[125]

---

[122] PERRIN J. (note 1), No. 471.

[123] PERRIN J. (note 1), Nos. 482 *et seq.*

[124] See *e.g.* PIOTET P., *Traité de droit privé suisse IV: Droit successoral*, Fribourg 1975, pp. 77 *et seq.*

[125] SCHÖMMER H.-P./BÜRGI U., *Internationales Erbrecht – Schweiz*, Munich 2006, No. 899; SEILER M., *Trust und Treuhand im schweizerischen Recht – unter besonderer Berücksichtigung der Rechtstellung des Trustees*, Ph.D. study Zurich 2005, p. 96; THÉVENOZ L. (note 42), p. 215.

In this context, it should however be noted that the *numerus clausus* of testamentary dispositions is aimed at limiting only dispositions that are exclusively successoral (such as the naming of an heir, the legacy, or disinheriting a potential heir); on the other hand, acts made by will that are not only successoral (such as the creation of a foundation) should not be seen as limited.[126] Indeed, as for foundations, trusts can be set up (unilaterally) either by an *inter vivos* act or by will, and their structure will then be recognised regardless of the way they were created.[127]

Given that trusts are not exclusively *mortis causa* acts, establishing them by will under Swiss succession law should not, in the author's opinion, be prevented by the *numerus clausus* of testamentary dispositions.[128] In such cases, Swiss succession law would apply to the act that transfers the assets to the trustee (Art. 4 of the Hague Trusts Convention). This act should also comply with the *numerus clausus* and take the form of naming of an heir, a legacy, or another permitted act, such as for the transfer to a foundation or like entity. Once the assets are validly transferred to the trustee, the law applicable to the trust would govern the trust issues.[129]

It should be mentioned that the formal requirements of Swiss succession law would apply to the creation of testamentary trusts, with the consequence that it would be very difficult for secret trust structures to be admitted.[130]

3. Trusts and the Limits on the Tying Up of Property

Trusts can be used to achieve results similar to those of family foundations or *fideicommissum* ('*substitution fidéicommissaire*'), according to which the testator can impose onto an heir the duty of holding assets during his/her own lifetime and transferring those assets to another person. Given that Swiss law has strongly limited the use and duration of both these constructions (Art. 335 and 488 of the SCC), the question arises whether or not such limitations would also apply to trusts.

In our opinion, the scope of such rules should be limited to the constructions they are focused on and should not be extended to trusts, whose structure is entirely different.[131] Consequently, the application of such limitations to trusts can

---

[126] MAYER T., 'Das Haager-Trust Übereinkommen – Auswirkungen und Vorteile einer Ratifikation aus rechtlicher Sicht', in: *Pratique juridique actuelle* 2004, pp. 156 *et seq.*, at p. 161; PERRIN J. (note 1), No. 490.

[127] PERRIN J. (note 1), No. 491.

[128] See also MAYER T. (note 126), p. 161. As suggested by this author, even if it were to be admitted that the *numerus clausus* applies to acts that are not exclusively successoral, Article 493 of the SCC (enabling the establishment of a foundation by will) should be interpreted broadly as also permitting the creation of foreign legal structures.

[129] PERRIN J. (note 1), No. 491.

[130] PERRIN J. (note 1), No. 487.

[131] LAPORTE C., *La titrisation d'actifs en Suisse (Asset-Backed Securitisation)*, Ph.D. study Geneva 2005, p. 179.

only be made indirectly, provided they would be considered as the expression of a general rule of Swiss public policy prohibiting wealth from being tied up to a family for an indefinite (or long) duration. This application seems nowadays to be highly dubious.[132]

In any event, such a question would arise only in the event that the trust structure under consideration would not be limited by a rule against perpetuities contained in the law applicable to the trust. Indeed, presuming that a trust law includes a rule against perpetuities that applies to trusts, such rule should be seen as sufficient to limit a trust's duration in a manner compatible with the objectives pursued by Articles 335 and 488 of the SCC.[133]

4. Trusts and Inheritance Agreements

As seen above, continental courts have often considered trusts in a contractual context. In the event that Swiss law would be applicable to the succession of the settlor, the question arises of whether a trust that would be effective on the settlor's death must meet the requirements pertaining to the validity of inheritance agreements ('*pactes successoraux*').

However, given the unilateral character of trusts, there should be no need to establish them by way of an inheritance agreement, even in the case of purely testamentary trusts, which would be effective only upon the settlor's death; on the other hand, the use of an inheritance agreement to set up a trust should be perfectly possible.[134]

5. Trusts and Forced Heirship

Probably the most important point regarding the articulation between trusts and Swiss succession law is that of the forced heirship rights (compulsory share) of the settlor's heirs. Indeed, within the context of estate planning, trusts are usually established without the settlor receiving any consideration in exchange for the property placed into the trust; this may result in the disappointment of some of his/her heirs.

The purpose of the present section is to determine to what extent the creation of a trust could be subject to claw-back ('*réduction*'), as the application of

---

[132] SUPINO P.P., *Rechtsgestaltung mit Trust aus Schweizer Sicht*, Ph.D. study St-Gallen 1994, pp. 109-110; THORENS J., 'L'article 335 CCS et le trust de common law', in: *Mélanges H.-R. Schüpbach*, BOLLE P.-H. (ed.), Basle etc. 2000, pp. 155 *et seq.*, at pp. 164-165; VOGT N.P. (note 18), No. 96 *ad* Vor Art. 149a-e SPILA. See also the SWISS FEDERAL COUNCIL (note 73), p. 593.

[133] THORENS J. (note 132), p. 161; VOGT N.P. (note 18), Nos. 62 and 95 *ad* Vor Art. 149a-e SPILA.

[134] PERRIN J. (note 1), No. 500.

rules regarding forced heirship is expressly reserved by Article 15(1)(c) of the Hague Trusts Convention.[135]

In this regard, testamentary and *inter vivos* trusts shall be compared (a), some procedural issues shall then be scrutinised (b), and finally the question of the heirs' right to information shall be examined (c).

a) Testamentary Trusts vs Inter Vivos *trusts*

Faced with a testamentary disposition that tries to establish a trust, the heirs would generally be in a comfortable situation. They should, in principle, be in a position to invoke their protected rights against the trustee (Art. 522 of the SCC).[136] Indeed, under Swiss succession law, the assets of the deceased vest automatically (through operation of law, see Art. 560 of the SCC) into the heirs at the time of the death, with the result that it would generally be necessary for the trustee to request delivery of the assets intended to be put into the trust before the trust could come into existence.

Even if heirs are listed as the beneficiaries of a trust structure, it should not prevent them from opposing the establishment of such trust to the extent it would exceed the freely disposable share, since it is accepted that they should receive their compulsory share free of all charges.[137]

On the other hand, *inter vivos* trusts create a situation where the trust assets are already in the hands of the trustee or beneficiaries at the time of the settlor's death, since they are established during the settlor's lifetime. In such a case, the heirs' attempts to recover their compulsory share may be more complicated, even if Swiss succession law also protects them against *inter vivos* acts infringing upon their compulsory share.

Indeed, Article 527 of the SCC allows the heirs to request the claw-back of given donations made by the deceased during his/her lifetime, to the extent such gifts infringe upon their compulsory share. In particular, gifts made in favour of some of the heirs as advances on their succession rights, provided that they are not brought back by the heirs into the estate (Art. 527(1) of the SCC), the gifts made to heirs in exchange for relinquishing any or all of their succession rights (Art. 527(2) of the SCC), revocable gifts or gifts made within five years prior to death (Art. 527(3) of the SCC), and gifts made with the intention of depriving the heirs of their compulsory share (Art. 527(4) of the SCC) shall be subject to possible claims by disgruntled heirs.

Consequently, in the event that the creation of a trust falls within one of these categories, it could be subject to the attacks of the settlor's heirs to enforce their forced heirship rights. In practice, the most important cases of application with regards to trusts should be those foreseen under Article 527(3-4) of the SCC.

---

[135] KÜNZLE H.R., 'Einleitung', in: *Praxiskommentar Erbrecht*, Basle 2007, No. 51.

[136] PERRIN J. (note 1), No. 512.

[137] PERRIN J. (note 1), No. 511.

Pursuant to Article 527(3) of the SCC, gifts made by the deceased where he/she either (1) reserved the right to revoke it during his/her lifetime or (2) made it within five years of his/her death are subject to claw-back. Even if Article 527(3) of the SCC uses the term 'gifts', which could lead to the conclusion that only bilateral acts would be encompassed within its scope of application, it is accepted that it also applies to unilateral acts, such as the creation of a foundation (Art. 82 of the SCC) or of a trust structure.[138]

As regards the transfer of assets made with the intention of depriving the heirs of their compulsory share, Article 527(4) of the SCC provides that it shall be subject to claw-back without any time limitation. This provision, broader in scope than Article 527(3), is clearly applicable to trusts that would have been set up with the intention of the settlor to deprive his/her heirs of their forced heirship rights.[139] In this regard, it should be noted that Article 527(4) might apply as soon as the settlor contemplates the possibility that an heir's compulsory share would, everything proceeding normally, be infringed and accepted such possibility (*dolus eventualis*).[140] According to case law, it is at the moment when the transfer is made that the intention of the settlor is to be examined.[141] Consequently, where the transfer occurs at a time when the settlor does not have any presumptive heir or when he/she is domiciled in a country where the succession law does not contain any protective provisions (provided that there was no indication that the circumstances would change), it would be difficult to conclude that he/she had the intention of infringing the rules on the compulsory share.[142]

Some scholars have argued that the fact that the settlor would have retained important rights or powers over the trust fund would mean that there was the intent to deprive one's heirs from their forced heirship rights.[143] In our opinion, however, even if such a reservation of powers over the trust is viewed as an indicator of the settlor's intent to circumvent an heir's forced heirship claims, that fact alone should not be sufficient *per se*, particularly when the structure created serves other goals, such as the protection of the family wealth.[144] Further, it is to be recalled that in the event that the settlor has a power to revoke the trust, such a trust would in any event be subject to claw-back pursuant to Article 527(3) of the SCC, irrespec-

---

[138] EITEL P., *Die Berücksichtigung lebzeitiger Zuwendungen im Erbrecht – Objekte und Subjekte von Ausgleichung und Herbasetzung*, P.D. study, Berne 1998, p. 457; PERRIN J. (note 1), No. 516; THÉVENOZ L. (note 42), p. 219, at fn. 129.

[139] THÉVENOZ L. (note 42), p. 219.

[140] Decision of the Swiss Supreme Court of 14 June 2002 in *Re B. vs K.*, ATF 128 III 314, para. 4; PIOTET P. (note 124), p. 413.

[141] Decision of the Swiss Supreme Court of 14 June 2002 in *Re B. vs K.*, ATF 128 III 314, para. 4.

[142] PERRIN J. (note 1), No. 517.

[143] SUPINO P.P. (note 132), p. 114; THÉVENOZ L. (note 42), p. 219.

[144] PERRIN J. (note 1), No. 517.

tive of any intention of the settlor to deprive his/her heirs of their forced heirship rights.[145]

In the event an *inter vivos* trust is subject to claw-back, Article 528 of the SCC limits the restitution duty of a good faith beneficiary to the value of his/her enrichment at the date of the settlor's death. Further details about this provision shall be given under the analysis of procedural issues (b).

In comparing an heir's ability to challenge both *inter vivos* and *mortis causa* trusts, it seems to be easier for an heir to challenge the *mortis causa* act, given that the trust structure would not yet exist in such a case. This is further reinforced by the fact that Article 532 of the SCC foresees that claw-back must be directed first towards *mortis causa* acts, and that *inter vivos* settlements should only be challenged in the event that the reduction of the testamentary acts would not be sufficient for the heirs to recover their compulsory share.[146]

In this context, it is worth reminding the reader that a foreign citizen domiciled in Switzerland would be entitled to avoid the application of these Swiss provisions by making a choice of law in favour of the succession laws of the country of his/her nationality; furthermore, Swiss case law would not consider the fact that such choice leads to the absence of protection of the heirs to be contrary to Swiss public policy.[147]

b) Procedural Issues: Capacity to Sue and to Be Sued

As a matter of principle, an heir deprived of his/her forced heirship rights would be in a position (if he/she so wishes) to file a claw-back claim ('*action en réduction*') against the person who has benefited from the generosity of the deceased.[148]

Confronted with testamentary dispositions, the disgruntled heir would of course be entitled to a claw-back claim directed against the person who should receive assets according to the deceased's will; however, since in such a case the assets subject to the testamentary disposition should normally be part of the deceased's estate, such heir could also simply interject an exception to the request for delivery of the assets. In the case of a testamentary trust, the trustee only would be in a position to request the delivery of the assets to be put into trust; consequently, the disgruntled heir would in such a case interject an exception to the request for delivery by the trustee, based upon the infringement of his/her compulsory share.[149]

---

[145] PERRIN J. (note 1), No. 517.

[146] PERRIN J. (note 1), No. 520.

[147] See the decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 4 (rendered before the entry into force of the SPILA); and PERRIN J. (note 1), No. 522.

[148] GUINAND J./STETTLER M./LEUBA A., *Droit des successions*, 6th ed., Zurich 2005, No. 150.

[149] PERRIN J. (note 1), No. 524.

As regards *inter vivos* settlements, the recovery of the assets from the person benefiting from the deceased's generosity is only possible if the heir also files a claim in restitution of the assets subject to claw-back.[150] In the case of trusts, since the claw-back claim must be directed against the persons to whom rights were transferred by the deceased, it shall be directed against both the trustee and against the beneficiaries for assets still held upon trust, to the extent that the beneficiaries would be entitled to fixed rights on the trust assets.[151] Indeed, failing a specific provision stating the contrary, it would not be sufficient to act only against the trustee, except in the event of a trust where the beneficiaries would not have fixed rights or where it would be impossible for the heirs to know the beneficiaries.[152] As regards assets already distributed, the beneficiaries should be sued. In this vein, it should be mentioned that Article 528 of the SCC generally protects the trustee regarding distributions that have already been made to the beneficiaries, since the trustee is no longer enriched in such cases, an exception however being made in case of the trustee's bad faith.[153]

c) Right to Information of the Heirs

One of the major problems for heirs confronted with trust structures is the difficulty they may have in obtaining information about those trusts and the assets contained therein.

Indeed, once the trust has been put into place, the assets are transferred into the hands of the trustee and removed from the settlor's patrimony. The settlor's heirs, in the event they are not beneficiaries of the trust, are generally not entitled to any information from the trustee under the applicable trust law. As a matter of principle, the majority of the trust laws would even consider that the trustee would be under a duty not to disclose any information to the heirs, since this would endanger the trust itself.[154]

Under Swiss succession law, the heirs are automatically entitled to all the rights to which the deceased was entitled and that are not extinguished through death (Art. 560 of the SCC), including the possible right to information that the deceased would have been entitled to from a third party depositary.[155] In this regard, it is generally accepted that the heirs are entitled to information from the bank regarding transactions that have occurred in the ten years prior to the settlor's death.[156]

---

[150] STEINAUER P.-H., *Le droit des successions*, Berne 2006, p. 406.

[151] PERRIN J. (note 1), No. 525.

[152] PERRIN J. (note 1), No. 525.

[153] PERRIN J. (note 1), No. 526.

[154] THÉVENOZ L. (note 42), p. 224.

[155] CHAPPUIS B. (note 117), pp. 54-55.

[156] LOMBARDINI C., *Droit bancaire suisse*, Zurich etc. 2002, p. 642.

As regards *inter vivos* trusts, the situation can be quite complicated. Even though the heirs shall in all likelihood be able to obtain information about the transfer of assets from the settlor to the trustee, provided that such transfer occurred within ten years prior to the settlor's death, their right to obtain information about the account opened in the name of a trustee is less certain. Indeed, after the trust has been established, the settlor generally loses all rights with regards to the trust assets; in particular, the settlor should not be entitled to any information from the bank where the trust assets are deposited, since he/she will be a third party to the banking relationship, regardless of whether he/she is a beneficiary of the trust.[157] Indeed, given that the beneficial owner concept under Swiss banking law and practice is of a purely administrative nature, the beneficial owner of a bank account is considered a third party to the banking relationship, with the result being that he/she is not be entitled to obtain any information from the bank.[158] As a consequence, the settlor cannot transmit any right whatsoever to his/her heirs in relation to information about the trust assets.

However, case law and scholars believe that there is some room for manoeuvre when the settlor was the beneficial owner of the account (*i.e.* the beneficiary of the structure) during his/her lifetime, even though the settlor would not have been personally entitled to any information.

In this matter, Geneva case law, which is to a very large extent unpublished, has given rise to comments and articles by scholars, which has allowed for some decisions to be revealed.[159] Despite the fact that bank secrecy is generally very difficult to overturn in private law matters under Geneva procedural law (as opposed to criminal proceedings),[160] the Geneva Court of Justice considers that information must be provided by the bank to the heirs of the deceased if (1) the bank was aware that the settlor was a beneficial owner of the structure, (2) the heirs bring sufficient evidence showing that succession assets are in the structure and (3) that their forced heirship rights are likely to be breached by such a construction.[161]

When these requirements are met, the bank must provide the heirs with information not only about the balance of the account at the time of the settlor's death, but also the bank statements of the last ten years, including the names of the persons who benefited from transfers out of the account.[162]

---

[157] CHAPPUIS B. (note 117), pp. 59-60; LOMBARDINI C. (note 156), p. 137.

[158] Decision of the Swiss Supreme Court of 1 July 1974 in *Re FLN*, ATF 100 II 200, para. 8; decision of the Swiss Supreme Court of 23 July 2002 in *Re X. SA vs Y. SA*, Case No. 4C.108/2002, para. 3c; STANISLAS G., 'Ayant droit économique et droit civil: Le devoir de renseignements de la banque', in: *Semaine Judiciaire* 1999 II 413 *et seq.*, at p. 428.

[159] CHAPPUIS B. (note 117), pp. 55 *et seq.*; STANISLAS G. (note 158), pp. 441-442.

[160] BERTOSSA B./GAILLARD L./GUYET J./SCHMIDT A., *Commentaire de la loi de procédure civile genevoise*, No. 3 *ad* Art. 227 LPC.

[161] See the different decisions of the Geneva Court of Justice (and relevant commentaries by scholars) quoted under footnotes 1265 and 1267 of PERRIN J. (note 1), No. 530.

[162] CHAPPUIS B. (note 117), pp. 56-57; STANISLAS G. (note 158), pp. 452 *et seq.*

Even though these court decisions have been the object of some criticism, it currently seems accepted by the majority of scholars that information must be provided to the heirs of the settlor in the event they make it plausible that their compulsory share has been violated and that the settlor was beneficial owner of the account.

In the event that the settlor would not have had any beneficial entitlement to the assets, the situation should in principle be treated the same as the case of a third party to the account, with the consequence that no information should be provided to the heirs.[163] In this context, the settlor's power to revoke the trust shall not modify the solution.[164]

As regards other cantons, we are not aware of many (published or reported) decisions in this context.[165] However, it should be mentioned that some procedural laws, such as the law of the Canton of Vaud, seem less reluctant to uphold banking secrecy in civil matters,[166] the result being that it seems likely that information shall at least be provided in the same circumstances as under Geneva case law.

In relation to the settlor's heirs' right to information, it should be mentioned that the procedure leading to the establishment of a provisional inventory ('*inventaire conservatoire*' – Art. 553 of the SCC) as well as the procedure known as 'subject to inventory' ('*bénéfice d'inventaire*' – Art. 580 *et seq.* of the SCC) should in principle not give the heirs sufficient means to require information with regards to trust assets. Indeed, the measure provided for under Article 553 of the SCC extends only to assets held by the deceased at the time of his/her death, but not to gratuitous acts made during his/her lifetime,[167] whereas the measure provided for under Articles 580 *et seq.* of the SCC, even though covering *inter vivos* acts,[168] does not encompass assets that were not held in the name of the deceased.[169]

In conclusion, the heirs will often encounter some difficulty in obtaining information about *inter vivos* settlements of the deceased, even when case law would give them a right to information.[170]

---

[163] STANISLAS G. (note 158), p. 442 and the two quoted decisions.

[164] Decision of the Swiss Supreme Court of 4 August 1994, Case No. 4C.470/1994, quoted by AUBERT M./HAISSLY B./TERRACINA J., 'Responsabilité des banques suisses à l'égard des héritiers', in: *Revue suisse de jurisprudence* 1996, pp. 137 *et seq.*, at p. 140.

[165] See however the Decision of the Ticino Court of Appeal of 27 September 2002 (12.2002.00090).

[166] Decision of the Appeal Chamber of the Cantonal Tribunal of Vaud of 16 April 1998 in *Re Philippe Mayor*, in: *Journal des Tribunaux* 1998 III 66.

[167] Decision of the Swiss Supreme Court of 16 July 1992 in *Re F. Treuhand*, ATF 118 II 264, para. 4b.

[168] Decision of the Swiss Supreme Court of 14 August 1992, Case No. 5P.104/1992, in: *Pratique juridique actuelle* 1996, pp. 730 *et seq.*

[169] PERRIN J. (note 1), No. 534.

[170] MORIN A., 'Les devoirs des tiers de renseigner les héritiers sur le patrimoine du défunt', in: *Mélanges publiés par l'Association des Notaires Vaudois à l'occasion de son centenaire*, BIANCHI F. (ed.), Zurich 2005, pp. 91 *et seq.*, at pp. 98 *et seq.*

Despite Professor Thévenoz's proposal to enact a specific legal provision regarding the right of the settlor's heirs to obtain information,[171] the Swiss implementing legislation to the Hague Trusts Convention does not include any rule in this regard, and it is apparently not anticipated to enact such a provision.[172]

B. Elements of Comparison with French and Luxemburg Succession Laws

Both French and Luxemburg conflicts rules make a distinction between the succession over immovable assets and the succession over movable assets, submitting the former to the *lex rei sitae* and the latter to the law of the deceased's last domicile.[173]

As regards international successions, both French and Luxemburg laws have a peculiarity: they protect the succession share of French/Luxemburg heirs under French/Luxemburg law over all the assets, wherever located. In the event that a national heir should not receive abroad the share that he/she should have received under the national law, he/she shall be entitled to take in France/Luxemburg a corresponding amount of assets, in order for him/her to get globally what was to be received in the event that the national law would apply to the whole succession ('*droit de prélèvement*').[174]

As regards the distinction between *inter vivos* and *mortis causa* trusts, the application of French or Luxemburg law fundamentally leads to the application of similar criteria as provided for under Swiss law, the result being that only trusts without any effect during the settlor's lifetime will be considered as testamentary trusts.[175] In a similar way to what happens under Swiss succession law, it is more problematic to establish a testamentary trust in French or Luxemburg law that it is to create an *inter vivos* trust.[176]

As under Swiss law, the limits regarding the tying up of property do not seem to be directly applicable to trusts and therefore should not create any obstacles to such settlements.[177] However, it cannot be totally excluded (especially

---

[171] THÉVENOZ L. (note 42), pp. 224-225.

[172] SWISS FEDERAL COUNCIL (note 73), p. 593.

[173] For French law, see *e.g.* LOUSSOUARN Y./BOUREL P./DE VAREILLES-SOMMIÈRES P., *Droit international privé*, 9th ed., Paris 2007, Nos. 429-430. For Luxemburg law, see SCHOCKWEILER F., *Les conflits de lois et les conflits de juridictions en droit international privé luxembourgeois*, 2nd ed. by WIWINIUS J.-CL., Luxemburg 1996, pp. 104 *et seq.*

[174] In France, such peculiarity is provided for by the law of 14 July 1819; see *e.g.* BOULANGER F., *Droit international des successions – Nouvelles approches comparatives et jurisprudentielles*, Paris 2004, pp. 39 *et seq.* In Luxemburg, a similar solution is provided for by the law of 29 February 1872; see SCHOCKWEILER F. (note 173), p. 105.

[175] See *e.g.* the decision of the French Cour de cassation of 20 February 1996 in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

[176] PERRIN J. (note 1), Nos. 554 *et seq.* (France) and 589 (Luxemburg).

[177] GODECHOT S. (note 25), p. 184.

for France which has not ratified the Hague Trusts Convention) that some courts would consider a trust to infringe upon such limits and thus to declare it void, in particular where it would not be governed by a law containing a rule against perpetuities.[178]

Under the French and Luxemburg succession regimes, a specific problem may arise in relation to Articles 906 and 911 of their respective Civil Codes. Pursuant to the first of these two provisions, the person benefiting from a gratuitous act must be alive (or at least conceived) at the time of the act. Even though it has been argued that such a provision would not allow the recognition of trusts having unborn beneficiaries, it seems to be now admitted that Article 906 of the French/Luxemburg Civil Code is not infringed when a trust structure enters into play, given that the assets are in the hand of the trustee and not deprived of any owner[179]. On the other hand, the rule contained in Article 911 of the French/Luxemburg Civil Code, prohibiting a benefit from being bestowed upon a person otherwise unable to benefit through the interposition of another person, could potentially apply to trusts.[180] In France, this could lead to some problems,[181] whereas in Luxemburg, in view of the application of the Hague Trusts Convention, this limitation should not apply to trusts falling within the scope of the Convention.[182]

In view of the fact that a trust is established unilaterally, the general prohibition contained both in French and Luxemburg law regarding inheritance agreements (Art. 1130 of both the FCC and LCC[183]) is not a direct obstacle to trusts. On the other hand, it prevents trusts from being set up by way of (prohibited) inheritance agreements; it is to be noted that in such a case, it shall not be the trust itself that would fall under the prohibition, but rather the preliminary act establishing the trust.[184]

---

[178] See the decision of the Civil Tribunal of the Seine of 9 March 1895, in: *Clunet* 1895, p. 628.

[179] GORÉ M., *L'administration des successions en droit international privé français*, Paris 1994, p. 72; GODECHOT S. (note 25), p. 184. See however HÉRON J., *Le morcellement des successions internationales*, Paris 1986, p. 141. Belgian case law (as regards a similar provision) also admits such solution, see the decision of the Civil Tribunal of Brussels of 27 November 1947 in *Re Evans vs Evans*, in: *Pasicrisie Belge* 1948 III 51.

[180] GRIMALDI M., *Droit civil – Libéralités, Partages d'ascendants*, Paris 2000, p. 92.

[181] PERRIN J. (note 1), No. 571.

[182] PERRIN J. (note 1), No. 595. This solution is based on the fact that Article 911 of the LCC shall not be encompassed in the scope of either Article 4 or Article 15 of the HTC.

[183] Even though the law of 23 June 2006 has made room for certain inheritance agreements under French law, thus amending the text of Article 1130 of the FCC, they remain prohibited as a matter of principle; see FAVIER Y., 'Le principe de la prohibition des pactes successoraux en droit français', in: *Les pactes successoraux en droit comparé et en droit international privé*, BONOMI A./STEINER M. (ed.), Geneva 2008, pp. 29 *et seq.*

[184] PERRIN J. (note 1), Nos. 566 *et seq.* (France) and 592 (Luxemburg).

As regards the protection of forced heirship rights, the situation in France and Luxemburg is to a large extent similar to the situation prevailing under Swiss succession law. It should however be mentioned that both French and Luxemburg laws extend the protection of the compulsory share to all gratuitous acts made by the deceased during his/her lifetime (Art. 920 FCC and LCC), without any similar time limitations to those provided under Swiss law. Consequently, *inter vivos* trusts are not to be considered as *jura singularia successionis*[185] and are subject to the possibility of claw-back to the extent necessary for the heirs to recover their compulsory share.

Notwithstanding that the order in which different *inter vivos* settlements could be the object of claw-back claims by the heirs should normally be determined on the basis of the effective date of such settlements,[186] the French *Cour de Cassation*, as regards a trust where the settlor was beneficiary and had the power to revoke, decided that the trust was to be considered as the last *inter vivos* gift and thus to be subject to claw-back immediately after the testamentary dispositions.[187]

As regards the settlor's heirs' right to information in relation to an *inter vivos* trust, the situation is not very clear in France, even if there is a likelihood that the courts will not give the heirs any right that the settlor did not have.[188] In Luxemburg, the situation seems to be quite similar; indeed, a 1994 decision denied a *légataire universel* any right to information, considering that the latter could not overturn banking secrecy owed to a trustee.[189]

C. Conclusion on Trusts and Continental Succession Laws

Given that the Hague Trusts Convention is not intended to prevent the application of any mandatory provisions of the applicable succession law, the articulation of trusts with continental succession laws highlights some of the problems that may arise from the collision between trusts and civil law concepts.

In this context, it is currently difficult to predict with certainty how testamentary trusts will be dealt with by civil law jurisdictions within the framework of successions governed by continental law, with the consequence that the creation of *inter vivos* settlements should be favoured.

The duration of trusts is another point deserving consideration, in particular when the applicable trust law does not contain a rule against perpetuities.

---

[185] GODECHOT S. (note 25), pp. 315-316.

[186] PERRIN J. (note 1), No. 575. See however GODECHOT S. (note 25), pp. 326 *et seq*., according to whom the order shall be determined in view of the acquisition of the gifts by the beneficiary.

[187] Decision of the French *Cour de Cassation* of 20 February 1996 in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

[188] PERRIN J. (note 1), No. 582.

[189] Order of the District Court of Luxemburg of 10 January 1994 in *Re Moortgat vs Octave Trust*, available under http://observatoire.codeplafi.lu.

Finally, it is clear that trusts cannot be used to circumvent the application of forced heirship provisions, and that disgruntled heirs are often in a position to limit the effectiveness of a trust infringing upon their compulsory share, even if they will probably encounter some practical difficulties.[190]

IV. General Conclusion

Even if originally developed in common law jurisdictions, trusts are being used in more and more situations having some connections to one or more civil law jurisdictions. The peculiarities of trusts have given rise to difficulties with regards to their recognition in continental countries; the Hague Trusts Convention constitutes an important step forward in this regard, enhancing the legal certainty surrounding trust recognition in the contracting States.

Nevertheless, the use of the trust structure within the framework of a succession governed by a continental law such as Swiss, French of Luxemburg law, raises some substantial questions. This is mainly because trusts have been developed in a common law context, where the protection of the heirs does not occur through mechanisms as rigid as the system of compulsory shares. However, it seems clear that the use of trusts is to a large extent possible in such situations, and that the heirs' rights should be protected, even if the location of the trust assets and of the trustee can lead to some problems at the enforcement stage.

[190] It is here to be mentioned that some offshore jurisdictions have enacted specific provisions to protect their trusts against attack from disgruntled heirs. As regards such anti-forced heirship rules, whose study would lie outside the scope of the present paper, see PERRIN J. (note 1), Nos. 605 *et seq.*, and quoted references.

SOME CRITICAL COMMENTS ON THE JURIDICITY OF *LEX MERCATORIA*

Thomas SCHULTZ*

I. Introduction

From the first days of law school, lawyers are taught to subsume facts under legal concepts in order to draw legal consequences from specific cases. Scientists are similarly taught to apply general definitions to individual instances in order to characterize them as belonging to the category of which the definition is the gatekeeper. This is how we establish legal and scientific truths, from which further consequences can then safely be derived. Infringing this rule amounts to a fundamental methodological error that invalidates or at least strongly weakens any inferred statement. Surprisingly, there is one legal question in relation to which this rule is usually, if not constantly, broken, which barely triggers any criticism or even reaction: it is the question of whether the *lex mercatoria* is law or not. The memorable 'trench warfare' that characterized the debate on this question in its

* *Maître d'enseignement et de recherche* (Senior Lecturer), Geneva University Law Faculty, detached in part to the Graduate Institute of International and Development Studies. This article is part of a research project funded by the Swiss National Science Foundation. The author wishes to thank Professor Matthew Kramer (Cambridge), for particularly useful comments on an earlier draft, as well as Professor Andreas Bucher (Geneva), Professor Gabrielle Kaufmann-Kohler (Geneva), and Professor François Ost (Brussels) for meaningful discussions and guidance.

Yearbook of Private International Law, Volume 10 (2008), pp. 667-710

earlier days,[1] with arguments fired across the line but little progress made, and the current relative scantiness of reflective effort on the matter, are doubtlessly due, in part, to this non-observance of proper scientific methodology.

The purpose of this article is thus to focus on the applicable analytical framework to determine the jural character of the *lex mercatoria*, or, in other words, the concepts of law and a legal system. It is there indeed that lies the most striking weakness of the contribution – which is otherwise permanently valuable – made to the debate by international lawyers. To be sure, the abstract questions of what law and a legal system are, how they are to be defined, and how they relate to each other, are barely ever given serious consideration in these circles when discussing the *lex mercatoria*. Arbitration specialists are usually quite prompt in criticizing non-specialists for failing to understand and rely on the relevant literature – and so they should, as the latter generally underestimate the complexity of the field. But the same specialists seem to think that they can dispense with following their own advice when it comes to the juridicity of the *lex mercatoria*, as they barely mention any relevant literature on the concepts of law and a legal system, in spite of the role the concepts hold for the question with which they are dealing. Often, authors refer to an unexplained and even undefined 'traditional' concept of law, thereby avoiding much criticism on account of the embarrassment that readers feel because of their ignorance of this traditional, and thus supposedly well-known, concept.[2] At best, one finds a few references to Santi Romano in the French literature on the topic.[3] Romano is of course an important author, but his work is quite limited. Relying solely on it is somewhat meager if one considers the more pregnant international scholarship, be it Italian (such as Norberto Bobbio), British (such as H.L.A. Hart, Joseph Raz and Matthew Kramer), Belgian (such as François Ost and Michel van de Kerchove), French (such as Jacques Chevallier), Austrian (such as Hans Kelsen), German (such as Gunther Teubner) or American (such as Lon Fuller and Paul Bohannan) – all authors whose works have direct importance for

[1] LAGARDE P., 'Approche critique de la lex mercatoria', in: *Le droit des relations économiques internationales: Études offertes à Berthold Goldman*, Paris 1982, p. 125.

[2] FOUCHARD P./GAILLARD E./GOLDMAN B., *Traité de l'arbitrage commercial international*, English edn., Paris 1996, English edn. 1999 with John Savage, para. 1450: 'the criteria which traditionally defined the existence of a legal order'. See similarly, GOLDMAN B., 'Lex Mercatoria', in: *Forum Internationale* 1983, p. 19, arguing that the *lex mercatoria* is not equity, as it may lead to inequitable results, and therefore 'it is manifest that [it] has the status of law'.

[3] KASSIS A., *Théorie générale des usages du commerce*, Paris 1984; OSMAN F., *Les principes généraux de la Lex mercatoria: contribution à l'étude d'un ordre juridique anational*, Paris 1992, p. 357 *et seq.*; FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1450. A notable exception is DEUMIER P., *Le droit spontané*, Paris 2002, p. 324 *et seq.* On the role played by Santi Romano in the theoretical construction of the *lex mercatoria* – whose impact and status seem to largely explain the acceptability under the social rules of French legal academia of referring to his theoretical construction alone –, see the comments made during a colloquium held in Paris in 2001 by Philippe Kahn, as transcribed in GHÉRARI H./SZUREK S. (eds), *L'émergence de la société civile internationale*, Paris 2003, pp. 266-268.

the issues as stake here and will be used in the present article. Just as one cannot seriously discuss key issues pertaining to the field of international commercial arbitration while ignoring the work of authors such as Pierre Lalive, Lord Mustill, Gabrielle Kaufmann-Kohler, Emmanuel Gaillard, Philippe Fouchard, William Park and many others, one cannot seriously discuss key issues pertaining to the field of legal theory while ignoring, and referring to, the works of authors such as those mentioned hereabove.

The question of the definition of law and a legal system are questions of legal theory. On such a topic, it obviously is legal theory that should teach international lawyers. Legal theorists are there to provide the definitions, the concepts; international lawyers are there to apply them to individual instances, to subsume the facts under the concepts.

The question of the juridicity of the *lex mercatoria* matters in at least three respects. First, the label of 'law' carries with it certain qualities that we have come to associate with, and expect from, that which is jural. On the one hand, these qualities relate to autonomy and supremacy. As Joseph Raz puts it summarily:

> 'There can be human societies which are not governed by law at all. But if a society is subjected to a legal system then that system is the most important institutionalized system to which it is subjected.'[4]

On the other hand, the qualities associated with law relate to the legitimacy and the quality of the mode of governance that uses, as a regulatory instrument, a normative set that deserves to be called law: we now face the rule of law as a moral-political ideal. The fundamental attributes of law – which Fuller famously has called the 'inner morality of law'[5] – become here principles of political morality.[6] To put it simply, qualifying the *lex mercatoria* as law would convey the idea that it is regulatorily important (that it directs behavior in a significant way) and that it constitutes a morally and politically estimable mode of governance for the *societas mercatorum*. This is what is generally considered the political debate behind the *lex mercatoria*, as such qualities of a normative system legitimize and even encourage a policy of non-intervention on the part of external institutions.[7]

Second, the question of the juridicity of the *lex mercatoria* has led to amendments in a number of national arbitration laws and procedural rules of arbitration institutions (which will be briefly reviewed in this article), opting for a reference to 'rules of law' as the applicable 'law' instead of 'a law'. The issue was

---

[4] RAZ J., *Practical Reason and Norms*, Oxford 1999, p. 154.

[5] FULLER L., *The Morality of Law*, rev edn, New Haven 1969, pp. 33-41.

[6] KRAMER M.H., *Objectivity and the Rule of Law*, Cambridge 2007, p. 142 *et seq.*

[7] It is likely against this presumption of the moral-political estimableness of the *lex mercatoria* that certain authors have reacted (more or less accurately) by pointing to a possible hegemony of the West using the *lex mercatoria* as an instrumentality of power. See, *e.g.*, TOOPE SJ, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons*, Cambridge 1990, p. 96: 'It would appear that the so-called *lex mercatoria* is largely an effort to legitimise as «law» the economic interests of Western corporations.'

the controversy on the question whether the *lex mercatoria* constitutes a legal system – which is what 'a law' would refer to. The locution 'rules of law' was thus introduced as a means to provide that the *lex mercatoria* is applicable as a set of legal rules, whether they collectively form a legal system or not. As we will see, this theoretical construction of 'rules of law' not being a 'legal system' turns out not to withstand close scrutiny and appears to be a scientifically unworkable compromise.

Third, legal pluralists use the *lex mercatoria* as the prime example of legal systems outside the State, as the starting point informing most reflections on non-national legal orders, such as the *lex sportiva*.[8] For instance, a PhD thesis pushing for a pluralistic view of law in the field of arbitration or international law would typically be exposed to severe criticism if it did not use the *lex mercatoria* as the initial proof-of-concept in the argumentation. Legal pluralists generally assume that there is at least one clear manifestation of non-State law, and that this manifestation is the *lex mercatoria*. The *lex mercatoria* is the flagship of legal pluralism.[9]

The approach of this article will be based on what remains the most practicable view of law: legal positivism. Eager critics might quickly argue that this amounts to a preconception that prejudges the entire debate, insofar as legal positivism simply excludes any law outside the State. Such critics, however, might be slightly misinformed: legal positivism cannot be reduced to this classical Benthamian and Austinian monistic construction of law (law as the exclusive product of the modern State), directly opposed to legal pluralism. Legal positivism, as we will briefly see, has many branches. The branch that I follow relies on the proposition (which is fundamental throughout legal positivism) that a rule of law, in order to be a rule of law, must be posited, that is selected by the officials of the relevant legal system, in accordance with the system's rule of recognition. This approach admits of non-State law; it is compatible with legal pluralism, which, to be sure, is a necessary condition (though not a sufficient one) to admit of the *lex mercatoria* as law.[10]

This article is divided into three Parts, which reflect the three main views of the nature of the *lex mercatoria*, in an order that starts with the most watered-down acceptance of the *lex mercatoria* and ends with the most ambitious one. It may be

[8] See, *e.g.*, LATTY F., *La lex sportiva*, Leiden 2007, p. 12 *et seq.*

[9] This is in particular so with regard to the branch of legal pluralism chiefly incarnated by the School of Dijon – the school of thought led by Berthold Goldman, Philippe Kahn, Philippe Fouchard and Eric Loquin (who all were or are based in Dijon), which first coined the idea of the rebirth of the *lex mercatoria* and, on this basis, strongly argued in favour of the recognition of non-state arbitral legal systems. For a lively account of the development of the School of Dijon, see Philippe Kahn's comments made during the Paris 2001 colloquium, in GHÉRARI H./SZUREK S. (note 3), pp. 266-268.

[10] See, *e.g.*, JACQUET J.-M./DELEBECQUE P./CORNELOUP S., *Droit du commerce international*, Paris 2007, pp. 59–60: 'l'admission de la juridicité de la *lex mercatoria* suppose une adhésion à la théorie du pluralisme juridique, récusant le rôle exclusif de l'Etat dans la production du droit.'

pointed out that these different views of the *lex mercatoria* are assessed not according to their appeal, workable character, or popularity in practice, but only with respect to their accuracy as theoretical constructs. Part I examines the idea that the *lex mercatoria* is merely a method of decision making used by arbitrators. This view relies on the idea that the *lex mercatoria* is a method of rule-selection, according to which rules are extracted from other legal systems (typically national ones), reinterpreted and adapted to international commerce, and applied in this new guise. The analysis will show that this view implicitly and necessarily relies on the idea that the *lex mercatoria* is, in fact, a legal system of its own. Part II delves into the view that the *lex mercatoria* is not a legal system, but merely a set of legal rules. The discussion will show that this view is fundamentally flawed, inasmuch as that which makes rules legal is their belonging to a legal system, which legal system is necessarily the *lex mercatoria* itself. Part III then critically analyzes the *lex mercatoria* as a legal system of its own, and concludes that it fails to meet certain requirements of structure and that its normative contents lack certain formal qualities, which all are essential features of a legal system. The article concludes that the *lex mercatoria* is not law, that it is in and of itself devoid of jural character, that it is not an instance of legal pluralism.

II. The *Lex Mercatoria* as a Method

The *lex mercatoria* is notorious for the difficulty faced by its proponents to come up with a defined set of rules that is rich and complete enough for it to be considered meaningful.[11] One way out of this issue, which at first appears sound and

[11] GAILLARD E., 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules', in: *ICSID Review - Foreign Investment Law Journal* 1995, p. 224: 'The transnational rules method is often criticized because of the perceived difficulty of determining the content of the rules with any precision.' See also MUSTILL M., 'The New Lex Mercatoria: The First Twenty-Five Years', in: *Arbitration International* 1988 p. 110 *et seq*., listing a total of 20 principles or rules forming the *lex mercatoria* – an almost meaningless amount compared to the normative wealth of national laws. See further HIGHET K., 'The Enigma of the Lex Mercatoria', in: *Tulane Law Review* 1989, p. 623: 'It is conceded by proponents of the lex that «[i]t is not possible to provide an exhaustive list of all the elements of the "law merchant."»'. This is true. It is not even possible to supply more than a meager inventory, loaded with vagueness and charged with logical or analytical legal error.' See further KASSIS A., 'L'arbitre, les conflits de lois et la lex mercatoria', in: ANTAKI N./PRUJINER A. (eds), *Actes du premier colloque sur l'arbitrage commercial international*, Montreal 1986, p. 136; LANGEN E., *Transnational Commercial Law*, Leiden 1973; SCHMITTHOFF C., 'The Unification of the Law of International Trade', in: CHENG C.-J. (ed), *Schmitthoff's Selected Essays on International Trade Law*, Deventer, 1988.

convincing, is to argue that the *lex mercatoria* is not actually a set of rules, but rather a method or technique of decision-making.[12]

What then does it mean exactly to argue that the *lex mercatoria* is a 'method of decision-making'? Fouchard, Gaillard and Goldman wrote in this respect that 'it cannot be too strongly emphasized that applying transnational rules involves understanding and implementing a method, rather than drawing up a list of the general principles of international commercial law.'[13] They claim that this method for the selection of rules is the 'true test of the effectiveness of *lex mercatoria* as an instrument for resolving disputes in international trade'.[14] In substance, the idea is that the conduct that the *lex mercatoria* commands may not be identifiable *in abstracto* by scholars, but will certainly be recognized by the arbitrator when he or she has to apply the *lex mercatoria*, which thus makes the *lex mercatoria* effective. The *lex mercatoria* is, in the approach discussed here, not viewed as a defined and readily available list of norms, but as a method used to identify those norms. This appears in even clearer focus in another contribution of Emmanuel Gaillard, where he wrote that 'the transnational rules [forming the *lex mercatoria*] do not result from a list but from a method.'[15] (The rules, it may be noted, *result* from the method.) He then specifies what this method consists of in the following words: 'in the absence of determinations on the method by the parties themselves, the counsels and arbitrators must make a comparative law analysis so as to identify the applicable rule or rules.'[16] 'Whatever the level of detail of the question posed', he goes on, 'the method is capable of providing a solution, in the same way that a

[12] GAILLARD E., 'Transnational Law: A Legal System of a Method of Decision Making?', in: *Arbitration International* 2001, p. 64: 'This understanding of transnational law [as a method of decision-making] presents a distinct advantage over the view which reduces it to a list, for it eliminates the criticism based on the alleged paucity of the list.' Others have called it the 'functional approach': see REDFERN A./HUNTER M., *Law and Practice of International Commercial Arbitration*, 4th edn, London 2004, para. 2-62.

[13] FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1455.

[14] *Ibid*.

[15] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 224: 'transnational rules are a method, not a list'. See also GAILLARD E., 'Transnational Law' (note 12), p. 62: 'The other approach to defining the contents of transnational law is to view transnational law as a method of decision-making, rather than as a list.'

[16] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 226: 'Failing a clear indication by the parties as to how the applicable transnational rules are to be determined, . . . the process [of the *lex mercatoria*] involves counsel and arbitrators carrying out an analysis of comparative law in order to establish the relevant rule or rules.' See also GAILLARD E., 'Transnational Law' (note 12), pp. 62-63: 'This approach consists, in any given case, of deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized.'

national law would'.[17] Similarly, Lowenfeld's position is that the *lex mercatoria* is 'a source of law made up of custom, convention, precedent, and many national laws. . . . [It is] an alternative to a conflict of laws search.'[18] It is thus meant to be equivalent to a conflict of laws search, at least in certain respects. The author, indeed, appears to consider that the *lex mercatoria* is a normative mechanism that allows us to identify or recognize the applicable norms, akin to a set of rules of conflict of laws. A similar position can be ascribed to Ole Lando, who wrote that the *lex mercatoria* 'has the advantage that it does away with the choice-of-law process which many lawyers abhor'.[19] It is here conceived of as a process of norm selection that replaces choice of law rules.[20] In essence, to rephrase what has already been said in terms that might now advance this article's thesis, what all these views of the *lex mercatoria* have in common is that it is conceived of as a normative process towards the selection of norms: if one is to apply the *lex mercatoria*, one is to identify rules and principles by means of a certain method.

What implications does this have on the examination of the *lex mercatoria*'s jural character? Before addressing the question, two seemingly germane points must be made. First, the *lex mercatoria*, even as a method, is meant to be a jural phenomenon, and not a mere social ordering of the *societas mercatorum*. As Lord Mustill writes, the *lex mercatoria* is not meant to be an 'expedient for deciding according to «non-law»'[21] For Lowenfeld, '[i]t is important to emphasize that *lex mercatoria* is not *amiable composition*'.[22] Second, the *lex mercatoria*, even as a method, is conceived of as something more than the sum of its constitutive parts.[23]

---

[17] GAILLARD E., 'Thirty Years of Lex Mercatoria' (note 11), p. 226: 'However detailed the question at issue, the transnational rules method will produce a solution, in the same way as national laws.'

[18] LOWENFELD A.F., 'Lex Mercatoria: An Arbitrator's View', in: *Arbitration International* 1990, p. 143 *et seq*.

[19] LANDO O., 'The Lex Mercatoria in International Commercial Arbitration', in: *I.C.L.Q.* 1985, p. 754.

[20] Lowenfeld and Lando disagree on the point whether the *lex mercatoria* replaces or displaces the choice of law process: see LOWENFELD A.F. (note 18), p. 145: '[The *lex mercatoria*] is, in other words, an additional option in the search for the applicable law, not an alternative to that search.' This debate has no implication on the fact that the *lex mercatoria* is understood as a method for the selection of norms and the difference between the positions of the two authors is thus one that does not make a difference for the purposes of the present study.

[21] MUSTILL M. (note 11), p. 92.

[22] LOWENFELD A.F. (note 18), p. 141.

[23] *Cf.* GAILLARD E., 'La distinction des principes généraux du droit et des usages du commerce international', in: *Études offertes à Pierre Bellet*, Paris 1991, p. 205: '[O]n tiendra provisoirement pour acquis qu'il est possible en pratique de dégager de telles règles d'une analyse de droit comparé ou de diverses sources internationales et que ces règles ne se limitent pas à des principes si généraux qu'ils se retrouvent dans tous les droits . . . ce qui les priverait de tout intérêt.' See also BUCHER A./TSCHANZ P.-Y. *International Arbitration in Switzerland*, Basle 1988, p. 105, who refer to the 'application of rules of law which are

This is meant in the sense that when an arbitrator is required to apply the *lex mercatoria*, he would fail his or her task if, after having made the comparative law analysis or followed any other relevant norm-identification process, he or she applied, strictly speaking, rule X of national legal system A, plus rule Y of national system B, plus rule Z of national legal C, and so on, where X, Y and Z have in substance the same content, which content is thus given a transnational character. Instead, he or she must distill the norm by following the relevant method[24] (recall that the transnational rules *result* from the method) and apply the result as a norm *of its own*,[25] as a norm that does not draw its jural character and its normative force from one of the national legal systems within which it exists, but from somewhere else.

If the *lex mercatoria* is meant to be a method towards the identification of a set of legal norms in application of which the dispute will be resolved, where does the legal character of these norms come from? An initial answer would seem to be that it comes from the different national legal systems and international law.[26] In the light of the immediately preceding discussion, this answer appears to be wrong. When an award rendered in application of the *lex mercatoria* is made, it is meant to be binding not because rules X, Y and Z, belonging to discrete national legal sys-

---

recognized in international trade independently from their enactment by any given state.' See also POUDRET J.-F./BESSON S., *Comparative Law of International Arbitration*, 2nd edn, London 2007, paras 696-697: '[A]lthough they claim to refer to an autonomous legal order, adherents of the *lex mercatoria* do not hesitate to use rules derived from other legal systems. . . . The generality of these principles does . . . have the advantage of constituting a reservoir into which arbitrators may dip in order to infer particular or new rules applicable to the case at hand. To this extent this source overlaps with arbitral practice ['jurisprudence arbitrale' in the original French version], which is a sort of modern praetorian law. . . . In short, we have seen that the *lex mercatoria* draws its norms from heterogeneous sources of unequal value derived from various legal systems'.

[24] *Cf.* MUSTILL M. (note 11), p. 92: 'Although the essence of the lex mercatoria is its detachment from national legal systems, it is quite clear from the literature that some, at least, of its rules are to be ascertained by a process of distilling several national laws.'

[25] Whether the resulting norm is considered to have been crafted, discovered or identified by the arbitrator is irrelevant. What matters is that it is the result of an application of the method of the *lex mercatoria*, that the norm has been 'imported', whatever its origin, into the *lex mercatoria* in application of its method. Further on the 'reception' of a norm in the 'transnational order', see KAHN P., 'Les principes généraux du droit devant les arbitres du commerce international', in: *Clunet* 1989, pp. 326–327.

[26] Based specifically on international law, their juridicity would, according to this view (which the author does not subscribe to), stem from treaty and customary law as generalized through the concept of general principles of law (Art. 38(1)(c) ICJ Statute): MALANCZUK P., *Akehurst's Modern Introduction to International Law*, 7th ed, London 1997, pp. 48-49: 'general principles of international law . . . are not so much a source of law as a method of using existing sources – extending existing rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning, and so on' (in other words, the *lex mercatoria* would be a method referring to a method (the general principles of international law) referring to treaty and customary law).

tems, international conventions, customary international law or other sources, command the legal solution embodied in the award. It is meant to be binding because a transnational rule (selected in application of the *lex mercatoria* method, effectively resulting from it) commands it.[27] This appears quite clearly in Lord Mustill's exposition of the matter, when he writes that 'the rules of the *lex mercatoria* have a normative value which is independent of any one national legal system.'[28] Ole Lando takes the same position: 'the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by state authorities but that it is recognized as an autonomous norm system by the business community and by state authorities'.[29] Similarly, Andreas Bucher and Pierre-Yves Tschanz wrote that '[i]nternational contracts and awards often refer to principles or rules the binding force of which does not result from any national rule of law.'[30] The same position is further implicit in the arguments of many authors who focus not on the source of juridicity but on the inventory of the norms that constitute the *lex mercatoria*.[31]

It is the same phenomenon as when a national court relies on a comparative law analysis to reach a decision, in which case the normative value of the rule according to which the decision is made results from the national legal system of the court in question (by dint of judicial law-making), not from those legal systems where the solution was found.[32] To put it differently, arbitrators applying the *lex mercatoria* extract rules and principles from various national legal systems, and possibly from the international legal system, then assemble and combine them, and maybe reinterpret or, as Gabrielle Kaufmann-Kohler would say, 'transnationalize them' to better adapt them to international commerce.[33] The norms are then applied

---

[27] *Cf. Akehurst's Introduction* (note 26), p. 50: 'In the case of «internationalized contracts» between a state and foreign companies, the purpose of referring to general principles . . . is primarily . . . to prefer to trust the arbitrator's (s') discretion to discover relevant rules of law creatively, rather than being at the mercy of the contracting state's national legislation.'

[28] MUSTILL M. (note 11), p. 88. See also FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1447: 'To denote rules other than those of a given jurisdiction, we shall use the generic expression *lex mercatoria*.'

[29] LANDO O. (note 19), p. 752.

[30] BUCHER A./TSCHANZ P.-Y. (note 23), p. 105.

[31] See, *e.g.*, LAGARDE (note 1), p. 128: 'Un inventaire scrupuleux des normes de la *lex mercatoria* doit exclure les règles de droit matériel international de nature étatique ou interétatique. Le critère ici doit être formel et non matériel. . . . L'originalité de la *lex mercatoria* est d'être du droit [adopté sans contrainte de l'Etat], créé par la *societas mercatorum*, et c'est donc en dehors des sources étatiques qu'il faut en chercher les manifestations.'

[32] See, *e.g.*, ANDENAS M./FAIRGRIEVE D., 'Finding a Common Language for Open Legal Systems', in: CANIVET G./ANDENAS M./FAIRGRIEVE D. (eds), *Comparative Law Before the Courts*, London 2004, p. xxviii.

[33] KAUFMANN-KOHLER G., 'Arbitral Precedent: Dream, Necessity, or Excuse?', in: *Arbitration International* 2007, p. 364: '[A]rbitrators have an inclination to «transnationalize» the rules they apply, either because they are subject to no meaningful

in this new quality. In the process, as the expositions of the various quotations above show, the arbitrators tear these rules and principles away from their original source of juridicity, namely the national legal systems and possibly the international legal system.

In other words, this means that, in the current approach, an arbitrator applying the *lex mercatoria* applies *a law* and not merely *law*,[34] the difference being that the former is a given instantiation of the latter, marked by an element of cohesion to be discussed later on. 'Law' can refer to a disparate collection of rules belonging to discrete legal systems (typically national ones) from which they would derive their juridicity. An arbitrator applying national law α to the validity of the arbitration agreement, national law β as the law governing the arbitration and national law γ to the substance of the dispute would in this sense be applying law (or laws), but not a law. The same holds true if the parties have elected several national laws that apply each to one specific legal question (e.g. contractual versus non-contractual responsibility, validity of a patent versus validity of a license), a process better known as '*dépeçage*'.[35] 'A law', by contrast, is an organic totality that is the source of its own juridicity. Brutally simplifying for the sake of clarity, the idea is that the *lex mercatoria* is, in the current approach, understood as being the result of mixing up an array of national legal systems and using the resulting product as a new normative entity.

These points will inform the answer one may give to the question asked above: what is a method of selection of rules in the arsenal of conceptual instruments available to examine or assess the jural character of a normative phenome-

---

controls when it comes to the merits, they act in a transnational environment, or they are themselves very often from different legal cultures. . . . [T]he purpose of transnationalization is to remove the dispute from the ambit of a possibly inadequate national law.' See also KAUFMANN-KOHLER G., 'Le contrat et son droit devant l'arbitre international', in: *Le contrat dans tous ses états*, Bern 2004 and CARBONNEAU T., 'Arbitral Law-Making', in: *Michigan Journal of International Law* 2004, pp. 1203-1204: '[Arbitrators] retain the authority to mold the chosen law to the specific circumstances of the litigation. . . . The content of the governing *lex*, however chosen, is quite malleable then, with the degree of malleability being determined by the arbitrator's ingenuity.' (references omitted).

[34] The contention made here may be in contradiction with those legal provisions – introduced specifically in France, the Netherlands and Switzerland in order to circumvent the question of the *lex mercatoria*'s nature as a legal system – that allow the arbitrator to apply 'rules of law', as opposed to 'the law' or 'a law'. It is hopefully obvious that what legal provisions, that is certain legal systems, say has no bearing on an analytical examination of what is law (and not 'a law'). The question, which reflects the second main view of the *lex mercatoria* (*i.e.* that it is a set of rules), will be examined in further detail in the following main section. See also GAILLARD E., 'Transnational Law' (note 12), pp. 62-63: 'one may be tempted to conclude that, where the relevant arbitration rules or arbitration statute mandates the arbitrators to select the «law» applicable to the dispute, as opposed to mere «rules of law», it is nonetheless open to them to select . . . transnational rules as «the law» applicable to the dispute.'

[35] BERGER K.P., *International Economic Arbitration*, Deventer 1993, pp. 492-493; FOUCHARD P./GAILLARD E./GOLDMAN B. (note 2), para. 1436.

non? Asked differently and in the light of the developments just made, the question hopefully will spark an obvious answer for anyone with a basic knowledge of legal theory: what is something that determines which norms belong to a law? The answer of course lies in Hart's distinction between primary and secondary rules.[36] It may be recalled that primary rules are rules of conduct, providing what the addressees are obliged to do, whereas secondary rules determine the pedigree that primary rules must have in order to be binding within the legal system to which the secondary rule belongs – as such it is more precisely called a secondary rule of recognition. Secondary rules are what constitute the 'element of cohesion' adumbrated above when distinguishing between law and a law.

This means that a method of rule selection is nothing more and nothing less than a norm (a norm is a statement that contains prescriptions or imperatives,[37] therefore a method is a norm) of recognition of other norms, or rather a rule of recognition.[38] Indeed, the *lex mercatoria* as a method of rule selection fits quite neatly under the definition of a rule of recognition. As Matthew Kramer writes,

> [T]he Rule of Recognition in any legal system exists as a set of normative pre-suppositions that underlie and structure the law-ascertaining behavior of the system's officials. It is an array of norms on the basis of which the officials determine what counts as legally binding and what does not.[39]

Precisely, the *lex mercatoria* as a method of rule selection underlies and structures the law-ascertaining behavior of arbitrators when they decide a case in application of the *lex mercatoria*. The *lex mercatoria* as a method determines what will count as legally binding and what will not.

The presence of such secondary norms – regardless of their level of precision or opacity – is precisely what characterizes a legal system as opposed to a

---

[36] HART H.L.A., *The Concept of Law*, 2nd edn, Oxford 1994, p. 91 *et seq*.

[37] See, *e.g.*, KRAMER M.H., *In Defense of Legal Positivism: Law Without Trimmings*, Oxford 1999, p. 80.

[38] The same conclusion is suggested by another passage by Emmanuel Gaillard, where he writes that the '*lex mercatoria* should be defined today by its sources . . . as opposed to its content': GAILLARD E., 'Transnational Law' (note 12), p. 62. A definition according to sources is a definition according to the object of secondary rules of recognition; a secondary rule defines the pedigree that a norm must have, that, is where it comes from, *i.e.* what are its possible recognized sources. A national legal system, for instance, is typically defined by its sources, by what the officials of the legal system in question say belongs to the system and what does not; it is not generally defined by any content of any rule. A non-legal normative system, on the other hand – that is one that does not have secondary rules of recognition – cannot be defined by its sources, as the sources are left undefined by the lack of secondary rules.

[39] KRAMER M.H., 'Of Final Things: Morality as One of The Ultimate Determinants of Legal Validity', in: *Law and Philosophy* 2005, p. 57.

social normative system.[40] This implies that the view according to which the *lex mercatoria* is a method for the selection of rules towards the constitution of a law with its own autarkic juridicity relies in fact, at its most foundational level, on the assumption that the *lex mercatoria* is a legal system, the contours of which are delimited by the method of norm selection.[41] The arbitrator is the official of the *lex mercatoria*'s legal system who, in application of the secondary rule of recognition that is the method, determines which norms belong to the system.[42]

We have thus progressed from noting that the *lex mercatoria* must be a law, even in the approach that considers it to be merely a method, to concluding that the *lex mercatoria*, by dint of logical necessity following from the most generally agreed understanding of what law is, must rely on the assumption that it is a legal system of its own.[43]

---

[40] See, *e.g.*, HART H.L.A. (note 36), p. 91 *et seq.*; BOBBIO N., 'Ancora sulle norme primarie e norme secondarie', in: *Rivista di filosofia* 1968, p. 35; BOHANNAN P., 'The Differing Realms of the Law', in: *American Anthropologist*, pp. 34-37; VAN DE KERCHOVE M./OST F., *Legal System Between Order and Disorder*, Oxford 1994, p. 110.

[41] This hopefully constitutes a reply to the question posed by Poudret and Besson with respect to Emmanuel Gaillard's method approach: 'Besides, can a method constitute a legal system?'

[42] See further text accompanying notes 161–173 below. *Cf.* FADLALLAH I., 'Le projet de convention sur la vente de marchandises', in: *Clunet* 1979, p. 766: 'La *lex mercatoria* peut être conçue restrictivement, si on ne la renvoie pas au néant, comme limitée aux normes propres spontanément secretées par le commerce international. Mais un système ne se réduit pas à ce qu'il a inventé. Reconnu, il s'étend à l'ensemble des règles et pratiques qu'il intègre, quelle qu'en soit la provenance'; LOQUIN E., 'Où en est la lex mercatoria?', in: LEBEN C./LOQUIN E./SALEM M. (eds), *Souveraineté étatique et marchés internationaux à la fin du 20e siècle - Mélanges en l'honneur de Philippe Kahn*, Paris 2000, pp. 25-26, who explains Emmanuel Gaillard's position in the following terms: 'Cette méthode relève de ce que l'on pourrait appeler 'un darwinisme juridique'. Il s'agit de sélectionner, à travers toutes les sources du droit, les règles qui sont les plus aptes à satisfaire les besoins du commerce international. C'est l'appropriation de la règle à ces besoins qui explique sa *réception* dans la *lex mercatoria*' (emphasis is mine). See also TEUBNER G., 'Breaking Frames: The Global Interplay of Legal and Social Systems', in: *Am. J. Comp. L.* 1997, p. 151, who asks the question: 'What are the secondary rules which would recognize the primary rules of *Lex mercatoria* and distinguish them from mere professional norms?' For theoretical developments on how the arbitrator can be the criterion of juridicity, see for instance the parallel in VAN DE KERCHOVE M./OST F., *Le droit ou les paradoxes du jeu*, Paris 1992, p. 179 ('L'intervention du juge à la fois l'indice et l'opérateur principal de la juridicité.')

[43] The following progression in Emmanuel Gaillard's argumentation is interesting in this regard: he first asks how 'the transnational rules methodology compares with the application of a fully fledged legal order' (GAILLARD E., 'Transnational Law' (note 12), p. 65), which means that he assumes that the *lex mercatoria* is not a fully fledged legal order (one does not compare A and B if assuming that A is an instance of B). He then lists four features that he argues are necessary and sufficient for a normative system to be a legal system and applies these features to the *lex mercatoria* as a method. He concludes that 'if not a genuine legal order, transnational rules do perform, in actual practice, a function strikingly similar to that of a genuine legal order' (at 71).

III. The *Lex Mercatoria* as a Set of Legal Rules

The second main view of the *lex mercatoria* considers it to be a repertoire of legal rules, but not a legal system. This view is not necessarily divorced in practice from the first approach just examined, but can and should nonetheless be distinguished analytically. The main conceptual difference resides in the obliqueness, in the preceding approach (method) as opposed to the current one (repertoire), of the reliance on readily identifiable rules, which proceeds in the preceding approach through the intermediary step of the 'method'. This difference sheds some additional light on the general question of the nature of the *lex mercatoria*, as will become plain in the later discussion of this matter.

The view of the *lex mercatoria* as a set of legal rules but not a legal system was, for instance, the dominant position before the publication of Berthold Goldman's first famous article on the *lex mercatoria*,[44] which started the 'trench warfare'[45] or 'war of faith'[46] that characterized the subsequent discussions of the *lex mercatoria*.[47] It is also the position, more or less explicitly, of more contemporary authors.[48] In essence, the position can be attributed to all those who evoke and

[44] GOLDMAN B., 'Frontières du droit et lex mercatoria', in: *Archives de philosophie du droit* 1964, p. 177. It might be recalled that the second famous article by Goldman on this matter is GOLDMAN B., 'La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives', in: *Clunet* 1979, p. 475.

[45] LAGARDE (note 1), p. 125.

[46] TEUBNER (note 42), p. 150.

[47] For representative writings reflecting the dominant position before Goldman, see, *e.g.*, JESSUP P., *Transnational Law*, New Haven 1956, p. 2: 'I shall use, instead of 'international law' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories' (and the comments thereupon by ABI-SAAB G., 'Cours général de droit international public', in: *Hague Lectures* 1987/207, p. 123; SCHMITTHOFF C., 'International Business Law: A New Law Merchant', in: *Current Law and Social Problems* 1961, p. 129 ('autonomous body of law'). A few years later, Schmitthoff characterized the *lex mercatoria* as a legal field ('*Rechtsgebiet*'), which even more clearly reflects the idea of a collection of legal rules which do not form, together, a legal system: SCHMITTHOFF C., 'Das neue Recht des Welthandels', in: *RabelsZ* 1964, p. 48.

[48] See, *e.g.*, POUDRET J.-F./BESSON S. (note 23), paras 697, 704: 'We are thus unable to discern an autonomous legal system', 'the *lex mercatoria* by no means constitutes a specific law . . . occupying a place of its own alongside national legal systems and the interstate legal order. It is rather a convenient name for *rules drawn from pre-existing . . . sources*'; PAULSSON J., 'La Lex Mercatoria dans l'arbitrage CCI', in: *Revue de l'arbitrage* 1990, p. 55; LOWENFELD A.F. (note 18), p. 144. See also HORN N., 'Uniformity and Diversity in the Law of International Commercial Contracts', in: HORN N./SCHMITTHOFF C. (eds), *The Transnational Law of International Commercial Transactions*, Deventer 1982, p. 14: '«transnational law» describes an actual uniformity or similarity of rules . . . This phenomenon of uniform rules serving uniform needs of international business . . . is today commonly labelled *lex mercatoria*'. The position is also implicitly present in Emmanuel Gaillard's

recognize the existence of 'principles and rules of transnational law'[49] in the realm of international trade and commerce, while denying that they constitute a legal system.[50] It is, above all, the position taken by those texts that have introduced the language 'rules of law' instead of (or in addition to) 'the law' or 'a law'[51] – such as certain national arbitration laws[52] and institutional arbitration rules,[53] the UNCITRAL Model Law,[54] and the Washington Convention.[55]

---

early writings: Gaillard 'La distinction des principes généraux du droit et des usages du commerce international' and Berthold Goldman's own theory also hinted at this conception in GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44), p. 21: '[International transactions] may perfectly well be governed by a body of specific rules, including transnational custom, general principles of law and arbitral case law. It makes *no difference if this body of rules is not part of a legal order* comporting its own legislative and judicial organs. Within this body of rules, the general principles of law are not only those referred to in Article 38(a) of the Statute of the International Court of Justice; there may be added to it principles progressively established by the general and constant usage of international trade.' (emphasis added). See also LOQUIN E., 'Où en est la lex mercatoria?' (note 42), p. 25: 'une *collection* de règles d'origine variable rassemblées sur le *seul* fondement de leur adéquation aux besoins du commerce international' (emphasis added).

[49] See, *e.g.*, BUCHER A./TSCHANZ P.-Y. (note 23), p. 198.

[50] Admittedly, many writings reveal a certain hesitation or confusion through the adjunction, in their rejection of the *lex mercatoria* as a legal system, of adjectives such as 'complete,' 'self-sufficient,' 'autonomous,' 'real', or 'genuine.' For an analysis of such language, in related contexts, see ROBERTS S., 'After Government? On Representing Law Without the State', in: *Modern Law Review* 2005, pp. 19-20.

[51] See, *e.g.*, GAILLARD E., 'Transnational Law' (note 12), pp. 65: 'this language («rules of law») . . . was in fact specifically intended to bypass the issue of whether *lex mercatoria* or general principles qualify as a genuine legal order.' REDFERN A./HUNTER M. (note 12), para. 2-71: 'The reference to «rules of law», rather than to «law» or «a system of law» is a coded reference to the applicability of appropriate legal rules, even though these may fall short of being an established and autonomous system of law.' POUDRET J.-F./BESSON S. (note 23), paras 679, 704: 'To the extent that it authorises the parties or the arbitrators . . . to apply rules of law and not merely a law, arbitration law today allows arbitrators to take the various constitutive elements of the *lex mercatoria* into consideration'.

[52] For instance the laws of the Germany (§ 1051 ZPO), Italy (Art. 834 al. 1 CPCI), the Netherlands (Art. 1054 WBR), France (Art. 1496 NCPC, Decree No.81-500 of May 12, 1981), Switzerland (Art. 187 PIL Act), and possibly Belgium (Art. 1700 Belgian Judicial Code, which refers to 'règles de droit', a language interpreted by some authors as meaning 'rules of law' outside a national legal system – *e.g.* DE BOURNONVILLE P., *Droit judiciaire: l'arbitrage*, Brussels 2000, p. 231 – and by others as meaning a national law – *e.g.* HUYS M./KEUTGEN G., *L'arbitrage en droit belge et international*, Brussels 1981.

[53] For instance the ICC Arbitration Rules (Art.17.1), LCIA Rules (Art. 22.3), International Arbitration Rules of the AAA (Art. 28.1), the WIPO Arbitration Rules (Art. 59.1).

[54] For instance the UNCITRAL Model Law (Art. 28: '1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute . . . 2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.').

It is quite uncontroversial that a repertoire of rules that are 'recognized in international trade independently from their enactment by any given state'[56] does indeed exist,[57] which is not to say that there is no controversy on the contents of the rules or principles that make up the *lex mercatoria*.[58] It may further be uncontentious that there have been 'countless applications of transnational rules by international arbitrators since far before the debate over the concept even began'.[59] One remains on relatively safe ground when asserting that there exists a 'discrete body of transnational commercial norms,'[60] that transnational commercial rules can effectively be uncovered, being 'drawn from international arbitral and contract practice, backed up by comprehensive comparative references'.[61] Klaus Peter Berger, among others, indeed appears to have satisfactorily established the existence of such rules through his empirical studies.[62] It seems fair to say, as he does, that the *lex mercatoria* is consequently 'capable of being codified in norm-like principles and rules together with commentary-like explanations, thus providing international legal practitioners with a means to apply the *lex mercatoria* in everyday legal practice.'[63] Or, as Harold Berman and Felix Dasser argue, whatever our theoretical framework is, it 'should not stop us from seeing what is right in front of our noses', namely 'the factual existence' of rules and principles that are applied in practice.[64] In sum, the question of whether the *lex mercatoria* exists as a set of rules

---

[55] Art. 42: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties'.

[56] BUCHER A./TSCHANZ P.-Y. (note 23), p. 105.

[57] See DE LY F., 'Emerging New Perspectives Regarding Lex Mercatoria in an Era of Increasing Globalization', in: *Festschrift für Otto Sandrock zum 70 Geburtstag*, Heidelberg 2000, p. 182. See also BOWDEN P., 'L'interdiction de se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration', in: GAILLARD E. (ed), *Transnational Rules in International Commercial Arbitration*, Paris 1993, p. 127: 'The [International Law Association] Committee's approach in its continuing study of transnational law has been to step back from the highly contentious issues that arise from any theoretical consideration of transnational law, or *lex mercatoria*, as a discrete body of principles and to examine, in a pragmatic way, the application of individual identifiable principles at least as a phenomenon of international commercial arbitration, which it undoubtedly is.'

[58] The contents of the *lex mercatoria*, which are not essential to the present discussion, are examined synthetically in, e.g., POUDRET J.-F./BESSON S. (note 23), paras 696.

[59] GAILLARD E., 'Transnational Law' (note 12), p. 59.

[60] FORTIER Y., 'The New, New Lex Mercatoria, or Back to the Future', in: *Arbitration International* 2001, p. 127.

[61] *Ibid*.

[62] See BERGER K.P., *The Creeping Codification of the Lex Mercatoria*, The Hague 1999, pp. 278-311.

[63] *Ibid* p. 3.

[64] BERMAN H.J./DASSER F., 'The «New» Law Merchant and the «Old»: Sources, Content, and Legitimacy', in: CARBONNEAU T. (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, The Hague 1998, p. 64.

seems to deserve a positive answer – which is of course not to prejudge the ascertainability of such rules by commercial actors, or their usefulness or completeness, which involve distinct questions.[65]

Would it thus be safe for *lex mercatorists* to simply back down one step and argue that, granted, the *lex mercatoria* may not exist as a legal system, but it is certainly not a mere 'doctrinal creation'[66] in its quality as a repertoire of legal rules? Does it solve or circumvent the issue to say that the *lex mercatoria* is merely a set of 'rules of law,' and not a legal system? Intuitively, one would be tempted to respond in the positive. But if such 'rules of law' are applied, not as norms of one or several specific national legal systems (which would confer to the rules the jural character flowing from their belonging to those systems), but as rules that are legal for another reason,[67] what would this reason be? Let it be said again, in different terms: if it seems quite agreeable that there are transnational commercial rules, why would they be jural, that is of a legal nature? What is it that would make such rules legal rules? As Gunther Teubner says: '*lex mercatoria*. Law or not law – that is the question!'[68]

---

[65] It might be pointed out at this stage that the completeness of a normative system is not a condition of its legal character. It is not because an adjudicator believes that he or she has to pronounce a *non liquet*, regardless of the frequency thereof, that the entire system should be denied its jural character. A very incomplete system would merely be quite meaningless. In addition, it is not because a normative system is not composed of very many norms that the system is necessary incomplete. Interpretative proficiency will in the vast majority of cases lead to some solution. As may be read in *Oppenheim's International Law*, in international law one will not find a 'clear and specific rule readily applicable to every international situation, but . . . every international situation is capable of being determined as a matter of law': JENNINGS R./WATTS A. (eds), *Oppenheim's International Law*, 9th ed., Harlow 1992, vol. 1, p. 13. For a similar argument with regard to the *lex mercatoria*: MERTENS H.-J., 'Das lex mercatoria-Problem', in: *Festschrift für Walter Odersky*, Berlin 1996, p. 857 *et seq.* The question of the completeness of the *lex mercatoria* is rather extensively discussed (curiously using the terminology 'self-contained regimes') in BERGER K.P., *Creeping codification* (note 62), p. 93 *et seq.*

It is another matter still that the *lex mercatoria* is not a virtually comprehensive normative system, meaning that it does not claim authority to intervene in all facets of its addressees' lives. While it is often argued by legal philosophers that virtual comprehensiveness is an essential feature of law (i.e. a condition of juridicity), I have argued elsewhere that federal legal systems should show this position to be doubtful: see SCHULTZ T., 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists', in: *Yale Journal of Law & Technology* 2007, p. 187 *et seq.*

[66] DE LA PRADELLE G., 'La justice privée', in: GHERARI H./SZUREK S. (eds), *L'émergence de la société civile internationale: vers la privatisation du droit international?*, Paris 2003, p. 134.

[67] On the source of juridicity of the norms forming part of the *lex mercatoria* being neither a national legal system nor the international legal order, see text accompanying notes 26–31 above.

[68] TEUBNER (note 42), p. 156.

One theoretical construction, meant to provide an answer to the question of the source of the juridicity of the *lex mercatoria* as a set of legal rules but not a legal system, resides in a natural law approach or jusnaturalism. Thomas Carbonneau, for instance, considers that the *lex mercatoria*, which he maintains 'includes natural law principles', is simply 'part of the bargain in international contracts.'[69] The *lex mercatoria*, in that sense, would intrinsically be part of international commerce as a social phenomenon. Actors of international commerce would have rights flowing directly from their being actors of international commerce, regardless of the professional, social, historical and geographical context of the transaction, the will of the parties and that which is provided by any rule of positive law. These rules would simply flow from values that pre-exist human normative decisions and are independent of them.[70] Incidentally, this natural law approach led Carbonneau to argue that the *lex mercatoria* is hierarchically superior to national laws and should trump them, which is consistent with the natural law approach to private international law, an approach that survived until the 19th century.[71] Similar positions are sometimes held with respect to human rights, when it is argued that people have certain rights by the mere fact that they are human beings – jusnaturalism incarnates a liberal ethic, promoting the defense of individual liberties against political powers.[72]

In such an approach, the only determinant criterion of juridicity is the legitimacy of a rule, that is its moral estimableness or conformity with some higher moral order.[73] For example, the reasoning would be that we consider certain rights to be fundamentally legitimate (in other words morally indispensable) and that, therefore, they form part of 'natural' human rights, 'natural' international law on jurisdiction, or the 'natural' regulation of international commerce. Principles such as *pacta sunt servanda*, therefore, would typically be a legal principle, not because it may be found in every national legal system, but because it is intrinsically legitimate and morally laudable.

Such an approach faces three major issues. First, the legal norms it would produce for international commerce would be characterized by a strong paucity, as many rules necessary for the smooth operations of international commerce are not

---

[69] CARBONNEAU T., *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, rev edn, Yonkers 1998, p. 16.

[70] See for instance VILLEY M., 'Le droit dans les choses', in: AMSELEK P./GRZEGORCZYK C. (eds), *Controverses autour de l'ontologie du droit*, Paris 1989.

[71] See for instance VON BAR L., *The Theory and Practice of Private International Law*, 2nd edn, Edinburgh 1892, p. 77, who explains that rules of private international law are derived 'from the nature of the subject itself'. See also YNTEMA H.E., 'The Historic Bases of Private International Law', in: *Am. J. Comp. L.* 1953, p. 309. For an excellent summary and analysis, see MILLS A., 'The Private History of International Law', in: *I.C.L.Q.* 2006, pp. 33-37.

[72] BOBBIO N., *Giusnaturalismo e positivismo giuridico*, Milan 1965, p. 135 *et seq.*

[73] OST F., 'Validité', in: ARNAUD A.-J. (ed), *Dictionnaire encyclopédique de théorie et de sociologie juridique*, Paris 1988, p. 433. *Cf.* also WALDRON J., 'Normative (or Ethical) Positivism', in: COLEMAN J. (ed), *Hart's Postscript*, Oxford 2001, p. 415 *et seq.*

particularly estimable from a moral point of view and simply serve to coordinate behaviors (the moment of the transfer of risks in a sale of goods is an example). Second, it would hardly be workable, as what constitutes a profoundly legitimate right or what is a legitimate rule is open to much controversy. Third, morality is not a necessary element of law: there have been legal regimes in history that were clearly evil but were nonetheless generally recognized as legal regimes.[74] Such an approach to law, at least as far as the *lex mercatoria* is concerned, therefore appears unsatisfactory and inappropriate.

The second theoretical construction that may be invoked to ground the juridicity of the *lex mercatoria* as a mere set of legal rules is to take a radically pluralistic approach of law, inspired by legal realism.[75] In substance, the idea is to focus on effectiveness: a legal rule is a rule of conduct that is effective, one that is followed in practice.[76] If such an approach were adopted, the rules of the *lex mercatoria* would be those norms that are followed in practice by the *societas mercatorum*. At a first glance, one might be content with such a proposition. But a moment's thought leaves one with a sense of weariness, caused by the realization that one is losing all reference to what law is.[77] Indeed, is brushing one's teeth in the morning – a norm undoubtedly followed by the actors of *societas mercatorum* – a legal norm? Is shaking hands when a deal is done a legal norm? Where is the distinction to be drawn between legal norms and social norms?

The only approach to juridicity that truly is workable in practice for the identification of non-State law – which is also the one that corresponds to the dominant view of what law is – is legal positivism. I mean positivism here not in the classical conception of legal positivism inherited from Bentham and Austin that sees law only in States (an approach that is unduly restrictive as there is historical evidence as to the existence of law before the emergence of States[78]), but in the sense of the formal criterion of the belonging of a norm to a legal system.[79] This

---

[74] See, *e.g.*, KRAMER M.H., *In Defense* (note 37), pp. 177–182, discussing Dworkin's opposite view.

[75] See, *e.g.*, SACCO R., 'Mute Law', in: *Am. J. Comp. L.* 1995, p. 455; DEL VECCHIO G., 'Sulla statualità del diritto', in: *Rivista internazionale di filosofia del diritto* 1929, p. 19; POSPISIL L.J., *Anthropology of Law: A Comparative Theory*, New York 1971, p. 96.

[76] OST F. (note 73), p. 433.

[77] See ROBERTS S. (note 50), p. 24.

[78] BERMAN H.J., *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA 1983, pp. 333-356; MARMOR A., *Positive Law & Objective Values*, Oxford 2001, p. 40.

[79] On the variety of strands of legal positivism, see, *e.g.*, HART H.L.A., 'Positivism and the Separation of Law and Morals', in: *Harvard Law Review* 1958, pp. 601-602: 'the non-pejorative name «legal positivism» like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins.' See also BOBBIO N., *Il positivismo giuridico*, Turin 1961, BOBBIO N., *Teoria dell'ordinamento giuridico*, Turin 1960. More specifically on legal positivism as state law and its origins BRECHT A., *Political Theory: The Foundations of Twentieth-Century Political Thought*, Princeton, NJ 1959. More specifically on the criteria of belonging to a system of law, VIRALLY M., *La pensée juridi-*

means that for a norm to become a legal norm it must be reinstitutionalized or restated in the formal institutions of the legal system, it must be adopted by an official of the legal system to which it then belongs (the arbitrator, in the case of the *lex mercatoria*). Using Hartian terminology, it means that the norm must pass the test set by a secondary rule of recognition. A social norm becomes legal if it is endorsed (reinstitutionalized, restated or recognized) by an institution of the legal system and such endorsement occurs according to the applicable rule of recognition (the 'method'). To apply a rule of recognition is to verify authoritatively that a norm has been taken over into the system through the operation of some formal acceptance by officials of the system in question.[80] The juridicity of a norm follows from its belonging to a legal system. Rules that do not form part of any legal order are not legal, as for instance the UNIDROIT principles are not legal rules.[81] General principles of law, as any other set of rules, cannot be legal in isolation. As François Ewald has put it, convincingly though awkwardly, 'The idea of a single legal norm has no meaning'.[82] Norms become jural when they are recognized by a legal system, which confers juridicity to these rules.[83]

---

que, Paris 1960, p. vii and SHINER R.A., *Norm and Nature: The Movement of Legal Thought*, Oxford 1992, p. 19. The unawareness of this variety of meanings that 'legal positivism' has is what has Bruno Oppetit, for instance, to speak of 'les négateurs de la *lex mercatoria* – il suffirait de dire: les positivistes': OPPETIT B., 'Le droit international privé, droit savant', in: *Hague Lectures* 1992/234, p. 331.

[80] See, *e.g.*, HART H.L.A. (note 36), p. 90 *et seq.*; BOBBIO N., 'Ancora sulle norme' (note 40); KRAMER M.H., 'Of Final Things' (note 39), p. 50; RAZ J., *The Concept of a Legal System*, 2nd edn, Oxford 1980, p. 200; GREENAWALT K., 'The Rule of Recognition and the Constitution', in: *Michigan Law Review* 1986, pp. 634–637; BOHANNAN P. (note 40); Ost F./VAN DE KERCHOVE M., *De la pyramide au réseau? Pour une théorie dialectique du droit*, Brussels 2002, p. 369.

[81] POUDRET J.-F./BESSON S. (note 23), paras 679, referring to the UNIDROIT principles as 'rules which are not laws' (a slightly awkward translation of the original French version, which reads: 'des règles non légales'). For an overview, see, *e.g.*, BLASE F., *Die Grundregeln des europäischen Vertragsrechts als Recht grenzüberschreitender Verträge*, Münster 2001, pp. 192–242. *Cf.* also JACQUET J.-M./DELEBECQUE P./CORNELOUP S. (note 10), p. 63: 'Les règles transnationales élaborées par des organismes plus ou moins liés au milieu des opérateurs échappent à tout contrôle de validité. Mais elles n'échappent pas à un contrôle de positivité qui, pour être plus diffus n'en est pas moins redoutable: il convient en effet que les contractants et les arbitres s'y réfèrent sans quoi elles demeureront lettre morte. Tel est le test de vérité des règles transnationales.' It is probably unnecessary to point out that 'legal' in this article does not mean 'relating to the field of law,' as in 'legal thinking' or 'legal tradition'. Such an understanding of the word 'legal' – in which sense the UNIDROIT are of course legal – is entirely unrelated to the present article and the question of the nature of the *lex mercatoria*.

[82] EWALD F., 'The Law of Law', in: TEUBNER G. (ed), *Autopoietic Law: A New Approach to Law and Society*, Berlin 1988, p. 36.

[83] On the different meanings of the term 'general principles of law,' see GAILLARD E., 'Transnational Law' (note 12), p. 67.

In sum, the question whether the *lex mercatoria* exists as a set of rules seems clearly to deserve a positive answer. The same clarity in the answer applies to the question whether such rules are legal in nature in the absence of the *lex mercatoria* being a legal system, though this time the answer is negative. Juridicity exists exclusively within a legal system; the belonging of a norm to a legal system is the necessary and sufficient condition for it to be of a legal nature. Put differently, the question of the nature of the *lex mercatoria* always boils down to this: is the *lex mercatoria* a legal system or not? This question forms the topic of the next section.

IV. The *Lex Mercatoria* as a Legal System

The third main view of the *lex mercatoria* considers it to be a legal system in its own right.[84] As has been suggested above, this conception of the *lex mercatoria* is the one that has created the most debate, but also the most interest. Legal pluralists have embraced it as the spearhead of their cause, claiming that it is 'the most successful example of global law without a state.'[85] The fact that law is most frequently, if not dominantly, equated with State law has also given the debate an important political undertone: the *lex mercatoria* is, in this approach, easily perceived as something actually equivalent to a national legal system, though global in nature and primarily destined to serve commercial actors. Such a perception opens the door to the whole debate about the vanishing sovereignty of States and the democratic legitimacy they represent, and the corresponding rise of global economic powers. In this context, the *lex mercatoria* as a legal system is often used as

[84] See, *e.g.*, GOLDMAN B., 'Frontières' (note 44); GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44); GOLDMAN B., 'Nouvelles réflexions sur la lex mercatoria', in: *Etudes de droit international en l'honneur de Pierre Lalive*, Basle 1993; LOQUIN E., 'L'application des règles anationales dans l'arbitrage commercial international', in: *L'apport de la jurisprudence arbitrale: l'arbitrage commercial international*, Paris 1986, pp. 119-122; LOQUIN E., *L'amiable composition en droit comparé et international*, Paris 1980, pp. 308-309; KASSIS, Théorie' (note 3), p. 37 *et seq.*; OSMAN F. (note 3), p. 357 *et seq.*; KAHN P., 'Droit international économique, droit international du développement, lex mercatoria: concept juridique unique ou pluralité des ordres juridiques?', in: *Le droit des relations économiques internationales*, Paris 1982; BERGER K.P., *Creeping codification* (note 62). See also REDFERN A./HUNTER M. (note 12), para. 2-71: 'The authority of an arbitral tribunal to apply a non-national *system of law* (such as the general principles of law or the *lex mercatoria*) will depend upon (a) the agreement of the parties and (b) the provisions of the applicable law' (emphasis added) and CREMADES M./PLEHN S.L., 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions', in: *Boston University International Law Journal* 1984, p. 324.

[85] TEUBNER G., '«Global Bukowina»: Legal Pluralism in the World Society', in; TEUBNER G. (ed), *Global Law Without a State*, Dartmouth 1997.

a pretext to argue in favor or against such shifts in the structures of power.[86] As an object of study in itself, however, to which one applies the available analytical framework to determine whether a given instance of a legal system is indeed a legal system, the *lex mercatoria* has received surprisingly little attention. To work within a better defined framework – explaining what may substantiate or refute the thesis of the *lex mercatoria* as a legal system – might help both legal pluralists and their opponents. Such an analysis is what the current section seeks to offer.

Before moving on to the analysis itself, a caveat must be entered: the question addressed here – whether the *lex mercatoria* in and of itself is jural – is a different matter altogether from the position taken on this question by courts, or national legal systems generally.[87] Whether a court, or indeed a number of courts, and national laws consider that the *lex mercatoria* is not legal has strictly no impact on the question addressed here.[88] Just as French law cannot take away juridicity from the English legal system, for instance, it cannot take it away from the *lex mercatoria*, provided of course there is something to be taken away. The question of the recognition by one public system of another is only a question of 'relevance,' as Santi Romano called it, which in essence means that a legal system gives effect to norms belonging to another – enforcement of foreign decisions, for instance.[89] Conversely, a legal system, such as the public legal system, cannot confer juridicity to another system. It may recognize it and consider it relevant, but it does not

[86] DE SOUSA SANTOS B., *Toward a New Legal Common Sense*, 2nd edn, London 2002, p. 90; DI ROBILANT A., 'Genealogies of Soft Law', in: *Am. J. Comp. L.* 2006, p. 499. See also ZUMBANSEN P., 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', in: *European Law Journal* 2002, p. 418 *et seq.*

[87] It is an argument quite frequently made that the *lex mercatoria* (or 'the arbitral legal order') is a legal system because certain national courts say so (implicitly most of the time). See, *e.g.*, CLAY T., *L'arbitre*, Paris 2001, 217.

[88] Similarly, the argument that States have 'delegated their law-making authority' (CARBONNEAU T., 'A Definition of and Perspective Upon the Lex Mercatoria Debate', in: CARBONNEAU T. (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, rev. edn, The Hague 1998, p. 12) in this area is not relevant either, as it would merely imply that the authority to make *State* law has been delegated and, hence, that *lex mercatoria* is State law. Indeed, the State cannot delegate a power that it does not have, such as the power to make non-State law. A delegation would imply that the delegator grants his law-making powers to the delegee; the *lex mercatoria* would thus form part of what the delegator produces, in other words State law.

It may be pointed out that the approach of the current article is one that might be ascribed to analytical philosophy, i.e. it seeks to define more clearly certain words or concepts, and thereby to answer the question 'what is the *lex mercatoria*?'. It would be a different question altogether to examine the importance, efficacy, or relevance of the *lex mercatoria*, a question for which the recognition by national legal systems is important indeed.

[89] In Romano's words, relevance is the fact that 'an order's existence, content or efficacy conforms to conditions set by another one': ROMANO S., *L'ordre juridique*, Paris 1975, p. 106.

make this other system jural; it cannot attribute juridicity to another legal system.[90] Imagine if French law, for instance, recognizes the juridical character of a given private normative order and that English law denies it, what is the juridical status of this private normative order? A legal system is legal on its own, or it is not legal.[91]

What then may determine whether a legal system is indeed a legal system or not? What are the criteria of juridicity? The following is based on the assumption that the essential features of a legal system may be classified in two categories: external and internal. External features are those that relate to the structure of the system and its autonomy vis-à-vis other legal systems. A legal system must for instance be sufficiently developed structurally (otherwise it is merely a system of social norms) and it must be sufficiently independent from other systems (otherwise it has no identity of its own but is merely a part of another system). Internal features are those that relate to the quality of the norms taken collectively.[92] Law intrinsically has a guiding role, orienting behavior by providing, for instance, dependable – that is predictable and consistent – landmarks for its addressees to know what the consequences of their actions will be. To fulfill this role, the norms must collectively bear certain characteristics; these are those that will be considered as internal features.

A. Structural Issues

In order to decide whether a given normative system qualifies as a legal system, it is insufficient to merely look at the norms it contains. As Norberto Bobbio stated, such a limited analysis would in essence amount to 'looking at the tree and the forest.'[93] As Paul Lagarde argues, with the *lex mercatoria* in mind: 'a legal order cannot be reduced to a set of norms, as it must also feature an element of organization, of structure, which is external and logically antecedent to the norms that follow from it'.[94] Such elements of organization and structure are what form the topic

[90] See LOQUIN E., 'L'application des règles' (note 84), p. 121: 'l'attitude des Etats à l'égard de l'ordre anational est indifférente à son existence', where by 'existence' he means existence qua *legal* order.

[91] See, *e.g.*, LAGARDE (note 1), p. 139: 'si cet ordre juridique existe . . . il ne tire pas son caractère juridique de la reconnaissance que l'ordre juridique étatique lui accorde, mais de lui-même. Le droit est immanent à l'organisation sociale.'

[92] *Cf.* SCHROEDER H.P., *Die lex mercatoria arbitralis*, Munich 2007, pp. 152-159, who opposes the concept of a legal system used in classical legal positivism to a 'functional concept of the legal order', which he considers is characterized by two essential features: the 'publicity' of the norms (i.e. the 'accessibility' of the norms and the predictability of a decision rendered in application of these norms) and the 'systematic' character of the normative order.

[93] BOBBIO N., *Teoria* (note 79), p. 7.

[94] LAGARDE (note 1), p. 133.

of the current section. It will discuss these elements and then examine if the *lex mercatoria* displays them.

The elements that are considered here are the following. First, a legal system needs a sustaining community. This is so because the social organization inherent in a community is a necessary (though not sufficient) condition for the existence of a legal system. As Chevallier states, '[law], aiming to act on society, is also the product of society's determinations'.[95] Only a community provides the kind of societal structure needed for law to develop: a relatively well-organized grouping that is distinct from the rest of the world. In more jurisprudential terms, this need for a community essentially translates into the criterion of the 'social autonomy' of a legal system, meaning the requirement that there be a specific social body underlying a legal system.[96] Social autonomy is itself a necessary (though again not sufficient) condition for another condition to be fulfilled: what one may refer to as 'normative autonomy,' which is a legal system's ability to decide on what normative contents form part of it. The following expounds on these requirements and examines the *lex mercatoria* in this structural light.

1. *The* Societas Mercatorum

The study of the anthropology of law yields an important lesson for law outside the State, which directly informs the question of the jural character of the *lex mercatoria*. Legal anthropology teaches that a legal system is, in essence, a community's social norms, which have evolved into a well-organized, even sophisticated normative system.[97] As van de Kerchove and Ost point out, 'A legal system is . . . a subset of a social system: while every legal norm is a social norm, the converse is not true.'[98]

At the start, a legal system originates as a simple set of rules. As soon as people start to develop social bonds to form a group that is identifiable as such, norms will inevitably start to emerge.[99] Where there is human interaction, there are rules. Initially, these rules are only social norms.[100] It is only later, under certain circumstances, that these norms may develop to become more formal and better organized, with institutions emerging that have specific powers related to these norms – typically the power to state which norms form part of this ensemble, the

[95] CHEVALLIER J., 'L'ordre juridique', in: *Le droit en procès*, Paris 1983, p. 30.

[96] See, *e.g.*, OST F./VAN DE KERCHOVE M. (note 80), pp. 189–190; ROMANO S. (note 89), p. 25.

[97] See, *e.g.*, BOHANNAN P. (note 40); BOBBIO N., 'Ancora sulle norme' (note 40); OST F./VAN DE KERCHOVE M. (note 80), pp. 367-371.

[98] VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 110.

[99] OST F./VAN DE KERCHOVE M. (note 80), p. 368.

[100] I thereby oppose the idea of *ubi societas ibi ius* stricto sensu, that wherever there is a society, there is *ipso facto* law, as defended for instance by SACCO R. (note 75); DEL VECCHIO G. (note 75); POSPISIL L.J. (note 75).

power to apply these norms to individual cases, and the power to constrain people to comply with these norms.[101] At that stage, the initial relatively loose set of norms of conduct develops into a much more formalized system of rules. In the process, its operations become closer to those of the public legal system (the archetype of a legal system).[102] The transition from social norms to legal norms takes place.[103]

The lesson that this view of the origin and emergence of law teaches is that a legal system necessarily has its roots in a 'collective social unit': a community.[104] As Jean Dabin, for instance, put it, law is 'a societal rule, emanating from the group and made for the group'.[105] In other words, law requires an underlying social organization; it cannot exist in the absence of a specific community creating and sustaining it. If we reverse the argument, it means that non-communities cannot make law. They would lack the social organization necessary to operate an organized system of norms and institutions, and such organization forms part of the definition of law.

One may further point out that the underlying social organization must form a single, comprehensive community, and not merely a plurality of assembled, socially organized spheres. A mere juxtaposition of smaller communities is unable to create one global legal system. Such smaller communities may give themselves specific rule-sets, but these rule-sets merely form specific legal systems or other forms of normative systems. They do not collectively form one overarching legal system, in the absence of one overarching organized social unit.[106] Concretely, this translates into the fact that law governs by general norms, addressed to all members of the group and not only sub-groups thereof.[107]

To use Santi Romano's words, one may recap the argument by saying that a legal system is not merely a set of rules, it is also the social body that creates these

---

[101] *Cf.* LOCKE J., *The Second Treatise on Civil Government*, Buffalo 1986 [1690], ch. IX, paras 124–126, who writes that in the state of nature '[t]here wants an established, settled, known law, received and allowed,' 'a known and indifferent judge' and 'power to back and support the sentence when right, and to give it due execution.'

[102] See, *e.g.*, MARMOR A. (note 78), pp. 39-42. See also LAGARDE P. (note 1), p. 134.

[103] BOHANNAN P. (note 40), pp. 34-37; BOBBIO N., 'Ancora sulle norme' (note 40), p. 39 *et seq.*; INGBER L., 'Le pluralisme juridique dans l'oeuvre des philosophes du droit', in: GILISSEN J. (ed), *Le pluralisme juridique*, Brussels 1971.

[104] PERRIN J.-F., *Sociologie empirique du droit*, Basle 1997, p. 40; GURVITCH G., *Eléments de sociologie juridique*, Paris 1940, p. 180; ROMANO S. (note 89), p. 17-18; MOORE S.F., *Law as Process. An Anthropological Approach*, London 1978, p. 54.

[105] DABIN J., *Théorie générale du droit*, rev. edn, Paris 1969, p. 98; MOORE S.F. (note 104), p. 54.

[106] See, *e.g.*, KAHN P., 'Lex mercatoria et pratique des contrats internationaux: l'expérience française', in: *Le contrat économique international*, Brussels 1975, p. 173 *et seq.*: 'il faut également que les opérateurs du marché international constituent un milieu suffisamment homogène pour que les solidarités professionnelles se fassent sentir et que s'expriment des besoins requérant des solutions juridiques cohérentes et adéquates.'

[107] See, *e.g.*, KRAMER M.H., *Objectivity* (note 6), p. 109 *et seq.* See further below, text accompanying notes 139 *et seq.*

rules, which thus acquires a defining function.[108] A legal system requires a specific social body giving itself specific rules. Law only exists where a community can be identified, since it is the community – or more precisely specific institutions within the community – that creates the law.[109] In addition, the required community must have achieved a certain level of organization. A loosely assembled number of individuals engaging in similar activities do not form a proper community, willing and able to self-govern by adopting its own norms in its own clearly identifiable law-making institutions.[110]

As Paul Lagarde famously remarked, there seems to be no well-organized global society of merchants, no *societas mercatorum.* He argues that 'the context in which international commerce evolves is itself so vast, so diverse, and so partitioned that one may seriously doubt that it can avail of a minimally organized community'.[111] According to the author, the purported *societas mercatorum*, indispensable for the existence of the *lex mercatoria*, seems to lack the required 'genuine organization in the transnational context'.[112] As he reminds us, such a genuine organization 'does not result automatically from the existence of international commercial relationships, it must be demonstrated'.[113] He concludes that the legal landscape of international commerce seems rather to be constituted of 'scattered islands of organization'[114] and the main way in which private rules emerge for international commerce is in the form of a 'plurality of corporate regulations'.[115] Arbitration practitioners and theorists alike have reached the same conclusion.[116] In

[108] ROMANO S. (note 89), p. 13 *et seq.*

[109] That was precisely the whole issue when nations, as communities matching states and thus forming nation-states, started to be created, so as to allow for the creation of a single legal system trumping the diversity of local regulations. See, *e.g.*, ANDERSON B.R., *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, London 1983; MEINECKE F., *Weltbürgertum und Nationalstaat: Studien zur Genesis des deutschen Nationalstaates*, Munich 1908, pp. 124-157; HABERMAS J., *The Postnational Constellation: Political Essays*, Cambridge 2001; ARENDT H., *The Origins of Totalitarianism*, rev. edn, London 1967.

[110] ROMANO S. (note 89), p. 18: 'une classe ou couche sociale, non pas organisée comme telle, mais résultant d'une simple affinité entre les personnes qui en font partie, n'est pas une société au sens propre.'

[111] LAGARDE (note 1), p. 138.

[112] *Ibid*.

[113] *Ibid*., pp. 138-139.

[114] *Ibid.*, p. 139.

[115] *Ibid.*, p. 136. See also DAVID R., 'Le droit du commerce international – une nouvelle tâche pour les législateurs nationaux ou une nouvelle «lex mercatoria»?', in: *New Directions in International Trade Law*, New York 1977, p. 17.

[116] REDFERN A./HUNTER M. (note 12), para. 2-58: 'There are many different communities carrying on activities which may be as diverse (and have as little in common) as the transport of goods or the establishment of an international telecommunications network. The rules of law that are relevant to these different commercial activities are in themselves likely to be very different. They may share certain basic legal concepts – such as the sanctity of

sum, there seems to be no *societas mercatorum* and, hence, there can be no legal system specific to it, that is no *lex mercatoria*.

Critics will quickly question how it is possible to argue against the existence of the *lex mercatoria* in the face of the possibility of identifying norms of commercial conduct that are applicable and generally complied with throughout the realm of international commerce. Indeed, norms such as *pacta sunt servanda* and (some of) those identified for instance by Lord Mustill and Klaus Peter Berger present themselves as valid expressions of that which shapes the rights and duties of any person engaging in international commerce.[117] Then again, Lagarde warned us that 'the existence of non-State norms does not prove the existence of a single legal system of the merchants'.[118] He seems right. If one compares the *lex mercatoria* to national legal systems, it would seem much closer to a juxtaposition of national legal systems, where norms are produced individually by Nation-States for themselves. The fact that there are common principles between them is insufficient to allow the assertion that such national legal systems collectively constitute a transnational legal system. American, English, French, German and Swiss law have many legal principles in common, but surely no one seriously believes that these national legal systems actually form one common transnational legal system.[119] Common rules do not amount to an overarching legal system.

2. Autonomy and Jurisdictional Powers

A legal system as a legal system must display a certain degree of autonomy from its environment, so as to be able to 'regulat[e] its own creation and application', as Hans Kelsen would say.[120] To understand this requirement, it helps to envision a

---

contracts (*pacta sunt servanda*) – but even here different considerations are likely to apply.' RIGAUX F., 'Les situations juridiques individuelles dans un système de relativité générale', in: *Hague Lectures* 1989/213, pp. 69, 256-257; KASSIS A., 'Théorie' (note 3), p. 396; LOQUIN E., 'Où en est la lex mercatoria?' (note 42), pp. 26-27; HERRMANN G., 'The future of trade law unification', in: *Internationales Handelsrechts* 2001, p. 11; MISTELIS L., 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in: FLETCHER I./MISTELIS L./CREMONA M. (eds) *Foundations and Perspectives of International Trade Law*, London 2001, p. 23; MAYER P., *Droit international privé*, 6th edn, Montchrestien 1998, para. 25; ROBERT J., *Le phénomène transnational*, Paris 1988, p. 225.

[117] MUSTILL M. (note 11); BERGER K.P., *Creeping codification* (note 62), pp. 278-311.

[118] LAGARDE P. (note 1), p. 135.

[119] Indeed, that which determines the contours of a legal system – how far it extends, what it covers – is not the contents of its primary rules of conduct, but the contents of its secondary rules. It is the secondary rules that determine which institutions have the power to make law for which subjects. A community, through secondary norms, decides to have its own set of rules, which is the same for every member of the community. Whether these rules happen to be the same, in part or even in total, as those of another community is entirely irrelevant for the determination of the realm of a given legal system.

[120] KELSEN H., *Pure Theory of Law*, Berkeley 1967, p. 71.

normative system that would be radically non-autonomous. Imagine a system whose normative content would be formulated in institutions not belonging to it, in the sense that both the recognition of the norms as part of the system and the admissible ways of modifying them would be beyond the system's control. Let us further imagine that the application of these norms – which are imposed from outside the system – would also be beyond the control of the system. In other words, the administration and adjudication of these norms, for instance the determination of sanctions against their violation, would be operated by someone outside the system. To complete the picture, add to this scenario the hypothesis that the enforcement of the system's norms would depend on the collaboration of institutions outside the system, in the sense that the system's norms could possibly be denied actual effect by an entity external to the system. Such a normative system would certainly strike one as barely having any proper identity. It would be indistinguishable from its environment as an operative normative system. Hence, it could not be a distinct legal system, but merely a collection of norms drawn together from different legal systems and obeying these other systems' rules of recognition, change, and application. Such a collection of norms, because of its lack of autonomy, would have no 'faculty of self-organization', as Charles Rousseau puts it.[121] It would be unable to form a legal system of its own, though it could of course be part of another, broader legal system.[122]

What this suggests is that a legal system, in order to effectively be a legal system in its own right, must be autonomous in the formulation, application, and enforcement of the norms that constitute it. In order to achieve such autonomy, the system must be equipped with the proper institutions to this effect. Indeed, it is insufficient for a normative system to simply be formally equipped with secondary rules of recognition.[123] In addition, these rules of recognition must be efficacious, so that the legal system may effectively decide upon its borders and its delimitation vis-à-vis other systems. As François Rigaux would say, the legal system must thus have its own powers of prescription, adjudication and enforcement, which provide it with the capacity to formulate, apply and enforce its own norms.[124] A legal

[121] ROUSSEAU C., *Droit international public*, p. 407.

[122] See, *e.g.*, VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 139-142.

[123] On this requirement of secondary rules of recognition, see, *e.g.*, *ibid* p. 141: '[t]he minimal condition on which a legal system possesses an identity in relation to another is that it is composed not only of rules of behavior, but also of a rule of recognition peculiar to it and making it possible for it to identify those rules as its own.'

[124] RIGAUX F. (note 116), p. 28: 'un ordre juridique se définit par ses institutions, auxquelles sont attribuées trois compétences . . ., la compétence législative (*jurisdiction to prescribe*), la compétence juridictionnelle (*jurisdiction to adjudicate*) et la compétence d'exécution (*jurisdiction to enforce*) . . . une proposition normative n'acquiert cette nature que si elle émane d'un pouvoir institué, et à la double condition que les contestations que peut faire naître son application soient soumises à une autorité apte à les trancher et que la décision rendue soit exécutoire, le cas échéant par la contrainte'. See also RIGAUX F., 'Souveraineté des États et arbitrage transnational', in: *Le droit des relations économiques internationales: études offertes à Berthold Goldman*, Paris 1982, p. 279: 'pour mériter la

system is 'complete' only if it has the institutions capable of closing it off from other systems.[125]

The need for a system's own enforcement power seems particularly important because of the traditionally central role of coercive might in the concept of law – a conception of law adopted by authors as diverse as Immanuel Kant,[126] John Austin,[127] Rudolf von Jhering,[128] Max Weber,[129] Hans Kelsen[130] and John Rawls.[131] When referring to a system's own enforcement power, I mean the requirement that the norms do not, in order to obtain compliance, need to resort to any external apparatus of enforcement. 'External' implies here that the apparatus lends its coercive arm on conditions that are not determined by the private normative system.

Enforcement power is, precisely, the form of jurisdictional power that the *lex mercatoria* most certainly lacks. A commercial arbitral award, in order to gain access to coercive might, must meet the requirements set by the public legal system. The *lex mercatoria* lacks an important element of autonomy, as it still needs

---

qualification d'ordre juridique, un système de relations sociales [doit] se composer de trois séries d'éléments: des règles de conduite observées par leurs destinataires, des règles de décision appliquées par un juge, des mécanismes de contrainte qui assurent l'effectivité du système.'

[125] See, *e.g.*, VIRALLY M. (note 79), p. 200: 'un ordre juridique complet, c'est-à-dire qui dispose à la fois de sources du droit originaires, où il puise sa propre validité, et d'un appareil de contrôle et d'exécution forcée, n'est tributaire d'aucun autre ni au point de vue de la création, ni au point de vue de l'application des normes qui le composent. Dès lors, il fonctionne naturellement en se refermant sur lui-même et en n'admettant comme valables que les normes qu'il secrète. Il constitue, structurellement, un système clos.'

[126] KANT I., *The Metaphysics of Morals* [1797], Cambridge 1996, p. 25 (Section 'Introduction to the Doctrine of Right', § D. 'Right is Connected with an Autorisation to Use Coercion').

[127] AUSTIN J., *The Province of Jurisprudence Determined* [1832], Indianapolis 1998, pp. 13-14. See also, *e.g.*, KRAMER M.H., *In Defense* (note 37), p. 100: 'For Austin, legal sovereignty and thus legal authority consisted in laying down orders backed by threats of overwhelming force, in being habitually obeyed, and in habitually obeying no one.'

[128] VON JHERING R., *Law as a Means to an End* [1877–83], Boston 1913, p. 231: 'The State is society as the bearer of the regulated and disciplined coercive force. The sum total of principles according to which it thus functions by a discipline of coercion, is Law.'

[129] WEBER M., *Economy and Society* [1925], Berkeley 1978, pp. 313, 332: 'The term «guaranteed law» shall be understood to mean that there exists a coercive apparatus' and «Valid» legal norms, which are guaranteed by the coercive apparatus of the political authority'.

[130] KELSEN H. (note 120), pp. 33, 320 ('a coercive order'; '[a normative order is] 'law', if it is a coercive order, that is to say, a set of norms regulating human behaviour by attaching certain coercive acts (sanctions) as consequences to certain facts'). See also KELSEN H., *General Theory of Law and State*, Cambridge MA 1945, p. 61.

[131] RAWLS J., *A Theory of Justice*, Cambridge MA 1971, p. 235: 'A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.'

to rely on national courts for enforcement.[132] As Simon Roberts would say, its 'legality is routinely secured from underneath, «downwards» into the State, as it were'.[133] The *lex mercatoria* can only have as effective contents what national courts allow it to have.[134] Assuming again that only efficacious rules matter, the final and decisive rule of recognition determining which rules of conduct belong to the *lex mercatoria* is in the hands of national courts. It is controlled by the public legal system. Because of this need to rely on enforcement in state courts, the public legal system is sovereign over what may be submitted to arbitration and how, and over the norms that arbitrators may produce.[135] It might be pointed out that even Berthold Goldman himself admitted that the *lex mercatoria*, for this reason, is an 'incomplete system'.[136]

This lack of autonomy of the *lex mercatoria* as an operative legal system, in addition to the fact that it cannot be anchored in a specific community that has any real substance, makes it very difficult for the *lex mercatoria* to successfully claim its status as a normative system of its own that would be jural in nature. If these structural issues were still considered insufficient to deny the *lex mercatoria* its own juridicity, additional arguments are to be found in its normative contents. Indeed, a system of norms that would be flawless with regard to its societal basis and its autonomy, being hypothetically equipped with well-functioning internal institutions of norm formulation, norm application and norm enforcement, might still fail to be law. This scenario is precisely the one envisaged by Lon Fuller, which led him to identify what he called the 'inner morality of law',[137] which are the formal conditions that norms must collectively fulfill in order to be law. This will be the topic of the following section.

---

[132] See, *e.g.*, OPPETIT B., *Théorie de l'arbitrage*, Paris 1998, p. 87. See also CRAIG W.L./PARK W.W./PAULSSON J., *International Chamber of Commerce Arbitration*, 3rd edn, Dobbs Ferry, NY 2000, p. 495; FRIEDMAN L.M., 'One World: Notes on the Emerging Legal Order', in: LIKOSKY M. (ed), *Transnational Legal Processes*, London 2002, pp. 31, 33.

[133] ROBERTS S. (note 50), p. 18.

[134] See, *e.g.*, VON BAR C./MANKOWSKI P., *Internationales Privatrecht*, 2nd edn, Munich 2003, p. 81.

[135] See, *e.g.*, LAGARDE P. (note 1), p. 147 *et seq.*; PAULSSON J. (note 48), p. 63 and JACQUET J.-M./DELEBECQUE P./CORNELOUP S. (note 10), pp. 59-61 (though failing to differentiate juridicity from efficacy, as they argue that the recognition of the lex mercatoria by state courts is what makes the lex jural, whereas it really is only what makes it efficacious, which does not alter its nature).

[136] GOLDMAN B., 'Nouvelles réflexions sur la lex mercatoria', in: *Études de droit international en l'honneur de Pierre Lalive*, Basle 1982, p. 249: 'cet ordre juridique n'est pas, ou n'est pas encore, complet.'

[137] FULLER L. (note 5), pp. 33-41.

B. Formal Qualities of the Normative Contents

Heretofore, this essay has explored the essential features of law from a systemic perspective, examining certain structural issues whose absence prevents a normative system from being a legal system. We have seen that when a state of affairs exists where the purported legal system cannot be said to be the normative reflection of a community or society, or where a normative system relies heavily on (other) legal systems in order to be effective, it appears highly uncertain that it qualifies as a legal system. In other words, we have focused on juridicity qua structure. But structure, even though it is a necessary condition of juridicity, is not a sufficient condition. In addition, the normative content of the system must bear certain qualities that embody the essence of what is law. The rules, collectively, must bear certain qualities, which are formal in nature. The fulfillment by the *lex mercatoria* of such requirements will form the substance of the current section. The first section below delineates these requirements of juridicity. The second then discusses what it is exactly that must meet these requirements, that is what the contents of the *lex mercatoria* are. The third section applies the requirements marked out in the first section to the contents identified in the second.

1. The Inner Morality of Law

The American legal theorist Lon Fuller famously delineated what is still largely considered to be the best exposition of the essential features of a legal system and its normative contents – though his analysis has been sharpened by subsequent treatments of the same criteria, that have clarified them and cleaned up Fuller's occasional argumentative clumsiness.[138] Fuller termed them in negative ways, listing 'eight ways to fail to make law', eight unwanted properties of a normative system that would prevent it from being jural: (1) 'every issue [being] decided on an ad hoc basis'; (2) 'failure to publicize'; (3) 'abuse of retroactive legislation'; (4) 'failure to make rules understandable'; (5) 'enactment of contradictory rules'; (6) enactment of rules that 'require conduct beyond the powers of the affected party'; (7) 'introducing such frequent changes in the rules that the subject cannot orient his action by them'; and (8) 'a failure of congruence between the rules as announced and their actual administration'.[139] These essential features of law form what Fuller called the 'inner morality of law', or the conditions that the norms must collectively fulfill in order to be law.[140]

The first two of these features, of these criteria of juridicity, are at issue with the *lex mercatoria*. In referring to them, I will follow Matthew Kramer's terminology, used in his particularly inspiring treatment of this subject-matter: 'Gov-

[138] See for instance KRAMER M.H., *Objectivity* (note 6), chapter 2.

[139] FULLER L. (note 5), pp. 38-39.

[140] *Ibid* pp. 42-43.

ernance by general norms' and 'Public ascertainability'.[141] Since these two criteria considerably overlap, they will be examined together in the following paragraphs.

Lon Fuller presents the essential features of law by recounting the imaginary failings of a well-meaning but slightly dim-witted king named Rex, in his attempts to make law in order to respond to the need for proper regulation expressed by his subjects. Rex's first action when he comes to the throne is to repeal all existing law, in order to have a clean slate on which to write. He then sets about to act as the sole judge of his kingdom, hoping to work out a system of rules over time, out of his purely casuistic case administration. But after a time, he realizes that he is unable to think in terms of generalizations, being busy enough deciding each individual controversy. He realizes that it is impossible to draw general rules from his patchwork decision-making activity. Aware that he would never succeed in making law this way, he sets out to draft a code. But his previous fiasco has left him with a grave lack of confidence. He thus decides to keep his code secret, its contents to be known only by him and his scrivener. His subjects, however, soon make it clear that this is no proper way to govern, at least not if he wants to rule by something that would be recognizable as law. His subjects, indeed, cannot ascertain their rights and duties.[142]

Fuller's account, as has already been suggested, embodies two essential features of law: the incompatibility between the concept of law and mere ad hocness in the administration of justice, or the need for governance by general norms, and law's essential need that its normative contents be publicized, so as to be publicly ascertainable. The imperative behind both these principles is to be ruled by laws and not men.[143]

More precisely, the first principle – governance by general norms – requires that any legal system must be constituted primarily of general norms in order to be a legal system. As Matthew Kramer puts it, it is the requirement that 'situation-specific directives are not the . . . principal means of regulating people's conduct'.[144] Such a purely casuistic approach could indeed easily become a 'higgledy-piggledy arrangement' that would, quite obviously it seems, be 'antithetical to the rule of law'.[145] The idea behind the second principle – public ascertainability – is that 'a regime of law has to render its mandates and other norms ascertainable by

[141] KRAMER M.H., *Objectivity* (note 6), pp. 109-18, 144-53.

[142] FULLER L. (note 5), pp. 34-35.

[143] See KRAMER M.H., *In Defense* (note 37), p. 51 (stating that law has a general end, 'which involves the control of human conduct *by rules*, rather than simply the control of human conduct'). *Cf.* also TAMANAHA B.Z., *On the Rule of Law*, Cambridge 2004, pp. 122-126, esp. p. 126: 'there is a vast difference between instructing persons . . . to follow or apply a relevant body of rules to a situation, versus instructing them to do as they please or to do what they consider right without regard to rules. This large difference is appropriately captured by the contrast between rule of law and rule of men.') and SCALIA A., *A Matter of Interpretation*, Princeton 1997, p. 17 ('Government of laws – of texts written down, not men').

[144] KRAMER M.H., *Objectivity* (note 6), p. 110.

[145] *Ibid.*, p. 111.

the people to whose conduct they apply.'[146] This requirement follows from the fact that, if the addressees of the norms are kept in the dark with respect to what the norms command, then the existence of the normative system would 'make no difference to anyone's reasoning about appropriate courses of conduct'.[147] In both cases – non-predominance of general norms and non-ascertainability by the addressees of the contents of the norms –, the addressees of the norms would be 'unable to form any confident expectations on the basis of which they can interact with one another',[148] and 'no one [would] have an informed sense of what anyone else is required or permitted or empowered to do'[149].

Such an inoperative normative system could not be considered to be law, because it could not 'perform its central guiding role'[150] by providing 'dependable guideposts for self-directed action'.[151] It is indeed an intrinsic purpose of law to provide such predictable and reliable signposts for action in the form of general and ascertainable rules.[152] Fuller's principles of the inner morality of law are in essence, as Hart explained, a list of the conditions for an efficacious attainment of this end.[153]

The *lex mercatoria* does not seem to be able to carry out this fundamental purpose of law since, as was already mentioned, it fails to meet the two conditions set out above, which are essential features of the inner morality of law and thus of law itself. Before moving on to explore the issues so raised, we must pause for a minute to think about which norms form part of the *lex mercatoria* – a question that will inform the exposition of the issues just mentioned. The structure of the following reflects these two steps in the reasoning.

2. The Contents of the Lex Mercatoria

The question of the contents of the *lex mercatoria* can be answered in two ways: on the one hand in a substantial and static way, referring to primary norms of conduct, and on the other in a formal and dynamic way, focused on secondary norms and institutions.[154]

---

[146] *Ibid.*, p. 113.

[147] *Ibid*.

[148] *Ibid.*, p. 112.

[149] *Ibid.*

[150] *Ibid.*, p. 118.

[151] FULLER L. (note 5), p. 229.

[152] On the idea that Fuller's precepts embody an end that is intrinsic to law, see KRAMER M.H., *In Defense* (note 37), pp. 50-51.

[153] HART H.L.A., 'Lon L. Fuller: The Morality of Law', in: *Essays in Jurisprudence and Philosophy*, Oxford 1983, pp. 350-351, 357.

[154] In substance, these two approaches correspond to the distinction made for instance by Hans Kelsen between static and dynamic systems: see KELSEN H., *Pure Theory* (note 120), pp. 196-197. In Kelsen's words, a static system is one in which norms 'are valid on the

The substantial and static way of defining the norms of the *lex mercatoria* constitutes the usual approach. What it boils down to is the drawing up of a list of norms of conduct that the *lex mercatoria* arguably contains. This is the more traditional approach, initially advocated by pragmatic and skeptical practitioners, who considered that the *lex mercatoria* does not bring anything to the table because of its normative paucity.[155] More enthusiastic authors sought to reply to such arguments by providing much more extensive lists of rules of conduct that the *lex mercatoria* arguably contains.[156] This approach was soon caught in a debate on the identification of these rules, where the central question is whether a given rule does or does not belong to the *lex mercatoria*. Such an approach is relatively unrewarding for the theorist seeking to ask the more fundamental question of these norms' juridicity as *lex mercatoria*, because of the endless character of the debate and the limited consequences attached to the status of each individual rule. Norberto Bobbio's image springs back to mind: such an approach might well be constitutive of looking at the trees and missing the forest.[157]

The formal and dynamic approach to the question of the normative content of the *lex mercatoria* seems more rewarding. Such an approach relies on a dynamic identification of rules: the norms forming part of the *lex mercatoria* are the norms that the official institutions of the *lex mercatoria* have adopted. As Kelsen wrote, '*Kein Imperativ ohne Imperator*': the presence of such officials is indispensable to make law.[158] Drawing a parallel, in another context, sheds light on what such an approach implies: the contents of a given national law typically are defined by reference to what the officials (Parliament, courts, and so on) of the legal system in question have adopted. British law, for instance, is what the British legislative institutions (most notably Parliament) have adopted and what English courts and administrative agencies have said. Conversely, it is irrelevant entirely what the French *Assemblée nationale*, for instance, might consider to form part of English law. The French Parliament cannot make English law because it is not an official institution of the English legal system. Someone external to a legal system, in the sense of an institution not part of the community underlying a given legal system,

---

strength of their content: because their validity can be traced back to a norm under whose content the content of the norms in question can be subsumed as the particular under the general', whereas a dynamic system is one in which a given norm belongs to the system 'because it was created in a fashion determined by the basic norm – and not because it has a certain content.' The *lex mercatoria* seems to fit more squarely into the second category, as my expositions below on the role of arbitrators will tend to show. On static and dynamic normative systems, see further TROPER M., 'Système juridique et Etat', in: *Archives de philosophie du droit* 1986, p. 29 and WRÓBLEWSKI J., 'Dilemmas of the Normativistic Concept of Legal System', in: *Rechtstheorie* 1984, Beiheft 5, p. 319.

[155] See, *e.g.*, MUSTILL M. (note 11).

[156] See, *e.g.*, PAULSSON J. (note 48) and BERGER K.P., *Creeping codification* (note 62).

[157] BOBBIO N., *Teoria* (note 79), p. 7.

[158] KELSEN H., *General Theory of Norms*, Oxford 1991, p. 234: 'No imperative without an imperator, no norm without a norm-positing authority, that is, no norm without an act of will of which it is the meaning.'

cannot make law for that particular system. Also, someone who has been attributed no law-making function within a specific legal system cannot make law for that system, regardless of his or her belonging to the underlying community. For instance, German legal scholars, though part of the German nation (which is the relevant community), cannot *make* German law. German legal commentators can only do precisely that: comment, and not decide upon the contents of German law. Such seemingly trivial conclusions on the contours of a legal system may help further the debate on what forms parts of the *lex mercatoria*, which in turn allows a proper examination of the 'inner morality' of the contents of the *lex mercatoria*. The debate is furthered in one main way: it helps focus on who has an authoritative and final say, a decisionary power as to what forms part of the *lex mercatoria*. This is to ask who are the officials of the normative system of the *lex mercatoria*.[159] It is then possible to take the analysis from there to examine whether these officials act in a way comparable to King Rex's, that is whether they succeed or fail to make law.

As is stated or implied by many authors, the only officials of the *lex mercatoria*, its only organs, are the arbitrators.[160] As Bruno Oppetit writes, summarizing the dominant position, to which he globally adheres, 'it is through their recognition, application and systematization by arbitral tribunals that the non-written norms (among which one finds trade usages) that constitute this merchant law would become jural'.[161] Within the limits of international public policy, arbitrators are sovereign with regard to the determination of what the *lex mercatoria* provides.[162] That the arbitrators participate in the creation of the *lex mercatoria* is

[159] In other words, we are looking for what the norms of adjudication and the rule of recognition of the *lex mercatoria* provide. As Matthew Kramer describes them, 'norms of adjudication empower officials to ascertain authoritatively whether violations of the prevailing laws have occurred, [whereas] the Rule of Recognition empowers them to ascertain authoritatively the existence and contents of the laws themselves. (Of course, a law-ascertaining determination is essential for any violation-detecting determination. Consequently when the former takes place, it often is an element of the latter.' See KRAMER M.H., 'Of Final Things' (note 39), pp. 49-50. As we will see, the *lex mercatoria*'s rules of adjudication and recognition designate the same officials, namely the arbitrators, who combine the two functions of direct law ascertaining and violation detecting.

[160] PELLET A., 'La lex mercatoria, «tiers ordre juridique»? Remarques ingénues d'un internationaliste de droit public', in: *Souveraineté étatique et marchés internationaux à la fin du 20e siècle: mélanges en l'honneur de Philippe Kahn*, Paris 2000, pp. 56-57: 'les arbitres «mercatoristes» ou transnationaux . . . organes de la «*Lex Mercatoria*» (comme la Cour de la Haye est l'«organe» du droit international)'; LAGARDE P. (note 1), p. 126-127, 146: 'l'arbitre, qu'on peut considérer comme un organe de la *lex mercatoria*'. See also GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44) and DEUMIER P. (note 3), p. 360: 'Les règles . . . inspirées de la pratique . . . sont le plus souvent formulées par des arbitres'.

[161] OPPETIT B., 'Droit savant' (note 79), p. 394, citing GOLDMAN B., 'La Lex Mercatoria dans les contrats' (note 44).

[162] On international public policy as a limit, see, *e.g.*, BUCHER A./TSCHANZ P.-Y. (note 23), p. 113.

generally accepted.[163] Might there be someone else who has authoritative power to say – as opposed to merely suggest – what the contents of the *lex mercatoria* are?[164] The only two other possibilities that deserve to be considered are legal commentators and the parties themselves.

Legal commentators qua legal commentators have no power to make law. They have no decisionary power with regard to what does and what does not form part of a legal system. Legal commentators and other people who are not officials of the legal system in question can only describe its rules, as opposed to prescribe them, or comment on them as opposed to make them. When certain provisions refer to learned writers as a source of law, it is merely a recognition of their role in representatively describing the positive law and suggesting solutions *de lege ferenda*. [165] It seems manifest that legal commentators sometimes err in their work, which would be impossible if their pronouncements made the law instead of describing it, as it is an intrinsic feature of creative statements that they cannot be true or false. They can only be desirable or undesirable. (All this, of course, does not mean that learned writers do not play a more or less significant role in developing new rules of law. But to play a role in the making of the law is quite a different thing than to actually make law. The following apagogical argument hopefully makes this apparent: if one may agree with the legal realists that what a judge eats for lunch and her education by her parents influence her reasoning and thus her decision, and therefore play a role in the making of the law, it would seem odd indeed to assert that lunch and her parents make law.)[166]

One could of course conceive of a normative system in which academia is completely self-regulated, where law professors, within specific institutions of this imaginary academic system, would formulate, apply, and enforce their own rules,

---

[163] OPPETIT B., 'Droit savant' (note 79), p. 394 *et seq*.

[164] On the importance of authoritative law-ascertaining, see note 159 above. Implying that there are no other officials: DE VRIES H., 'Foreword', in: EISEMANN F. (ed), *Usages de la vente commerciale internationale - Incoterms aujourd'hui et demain*, 2nd edn, Paris 1980, p. 17: 'le commerce international est une République sans territoire, sans gouvernement et sans pouvoir législatif.'

[165] As Bobbio would say, when legal commentators state that certain people must do certain things, the verb 'must' is always a citation to an order given by someone else and not an order in itself. See BOBBIO N., 'Essere e dover essere nella scienza giuridica', in: BOBBIO N. (ed), *Studi per una teoria generale del diritto*, Turin 1970. See also, on the distinction between sources of law and the law itself, with a legal realism approach and by one of the fathers of this school of thought, GRAY J.C., *The Nature and Sources of the Law* [1909], Dartmouth 1997.

[166] *Cf. Akehurst's Introduction* (note 26), p. 51, describing the role of Article 38(1)(d) ICJ Statute in the following terms: 'learned writings can be evidence of customary law, but they can also play a subsidiary role in developing new rules' and DEUMIER P., 'Observations sur «la doctrine collective législatrice: une nouvelle source de droit»', in: *Revue trimestrielle de droit civil* 2006, p. 63, who makes, p. 65, an interesting distinction between the 'constraining force' of non-legal rules and their persuasive force, and another, p. 68, between legal expertise and political (in the sense of law-making) power.

by which they regulate their community. In this case, the law professors would both be members of the community and would have been attributed specific law-making powers.[167] However, the situation is, precisely, quite different with regard to the *lex mercatoria*. Law professors cannot make law for the *societas mercatorum* (assuming, *arguendo*, that such a society exists), because they neither form part of the community of merchants nor have been expressly attributed any law-making function. It seems plain that arbitrators applying the *lex mercatoria* to a given case are free not to follow that which academics have contended forms part of the *lex mercatoria*, which would not be possible if the norms ascertained by legal commentators were authoritative, that is binding.

This assertion about the academics' absence of power to make the *lex mercatoria* must be distinguished from the situation where law professors are appointed as arbitrators and then requested to apply – that is to make, because of the necessity to interpret and thus to create normative content – the *lex mercatoria*. Bruno Oppetit famously concluded on this basis that the *lex mercatoria* is a '*droit savant*', a learned law in the sense that arbitrators, who formulate the rules that constitute it, are essentially (or 'were essentially', in his time) academics.[168] In this situation, law professors do indeed make the *lex mercatoria*, but they do so qua arbitrators, not qua legal commentators. To contend on the basis of law professors' role as arbitrators that the *lex mercatoria* is a professors' law involves the same argumentation as to say that American law, for instance, is white, male and top-law-school law, because most members of Congress and most judges are white men from top law schools. This might be sociologically correct, but it is totally unrelated to the formal conditions on which law is made, which is what we are interested in here, as we are looking for the institutions that have law-making powers – that is, Congress – and not particular profiles of members of Congress, arbitrators and not particular profiles of arbitrators.

Again, legal scholars have a purely descriptive function. They describe what they think the *lex mercatoria* is or should be; they cannot make it. When Klaus Peter Berger, for instance, set up a database meant to contain the rules that form part of the *lex mercatoria*, he did not *make lex mercatoria*.[169] The same, incidentally, holds for groups of experts, for instance when drafting the UNIDROIT principles.[170] Their work can be a source of the *lex mercatoria* – just as foreign law is typically a source for law reforms in any country – but it is not determinative of what the *lex mercatoria* contains.

---

[167] *Cf.* ENCINAS DE MUNAGORRI R., 'La communauté scientifique est-elle un ordre juridique?', in: *Revue trimestrielle de droit civil* 1998, p. 247.

[168] OPPETIT B., 'Droit savant' (note 79), p. 396 *et seq.*

[169] See Transnational Law Digest & Bibliography at <www.tldb.net>.

[170] See OPPETIT B., 'La notion de source du droit et le droit du commerce international', in: *Archives de philosophie du droit* 1982, p. 44: '[L'institution] ne saurait se reconnaître compétence à elle-même à l'effet de produire des règles de droit, encore faut-il que ce rôle lui ait été imparti.'

Can the parties be the officials that authoritatively decide on what forms part of the *lex mercatoria*? Let us accept again, *ex hypothesi*, that the *societas mercatorum* exists. A society always potentially has the capacity to create its own law. But in order to actually be able to do so, the society must be sufficiently organized and autonomous from its environment, in the sense that it is effectively able to formulate, apply, and enforce its own rules, and it must have clearly identifiable institutions in which the norms, which originate in the community itself, are formally restated. A normative system with no specific institutions that have the powers to formulate, apply, and enforce norms is in principle a system of social norms, and not a legal system. What marks it as legal is, precisely, the fact that *specific* institutions, which represent the community, have clearly identifiable powers of norm formulation, application, and enforcement. The members of a community, which comprise the parties to arbitration proceedings in the case of the *lex mercatoria*, always are a source of law, but they do not constitute in and of themselves the institutions where social norms are restated so as to be legal in nature.[171] In other words, although the role of the members at large of the *societas mercatorum* is important for the formation of law, it would be insufficient to look at the way they handle norms to come to the conclusion that the inner morality of their legal system is respected. Indeed, if we look only to the actions of members of the community qua members, we would only be in the presence of social norms.[172] The principles making up the inner morality of law must be met by the officials of the legal system, by those institutions specifically designated to make law.[173] In sum, we might dispense with looking at the behavior of the parties, because their actions are in themselves insufficient to create a legal system.

For a legal system to be made, the officials of the normative system in question – that is the institutions that represent the underlying community and have specific powers of rule formulation, application, or enforcement – must respect the precepts of the inner morality of law. This is what the following section expounds on.

3. The Inner Morality of the Lex Mercatoria

The preceding paragraphs propounded that the arbitrators' role in the *lex mercatoria* is crucial to the prospect of attributing it juridicity, that is of making it a legal system. Indeed, the arbitrators appear to form, collectively, the only organ, the only institution that has specific powers to authoritatively formulate and apply the rules forming part of the *lex mercatoria*. We have seen that without institutions having

[171] See generally BOHANNAN P. (note 40).

[172] *Cf.* VAN DE KERCHOVE M./OST F., *Legal System* (note 40), p. 35: 'there can be a legal system only where there exist both general rules that ground the content of individual decisions and judges authorized to remedy authoritatively the imperfections inherent in those rules.'

[173] *Cf.* OPPETIT B., 'Droit savant' (note 79), p. 299: 'the power to make law [of the arbitrators] . . . is conferred upon them by the parties.'

such powers, there can be no legal system, as the presence of such institutions is precisely what distinguishes a legal system from an unqualified social normative system.[174] In order for the arbitrators to be able to effectively play their role in the constitution of the *lex mercatoria* as a legal system, their normative contribution must conform to the precepts embodied in the inner morality of law. Indeed, if their normative production fails to meet the criteria of juridicity, they cannot be deemed to make any normative system jural. As was already suggested above, the arbitrators' normative production fails to meet two criteria of juridicity: governance by general norms and public ascertainability.[175] The following argues why.

First of all, it must be pointed out that the arbitrators could theoretically fulfill the requirements of governance by general norms and public ascertainability. Indeed, both these essential features of law can be achieved through individual decisions. As opposed to Fuller, who considered that these criteria could only be fulfilled through direct promulgation of the (general) rules to the addressees, Matthew Kramer convincingly argues that:

> '[T]he regulation of behavior through the laying down of norms and the setting of standards . . . does not necessarily involve making those norms and standards known to [the addressees] by means other than the patterns of official approval and disapproval that implement the norms and the standards.'[176]

In other words, there is no need, with respect to the inner morality of law, for a publicly accessible code of general rules. These essential features of law may be attained through patterns of rule application by the system's officials, as the addressees of the rules could then 'infer the content of the rules by studying the patterns of the decisions which authoritatively settle disputes'.[177] However, in order for

[174] *Cf.* KRAMER M.H., 'Of Final Things' (note 39), p. 63: '*some* person or body of persons must have . . . a final say [over the existence and contents of legal norms] if a legal system is to be sustainable.'

[175] It may be pointed out that the inclusion in the analysis of governance by general norms and public ascertainability as essential features of law may go some way towards reconciling academia and practice, or law as it is conceived of and law as it is lived, the separation of which too frequently marks theoretical perceptions of law: as Lord Mustill writes, 'To the academic lawyer these considerations [about the lack of published awards and the consequent lack of public ascertainability of the contents of the *lex mercatoria*] may seem trifling. Either the *lex mercatoria* is part of an international legal order, or it is not. Either a rule forms part of the lex or it does not. The difficulties which practising lawyers in various parts of the world may experience when trying to search it out cannot alter the position. Nor, it may be said, is it a valid objection to the doctrine as an intellectual construct that the adviser may find it difficult, and often impossible, to predict whether a tribunal not yet appointed will decide to apply the *lex mercatoria*; or what kind of *lex mercatoria*, whether «macro» or «micro» or some other kind, it will be; or what sources the tribunal will consider of greatest importance; or what weight will be attached to prior awards on the same question, if any exist and can be found.' See MUSTILL M. (note 11), p. 116.

[176] KRAMER M.H., *In Defense* (note 37), p. 46.

[177] *Ibid*.

this inference of the content of the rules to effectively take place, the patterns of decisions must display certain qualities.

First, the decisions – in the current case, the awards – must be sufficiently 'plentiful and regularized to create clearly intelligible patterns' from which the addressees (that is the members of the *societas mercatorum*, whose existence is admitted *ex hypothesi*) can infer predictable and consistent rules.[178] Indeed, as arbitral awards are the only authoritative vehicle for the (intermediate) expression of the contents of the *lex mercatoria*, they must be in sufficient number to allow the rules they apply to become manifest, and to allow the parties to apprise themselves (requirement of public ascertainability) of the general rules (requirement of governance by general norms) that will determine the outcome of their case. Rules that do not become manifest cannot fulfill the 'chief function of law in guiding and channeling people's conduct'.[179] As Matthew Kramer puts it,

> 'If the decisions are few and far between, or if a number of them are aberrant, they will not be adequately reliable and informative as conduits that provide indirect access to the norms that lie behind them.'

The same rationale leads to the second required quality of decisions: they must have precedential force. This precedential force may be either juridical or plainly factual. If the precedential force is juridical, that is if the officials applying the rules follow a strict doctrine of *stare decisis*, each decision in itself would amount to a publicly ascertainable and general norm – provided of course the decision is publicly available.[180] The precedential force may also be purely factual, in the sense that the officials follow a doctrine of *de facto stare decisis*: they consistently follow prior cases without any express duty to do so.[181] The absence of any doctrine of *stare decisis*, combined with the absence of other authoritative vehicles for the expression of the rules, would make it very difficult to infer the norms' contents from their applications. What matters is that all decisions be expositions of the same contents of the law, that one decision does not suggest that the law is X while another implies that it is Y. If decision makers do not follow prior cases, the risk that there be variations among the decisions seems great indeed. And, as Matthew Kramer writes,

---

[178] KRAMER M.H., *Objectivity* (note 6), pp. 113-15. See also KRAMER M.H., *In Defense* (note 37), pp. 45-46 and, more specifically in the context of arbitration, FOUCHARD P., *L'arbitrage commercial international*, Paris 1965, p. 435 (writing on 'l'objet essentiel du droit, la prévisibilité').

[179] KRAMER M.H., *Objectivity* (note 6), p. 114. See also KRAMER M.H., *In Defense* (note 37), p. 46 (stating that the rules' addressees must be 'able to infer the content of the rules by studying the patterns of the decisions which authoritatively settle disputes').

[180] KRAMER M.H., *Objectivity* (note 6), p. 114: 'insofar as the officials' judgments and their rationales would have precedential force, those judgments and rationales themselves would constitute directly ascertainable legal norms.'

[181] See generally BHALA R., 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy) ', in: *American University International Law Review* 1999, pp. 940-42.

> 'Because gaining knowledge of the contents of those norms is a far more difficult task when one's access to them is indirect rather than direct, the epistemically disruptive effects of any transformations of the norms will be greatly accentuated.'[182]

This means that, if the application of rules to the resolution of individual disputes is the only authoritative expression of the rules, then the slightest variation in these applications would be likely to frustrate any effort in inferring the general rules from their applications. The norms would no longer be publicly ascertainable, and such a disparate collection of decisions would not collectively amount to governance by general norms. There no longer would be proper general norms ascertainable by their addressees. The *societas mercatorum*, when submitted to the *lex mercatoria*, would be governed by the arbitrators and not by law.[183]

Narrowed down as these requirements are, it will be unsurprising to most of those with only a basic knowledge of arbitration that the *lex mercatoria* largely fails to meet these requirements of the inner morality of law. Published arbitral awards applying the *lex mercatoria* are few and far between. As Lord Mustill puts it in a euphemism: 'the reported awards do not in all cases seem to sustain the wealth of commentary based upon them.'[184] The author then gives his estimate of the number of published awards in existence that are concerned with the *lex mercatoria*: 25.[185] Admittedly, Lord Mustill's estimate dates back almost 20 years, but the rhythm of publication of awards based on the *lex mercatoria* can in no way be said to have quickened to the point of involving any relevant portion of such awards. And of course, as Christine Gray and Benedict Kingsbury argue, even in the context of the international legal system where inter-State arbitral law-making

---

[182] KRAMER M.H., *Objectivity* (note 6), pp. 114-15.

[183] *Cf.* MUSTILL M. (note 11), p. 116-117: 'If the contract expressly directs the arbitrator to apply the *lex mercatoria*, or if he conceives that the circumstances justify him in treating such a directive as implicit, he will find a way of doing so, notwithstanding the fragmentary nature of the norms so far established. But this is only a small part of the story. The purpose of a commercial legal order is to regulate transactions, not awards or judgments. What [the businessperson, that is the addressee of the *Lex Mercatoria*] requires is a legal framework, sufficient to inform him before any dispute has arisen what he can or must do next. If a dispute does arise he needs to be told whether he can insist or must yield, and how much room he has for manoeuvre. When asking such a question, the last answer which a businessman wants to hear is that it is a good question.' (references omitted).

[184] *Ibid.*, p. 114.

[185] *Ibid.*, p. 116. At p. 115, the author writes further that '[the practitioner] would be likely to look for concrete examples of situations in which the *lex mercatoria* has been applied through awards rendered in international commercial arbitrations. Here again he would be in difficulties. Thousands of such awards are made every year. Some are published under the auspices of certain arbitral institutions, but most are not. Moreover, the published awards are almost without exception concerned with the application of national laws. Few can be claimed as clear examples of the working of the *lex mercatoria* in practice.' (references omitted).

clearly is recognized, 'Unpublished awards have virtually no law-making effect; also those not easily accessible or not reported in full will have little impact.'[186]

In addition, commercial arbitral awards barely have precedential force at all. More precisely, they barely have a *de facto* precedential force, as they have strictly no *de jure* precedential force in international commercial arbitration: an award being annulled because of its disrespect of a relevant earlier arbitral award in a different dispute is entirely unheard of.[187] Sure enough, at least some authors in the field of international commercial arbitration are aware that basing argument on precedents is 'necessary to the consistency and even-handedness (and, therefore, the legitimacy) of the process'.[188] Sometimes, such authors then assert in a jolt of wishful thinking, without any evidence to support their claim, that a practice of following prior arbitral awards actually does exist widely.[189] But more candid empirical research has revealed an almost purely case-by-case approach. As Gabrielle Kaufmann-Kohler wrote in her recent comprehensive study on the role of precedent in arbitration practice: 'Aside from procedural issues perhaps, one can see no [*de facto*] precedential value . . . in commercial arbitration awards.'[190] Arbitrators typically treat each situation in isolation from any other situation,[191] typically making use of their 'sweeping freedom to apply the law that allows [them] to 'mint' the rules to take account of the specificities of each case.'[192] The result is that the applications of the *lex mercatoria* vary in the contents given to the

[186] GRAY C./KINGSBURY B., 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945', in: *British Year Book of International Law* 1992, p. 122.

[187] On this distinction between *de jure* and *de facto* precedential force in international commercial arbitration, see, *e.g.*, LARROUMET C., 'A propos de la jurisprudence arbitrale', *Gazette du Palais* 2006/348, p. 5 (the semantics of the debate (*de jure* vs. *de facto*), however, went unnoticed by the author). See also ICC (ed), *L'apport de la jurisprudence arbitrale*, Paris 1986; MAYER P., 'The UNIDROIT Principles in Contemporary Contract Practice', in: *ICC Bulletin – Special Supplement: UNIDROIT Principles of international commercial contracts* 2002, p. 111: 'Each arbitral award stands on its own. There is no doctrine of precedence or of stare decisis as between different awards'.

[188] CARBONNEAU T., 'Arbitral Law-Making' (note 33), p. 1205.

[189] *Ibid.*, pp. 1204-1205.

[190] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 363.

[191] It may be noted that the situation is somewhat different in international law and inter-State arbitration, where references to earlier arbitral awards are simply 'unusual': GRAY C./KINGSBURY B. (note 186), pp. 128-129. Kaufmann-Kohler's study also extended to sports arbitration, where 'there is strong reliance on precedents . . . , which comes close to a true stare decisis doctrine', and to investment arbitration, where 'there is a progressive emergence of rules through lines of consistent cases on certain issues, though there are still contradictory outcomes on others.' See KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 363.

[192] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), p. 365.

rules to the point of being straightforwardly contradictory.[193] As Poudret and Besson put it, a reference to the *lex mercatoria* may indeed amount to a lucky dip, merely that the *lex mercatoria* is a grab bag.[194] Hence, it seems utterly unlikely that the way arbitrators decide cases – that is the only authoritative expressions of the *lex mercatoria* – really makes a difference to anyone's reasoning about appropriate rules of conduct.[195] The *lex mercatoria* hardly can be said to direct anyone's behavior, which is a sign of the absence of an operative system of law.[196] This is acknowledged quite openly by some of the most prominent arbitrators. As Gabrielle Kaufmann-Kohler concludes, there is no need in international commerce for what is generally considered to be the heart and core of law, namely predictability and consistency. She writes:

> 'In commercial arbitration, there is no need for developing consistent rules through arbitral awards because the disputes are most often fact- and contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs.'[197]

On the contrary, she argues, '[t]he arbitrator's sweeping freedom to apply the law [is] in direct contradiction with the very idea of precedent'.[198] In other words, the freedom of the arbitrators with regard to how they decide on the merits of each case, and their quest for individually tailored solutions, appears to be considered beneficial for international commerce, more beneficial than the respect of the rule of law. Hence, the practice indeed looks like what Lord Mustill has called the micro *lex mercatoria*: 'a law is newly minted by the arbitrator on each occasion, with every contract subject of its own individual proper law'.[199] Mustill's 'law', of course, has nothing in common with what any jurisprudential or even analytical account of law would provide – an antiphrasis in the use of the term 'law' that can only be attributed to the author's usual humor. In sum, it is this individualism in decision making, this individualization of rules, that makes the *lex mercatoria* antithetical to the rule of law, not meeting the requirements imposed by the inner morality of law.

---

[193] See for instance HIGHET K. (note 11) and DELAUME G., 'Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria', in: *Tulane Law Review* 1989, pp. 595, 602.

[194] POUDRET J.-F./BESSON S. (note 23), paras 685: 'a legal grab-bag with varying results'.

[195] See also REDFERN A./HUNTER M. (note 12), para. 2-63:'Under the guise of applying the *lex mercatoria*, an arbitral tribunal may in effect pick such rules as seem to the tribunal to be just and reasonable – which may or may not be what the parties intended when they made their contract.'

[196] KRAMER M.H., *Objectivity* (note 6), p. 113.

[197] KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33), pp. 375-376.

[198] *Ibid*., p. 365.

[199] MUSTILL M. (note 11), p. 94.

And so we come to the end of these different lines of argument that all led us to conclude that the *lex mercatoria* is not law, because it is not a legal system, because it cannot be a set of *legal* rules without deriving its non-State juridicity from its belonging to a non-State legal system, and because being a method of rule-selection necessarily relies on the assumption that the *lex mercatoria* is a legal system.

V. Conclusion

Ideas, especially if they come within the realm of what is fashionable, frequently move by extremes. An extreme position is taken, forms the paradigm for one or several generations of thinkers, then to be replaced, as the fallacies attached to the extremism are revealed, by the opposite extreme position. Sometimes, the debate then settles for a position that is somewhere in the middle between these two extremes. The concept of law and its relationship to the State follow the same movement. If law has for a long time been dominantly considered to be State law and nothing else, it has more recently become fashionable to see law everywhere.[200] The current article, then, is one of those that argue for settling in the middle between these two extremes: non-State law certainly exists, but it cannot be found just everywhere. Certain conditions must be fulfilled, and these conditions must provide us with a workable definition of law. The positivist account of law used in this article appears to be one such definition. It admits of non-state law, but it does not see law everywhere. The *lex mercatoria*, in particular, is one place where law is not to be found.

This conclusion makes this article a rejoinder to the English view, which Andreas Lowenfeld describes in the following terms: 'The English view regards *lex mercatoria* as a slightly wicked misnomer (not to say contradiction in terms), on the ground that *lex mercatoria* is not law at all.'[201] Pierre Mayer caught the ensuing consequence nicely: he writes that arbitrators deciding in application of the *lex mercatoria* 'are in effect . . . decid[ing] in accordance with what they consider to be just and equitable, whilst purporting to decide in accordance with legal rules.'[202]

Arguably, in arbitral practice, this makes little difference, as arbitral awards made in application of the *lex mercatoria* are utterly unlikely to ever be

[200] ROBERTS S. (note 50), p. 2: 'during the second half of the 20th century, . . . law became increasingly seen as somehow «everywhere» in the social world, present even in the simplest aggregations; it was not necessarily linked to self-conscious regulatory activity' (references omitted).

[201] LOWENFELD A.F. (note 18), p. 134.

[202] MAYER P., 'UNIDROIT Principles' (note 187), p. 111.

successfully challenged or denied enforcement on such a theoretical ground.[203] Admittedly, the *lex mercatoria* does not need a deep and detailed theoretical analysis to work, that is to meet the goal of arbitration as defined by Lord Mustill: serve the commercial person.[204] The businessperson, indeed, barely needs the *lex mercatoria*, and much less any theoretical considerations about it, to go about his or her business. He or she is entirely justified in demanding to be left in peace, outside such theoretical debates.[205] From the internal point of view of businesspeople and the arbitrators serving them, the jural status of the *lex mercatoria* may indeed be of little relevance.

Nevertheless, in some instances, an external point of view must also be adopted. Scholarship that is concerned exclusively with the internal mechanics of arbitration, with what it needs to smoothly operate as a service available to the businessperson, becomes on the whole less and less sufficient. The expanding realm of arbitration exposes it increasingly to ethical and political scrutiny, and sometimes concerns – some warranted, others not. To inform these kinds of analyses, one way to proceed is to examine certain operations of arbitration in the light of what expresses a society's adherence to liberal-democratic values: the sustaining, within a society, of the rule of law.[206] To examine the juridicity of the *lex mercatoria* is one way to examine whether one specific aspect of arbitration implements the regulatory standards that are embodied in the very concept of law.[207]

[203] See generally DASSER F., *Internationale Schiedsgerichte und Lex Mercatoria*, Zurich 1989, pp. 59, 322 *et seq.*, 347 *et seq.*

[204] MUSTILL M. (note 11), p. 86.

[205] See MUSTILL M., 'Lex Mercatoria and Arbitration (A Discussion of the New Law Merchant)', in: *Arbitration International* 1992, p. 215.

[206] KRAMER M.H., *Objectivity* (note 6), p. 102.

[207] Gabrielle Kaufmann-Kohler's study on the role of precedents in commercial, investment and sports arbitration had precisely the same purpose, or at least a very similar one: assess how good regulation through arbitration is in these three different contexts. See KAUFMANN-KOHLER G., 'Arbitral Precedent' (note 33).

THE INAPPLICABILITY OF THE CONNECTING FACTOR OF NATIONALITY TO THE NEGOTIATING CAPACITY IN INTERNATIONAL COMMERCE

Benedetta UBERTAZZI*

I. Introduction

As an introduction, I must point out that the complex system of sources of international law, Community law, and Italian national rules on private international law provide four different rules regarding the law applicable to the negotiating capacity of natural persons. The first rule is of a general nature and concerns the general capacity to act. It submits this capacity to the national law of the person in question. This general rule is provided in Article 23(1) part 1 of the Italian Private International Law Statute, according to which 'a natural person's capacity to act is regulated by his national law.' The same rule is also provided by the Geneva Convention of 7 June 1930, which provides a uniform law for bills of exchange and promissory notes,[1] and of 19 March 1931, which provides a uniform law for cheques.[2]

* Doctor in International Law, University of Padova. Research fellow in International Law, University IULM of Milan. This study provides a summary of Chapter IV of my monograph on *La capacità delle persone fisiche nel diritto internazionale italiano*, Padova 2006, at 421.

[1] The Convention was ratified (and entered into force) in Italy by Royal Decree on 25 August 1932, n.1130, converted into law on 22 December 1932, n.1941, Italian Official

Yearbook of Private International Law, Volume 10 (2008), pp. 711-736

A second rule concerns the uniform category of special capacities provided in Articles 20(2) and 23(1) part 2, which subjects these capacities to the *lex substantiae actus*, under the principle that 'the special conditions for capacity provided for by the law applicable to a specific case are governed by that same law' (the wording of Article 20(2) is partially different from that of Article 23(1) part 2, which states 'where the law applicable to a specific case provides for special conditions regarding the capacity to act, these are governed by the same law').

The third rule concerns the negotiating capacity for certain business transactions, subjecting it, under certain circumstances, to the *lex loci*. In Italy, the *lex loci* connecting factor for negotiating capacity is laid down in Article 2(2) of the Geneva Convention of 7 June 1930; in Article 2(2) of the Geneva Convention of 19 March 1931; in Article 11 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations[3]; in Article 13 of the EC Regulation 593/2008 on the law applicable to contractual obligations (Rome I);[4] and last but not least in

---

Journal (GU) 16 September 1932, at 215. The Convention is published in: *Riv. dir. int.* 1933, at 522. Regarding the latter see among others: MONACO R., *I conflitti di legge in materia di cambiale*, Torino 1936, *passim*; ARANGIO RUIZ G., *La cambiale nel diritto internazionale privato*, Milano 1946, *passim*; ID, 'Assegno e assegno bancario (dir.int.priv.)', in: *Enc. dir.*, Milano 1958, at 348-352; ID., 'Cambiale (dir.int.priv.)', in: *Enc.dir.* 1959, at 921-939; STELLA RICHTER M., 'I titoli di credito nel nuovo sistema di diritto internazionale privato', in: *BBTC* 1996, at 767-791; TREVES T., 'Titoli di credito', in: POCAR F. / TREVES T. / CLERICI R. / DE CESARI P. / TROMBETTA PANIGADI F. (eds.), *Codice delle convenzioni di diritto internazionale privato e processuale*, Milano 1999, at 971-975 (hereafter: *codice delle convenzioni d.i.pr.*); BALLARINO T., *Diritto internazionale privato*, Padova 1999, at 744-748; TONOLO S., 'Se le condizioni per valutare la capacità della persona che sottoscrive una cambiale in un paese diverso da quello della nazionalità debbano essere valutate secondo l'art. 23, comma 3, della legge n. 218 del 1995 o secondo l'art.2, comma 2 della Convenzione di Ginevra del 7 giugno 1930', in: CONETTI G. (ed.), *Questioni di diritto internazionale privato e processuale*, Padova 2004, at 226-228.

[2] The Convention was ratified (and entered into force) in Italy by Royal Decree on 24 August 1933, n. 1077, converted into law on 4 January 1934, n.61, in *GU* regular issue of 29 August 1933, at 200. The Convention is published in *Riv. dir. int.* 1933, at 552. Regarding the latter, see *supra*, note 1.

[3] The Convention was ratified (and entered into force) in Italy on 18 December 1984, n. 975, in *GU* regular issue of 30 January 1985, at 25. The Convention is published in *Riv. dir. int. priv. proc.* 1980, at 297. With regard to the latter see among others: BALLARINO T. (ed..), *La convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali. II. Limiti di applicazione. Lectio notariorum*, Milano 1994, *passim*; POCAR F., 'Obbligazioni e contratti in generale', in: *Codice delle convenzioni d.i.pr.*, at 469-473; BALLARINO T., *Diritto internazionale privato*, Padova 1999, at 606-656; VILLANI U., *La Convenzione di Roma sulla legge applicabile ai contratti*, Bari 2000, at 8. It is sometimes discussed whether the Rome Convention constitutes a Community convention, regarding this problem, see among others: ROSSI L.S., *Le convenzioni fra gli Stati membri dell'Unione Europea*, Milano 2000, at 57-69.

[4] In OJEU 4 July 2008, L 177, at 6. On this Regulation I take the liberty to refer, also for bibliography, to UBERTAZZI B., *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milano 2008.

Articles 23(2), 23(3), and 23(4) of the Italian private international law statute of 1995.

In my opinion, however, there is also a fourth unwritten rule that applies to the negotiating capacity for business transactions in international commerce[5] that subjects this capacity to the *lex substantiae actus*, even where it does not qualify as special capacity.[6] This study is dedicated to the demonstration of this thesis.

[5] The concept of transactions in international commerce is used for a subject that is different from that of capacity by POCAR F., 'La codification européenne du droit international privé: vers l'adoption de règles rigides ou flexibles vers les États tiers?', in: *Mélanges en l'honneur de Paul Lagarde*, Paris 2005, at 701.

[6] The category of negotiating capacity in international commerce is not new. In the timely scope of application of the preliminary clauses of the Italian civil code of 1865, the leading doctrine distinguished between capacity regarding negotiations in international commerce and capacity relating to negotiations regarding personal status. It submitted the former to the law of the place of performance of the obligation in question according to Article 58 of the Italian commercial code of 1882, pursuant to which 'the form and the essential prerequisites of the commercial obligations […] are regulated respectively by the law or the usages of the place where the obligation has to be performed'. It submitted the latter to the *lex patriae* according to Article 6 of the preliminary clauses of the Italian civil code of 1865. See DIENA G., *Trattato di diritto commerciale internazionale. Ossia il diritto internazionale privato commerciale*, Firenze 1900, at 27; ID., 'La capacité de la femme mariée d'après la nouvelle législation italienne et les conflits de lois éventuels', in: *Clunet*, 1920, at 74-80; CAVAGLIERI A., *Il diritto internazionale commerciale*, Padova 1936, at 97; FEDOZZI P., *Il diritto internazionale privato – Teorie generali e diritto civile*, Padova 1935, at 373; GEMMA S., *Appunti di diritto internazionale privato*, Padova 1936, at 237; BOSCO G., *Corso di diritto internazionale privato*, Roma 1939, at 206; FORMAGGINI A., 'L'art. 58 codice di commercio e la nuova legislazione cambiaria', in: *Riv. dir. int.* 1937, at 39; AMATI R., 'Les nouvelles règles italiennes de droit international privé', in: *Clunet* 1940-1945, at 335. As regards case-law, see App. Milano 1 July 1914, in: *Riv. dir. int.* 1914, at 610 on which see ANZILOTTI D., in: *Riv. dir. int.* 1914, at 614. Against the application of the *lex patriae* to the capacity regarding commercial negotiations see ESPERSON P., *Intelligenza dell'articolo 58 del nuovo codice di commercio*, Roma 1886, at 1-63; PACCHIONI G., *Elementi di diritto internazionale privato. Corso di lezioni tenute alla Reale università egiziana del Cairo negli anni 1927-28 e 1928-29*, Padova 1930, at 272; CALAMANDREI R., *La cambiale: commento al libro primo titolo 10 del Nuovo Codice di Commercio italiano*, Torino 1896, at 316, according to whom the capacity relating to international commerce should also be regulated by the *lex patriae*. The Italian commercial code was abrogated by Article 112 of the Royal Decree of 24 April 1939 n.640, and the negotiating capacity in international commerce was subsumed under the rules of the Italian international private law, i.e. under general capacity first in Article 6 of the commencement clauses of the Italian civil code of 1865 and later in Article 17 of the commencement clauses of the Italian civil code of 1942. See: AMATI R., (this note), at 330 and 756.

II. The Community Principle of Non-Discrimination

The principle of non-discrimination[7] has been a basic principle in EU for a long time. This principle is established in Article 12 (former Article 6) EU, according to which 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'[8] The principle of non-discrimination prohibits different treatment in situations that are alike and those that are analogous, except for determinate aspects that the constitutional principle of non-discrimination does not deem sufficiently relevant. According to the ECJ's interpretation,[9] the prohibition on

[7] For the general history and contents of the principle of equality, see UBERTAZZI G.M., 'Règles de non-discrimination et droit international privé', in: *Recueil des Cours* 1977-IV, at 343.

[8] On the Community principle of non-discrimination on the ground of nationality, see among others: UBERTAZZI G.M. (note 7), at 378; GARCIMARTÍN ALFÉREZ F.J. / HEREDIA CERVANTES I., 'El artículo 6 del TCE y el Derecho procesal civil: a propósito de la sentencia TJCE de 10 de febrero de 1994', in: D-23 *GJ* 1995, at 56; LENGAUER A., 'The new General Principle of Non-Discrimination in the EC Treaty as Amended by the Treaty of Amsterdam', in: *Austrian Rev. int. & Eur.Law* 1998, at 369-395; GHERA F., *Il principio di eguaglianza nella Costituzione italiana e nel diritto comunitario*, Padova 2003, at 47; DAVIES G., *Nationality Discrimination in the European Internal Market*, 's-Gravenhage 2003, *passim*; HERNU R., *Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de Justice des Communautés européennes*, Paris 2003, *passim*; BASEDOW J., 'Der Grundsatz der Nichtdiskriminierung im europäischen Privatrecht', in: *ZEuP* 2008, at 230. For the case law see ECJ 11 July 2002, C-224/98, *D'Hoop*, in: *Rec.*, I-6191, paragraph 36 and ECJ 17 July 1997, C-354/95, *National Farmers' Union and Others*, in: *Rec.* I-4559, paragraph 61. See Article 6 EU, Article 21(2) of the Nice Charter of 2000 and Article II-81 of the Constitutional Treaty.

[9] The same principle follows from the ECJ's case law on Article 14 ECHR (see *e.g.* ECJ 28 October 1987, *Inze*, serie A n.126, in <www.hudoc.echr.coe.int>, see for all: PADELLETTI M.L., *La tutela della proprietà nella convenzione europea dei diritti dell'uomo*, Milano 2003, at 63. With regards to Article 14 ECHR and with regards to the ECJ's jurisprudence hitherto, see: BIN R., 'Sub Art. 14 ECHR', in: *Commentario Bartole-Conforti-Raimondi*, at 409-423; BOSSUYT M., 'Sub Art. 14 ECHR', in: DECAUX E. / PETTITI P.H., *La Convention européenne des droits de l'homme. Commentaire article par article*, Paris 1999, at 475-488; VIARENGO I., 'Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia', in: *Riv. dir. int.* 2005, at 985) and from the case law of the Italian Constitutional court on Article 3 of the Italian constitution (for Art. 3 of the Italian constitution and for the relating jurisprudence of the court, see: PALADIN L., *Il principio costituzionale d'eguaglianza*, Milano 1965, at 248; SCACCIA G., *Gli strumenti della ragionevolezza nel giudizio costituzionale*, Milano 2000, at 50; AAVV., *Corte Costituzionale e principio di eguaglianza*, Padova 2002, *passim*; GHERA F. (note 8), at 50; ROMANO G.P., *Is Multilateral Rule on Capacity to Marry in line with the Constitution? Some Observations Suggested by Two Recent Conflicts Cases Submitted to the Italian Constitutional Court*, in this *Yearbook* 2005, at 22; MAZZIOTTI DI CELSO M. / SALERNO G.M., *Manuale di diritto costituzionale*, Padova 2005, at 582 and 150; BIN R. / PITRUZZELLA G., *Diritto costituzionale*, Torino 2005, at 455).

discrimination contained in Article 12 EU not only refers to direct and obvious discrimination but also to 'factual' or indirect discrimination arising from provisions that seem neutral in the abstract but whose application 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'; it instead allows disparate treatment in situations that differ from each other due (e.g.) to the element of nationality, when the different treatment is based on 'objective connecting factors' (ECJ's judgment in *Walt Wilhelm* of 13 February 1969).[10]

The ECJ's complex jurisprudence demonstrates that Article 12 EU prohibits any disparate treatment mandated by a Member State's national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified.

In this framework, the doctrine has raised the question of whether the adoption of the nationality connecting factor as part of the neutral rules of conflict[11] is

[10] ECJ, 13 February 1969, 14/68, *Walt Wilhelm*, in: *Rec.*, 1. For this judgment see LAUWAARS R.H., Note to *Walt Wilhelm*, in: *C.M.L. Rev.* 1969, at 488-490; CATALANO N., *Competenze comunitarie e competenze degli Stati membri in materia di regole di concorrenza*, Note to *Walt Wilhelm*, in: *Foro it.* 1969, at 85-89; JEANTET F.-C., in: *Clunet* 1970, at 447-455; WALZ R., 'Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law', in: *ELR* 1996, at 449-464. On indirect discrimination, see recent ECJ, decision C-28/04, 30 June 2005, *Tod's s.p.a. and Tod's France SARL c. Heyraud S.A.*, in <www.europa.eu.int>.

[11] For neutral bilateral conflict of laws rules, see BATIFFOL H., 'Le pluralisme des methodes de doit int. privé', in: *Recueil des Cours* 1973, t. 139, at 79-185; LAGARDE P., 'Le principe de proximité dans le droit international privé contemporain', in: *Recueil des Cours* 1986, t. 196, at 29; BALLARINO T., *Diritto internazionale privato*, Padova 1999, at 227 ss.; CARBONE S.M. / IVALDI P., *Lezioni di diritto internazionale privato*, Padova 2000, at 21; PAGANO E., *Lezioni di diritto internazionale privato*, Napoli 2003, at 73; BONOMI A. / BUCHER A., *Droit international privé*, Bâle-Genève-Munich 2004, at 91; PICONE P., 'Diritto internazionale privato comunitario e pluralità dei metodi di coordinamento tra ordinamenti', in: PICONE P. (ed.), *Diritto internazionale privato e diritto comunitario*, Padova 2004, at 485-525; MOSCONI F. / CAMPIGLIO C., *D.i.pr. Parte generale e contratti*, Torino 2004, at 111; BALLARINO T. / ROMANO G.P., 'Le principe de proximité chez Paul Lagarde', in: *Mélanges en l'honneur de Paul Lagarde*, Paris 2005, at 38; KESSEDJIAN C., 'Le principe de proximité vingt ans après', in: *Mélanges Paul Lagarde* (note 5), at 507-521. The conflict of laws rules that use the nationality of only one party of the dispute as a connecting factor, and thus privilege one party compared to the other, are not considered neutral. For rules of this type and their discriminating character, see CARBONE S.M., 'Sul controllo di costituzionalità della norma straniera richiamata', in: *Riv. dir. int. priv. proc.* 1965, at 685; JAYME E., 'La costituzione tedesca e il diritto internazionale privato', in: *Riv. dir. int. priv. proc.* 1972, at 76; BALLARINO T., 'Costituzione e diritto internazionale privato', in: *Dir. Int.* 1970, at 41; ID., *Costituzione e diritto internazionale privato*, Padova 1974, *passim*; GIARDINA A., 'L'uguaglianza dei coniugi in diritto internazionale privato', in: *Riv. dir. int. priv. proc.* 1974, at 25; UBERTAZZI G.M. (note 7), at 367; GAMILLSCHEG F., 'Ordine pubblico e diritti fondamentali', in: *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, Milano 1987, at 89; PISILLO MAZZESCHI R., 'La sentenza 71/1987, della Corte Costituzionale, il ruolo dell'ordine pubblico e l'attuale regime di conflitto del

compatible with the Community principle of non-discrimination. This topic has already been deeply examined: it has been particularly analyzed (1) in the *Walt Wilhelm* judgment;[12] (2) by scholars like Drobnig[13] and the Max Planck Institute in Hamburg in the seventies; [14] and (3) in Italy by Ballarino since the beginning of the eighties.[15] The latter, as well as other previous studies,[16] were published in a period when the establishment of the Community structure had substantially just begun. To date, the topic has come to the ECJ's attention in a series of judgments, starting with *Micheletti* on 7 July 1992[17] and continuing with judgments in the nineties until completed with *Avello* in 2003 and *Grunkin* in 2008.[18] Academics on the other

---

divorzio', in: BAREL B. / COSTANTINO B. (ed.), *Norme di conflitto italiane e controllo di costituzionalità*, Padova 1990, at 25.

[12] *Supra*, note 10.

[13] See DROBNIG U., 'Verstößt das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?', in: *RabelZ* 1970, at 636-662; ID., 'L'apport du droit communautaire au droit international privé', in: *Cah. dr. eur.* 1970, at 526-543.

[14] See BEITZKE G., 'Probleme der Privatrechtsangleichung in der Europäischen Wirtschaftsgemeinschaft', in: *Zeitschrift für Rechtsvergleichung* 1964, at 80-93.

[15] See BALLARINO T., 'La CEE e il diritto internazionale privato', in: *Dir. com. sc. int.* 1982, at 1-13.

[16] Also see SAVATIER R., 'Le Marché commun au regard du droit international privé', in: *Rev. crit. dr. int. pr.* 1959, at 237-258; WENGLER W., 'Les conflits de lois et le principe d'égalité', in: *Rev. crit. dr. int. pr.* 1963, at 203-231 and 503-527; LOUSSOUARN Y., 'Les incidences des Communautés européennes sur la conception française du droit international privé', in: *Rev.trim.dr.eur.* 1974, at 708-727; UBERTAZZI G.M. (note 7), at 337-414; VILLANI U., 'L'azione comunitaria in materia di diritto internazionale privato', in: *Riv.dir.eur.* 1981, at 373-424; BADIALI G., 'Le droit international privé des Communautés européennes', in: *Recueil des Cours* 1985, t. 191,at 9-181.

[17] ECJ, 7 July 1992, C-369/90, *Micheletti*, in: *Rec.*, I-4239. See on this decision, RUZIE D., 'Nationalité, effectivité et droit communautaire', in: *Revue générale de droit international public* 1993, at 107-120. Regarding the judgment in Micheletti also see the annotations by BORRÀS RODRIGUEZ A., in: *RJC* 1993, at 584-587; JESSURUN D'OLIVEIRA H.U., in: *C.M.L. Rev.* 1993, at 623-637; BOUTARD LABARDE M.C., in: *Clunet* 1993, at 430-431; BOUZA I VIDAL N., 'El ambito personal de aplicación del Derecho de establecimiento en los supuestos de doble nacionalidad. Comentario a la Sentencia del TJCE de 7de julio de 1992 en el caso Micheletti c. Delegación del Gobierno de Cantabria /As. C 369/90)', in: *Rev. Instituciones Eur.* 1993, at 563-581; IGLESIAS BUHIGUES J. L., 'Doble nacionalidad y Derecho comunitario', in: *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor don Manuel Díez de Velasco*, Madrid 1993, at 953-967.

[18] ECJ, 2 October 2003, C-148/02, *Carlos Garcia Avello*, in: *Rec.*, I-11613. For the Avello case see QUIÑONES ESCÁMEZ A., 'Derecho comunitario, derechos fundamentales y denegación del cambio de sexo y apellido: un orden público europeo armonizador? (a propósito de las SSTJCE, asuntos K.B. y Garcia Avello)', in: *Revista de derecho comunitario Europeo* 2004, at 507-529; LAGARDE P., in: *Rev.crit.dr.int.pr.* 2004, at 192-202; ILIOPOULOU A., 'What's in a name? Citoyenneté, égalité et droit au nom. A propos de l'arrêt Garcia Avello', in: *Rev. trim. dr. eur.* 2004, at 565-579; LARA AGUADO A., 'Libertades comunitarias, doble nacionalidad y régimen de los apellidos', in: *La ley* 2004, n.6107, at 1-12; REIG FABADO I., in: *Cuadernos Civitas de jurisprudencia civil* 2004, at 463-475;

hand began returning to the topic in the nineties by publishing several important studies.[19]

BALLARINO T. / UBERTAZZI B., 'On avello and other Judgments: a new Point of Departure in the Conflict of Laws', in this *Yearbook* 2004, at 85-128; TONOLO S., 'La legge applicabile al diritto al nome dei bipolidi nell'ordinamento comunitario', in: *Riv. dir. int. priv. proc.* 2004, at 957-977; BOGDAN M., 'The Impact of the E.C. Treaty on the Surnames of Migrating European Citizens', in: *Homenaje Julio D. González Campos*, Madrid 2005, at 1277-1286; BARATTA R., 'Verso la 'comunitarizzazione dei principi fondamentali del diritto di famiglia', in: *Riv. dir. int. priv. proc.* 2005, at 587. See ECJ, 14 October 2008, C-353/06, *Grunkin*, still published only on the internet at <www.europa.eu.int>. On this judgment, see BONOMI A., 'Il diritto internazionale privato dell'Unione europea: considerazioni generali', in: ID. (ed.), *I regolamenti comunitari di diritto internazionale privato*, forthcoming.

[19] *Cf.* STRUYCKEN A.V.M, 'Les conséquences de l'intégration européenne sur le développement du droit international privé', in: *Recueil des Cours* 1992, t. 223, at 257-383; FALLON M., 'Variations sur le principe d'origine entre droit communautaire et droit international privé', in: *Nouveaux itinéraires en droit - Hommage à François Rigaux*, Bruxelles 1993, at 187-221; RADICATI DI BROZOLO L., 'L'influence sur les conflits de lois des principes de droit communautaire en matière de libre circulation', in: *Rev. crit. dr. int. pr.* 1993, at 401-424; RIGAUX F., 'Droit international privé et communautaire', in: *L'internalisation du droit. Mélanges en l'honneur d'Yvon Loussouarn*, Paris 1994, at 341-354; TEBBENS H.D., 'Les conflits des lois en matière de publicité déloyale à l'épreuve du droit communautaire', in: *Rev. crit. dr. int. pr.* 1994, at 451-481; FALLON M., 'Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté Européenne', in: *Recueil des Cours* 1995, t. 253, at 9-281; SANCHEZ LORENZO S., 'La incidencia del principio comunitario de no discriminación por razón de nacionalidad en los sistemas conflictuales de los Estados miembros', in: *RCEA* 1996, at 73; DE MIGUEL ASENSIO P., 'Integración europea y Derecho internacional privado', in: *Revista de Derecho Comunitario Europeo* 1997, at 413-445; DONY M., 'Les discriminations fondées sur la nationalité dans la jurisprudence de la Cour de justice des Communautés européennes', in: BRIBOSIA E. / DARDENNE E. / MAGNETTE P. / WEYEMBERGH A. (ed.), *Union européenne et nationalités. Le principe de non discrimination et ses limites*, Bruxelles 1999, at 45-62; WILDERSPIN M. / LEWIS X., 'Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres', in: *Rev. crit. dr. int. pr.* 2002, at 1-37 and 289-313; FALLON M. / MEEUSEN J., 'Private International Law and the Exception of Mutual Recognition', in this *Yearbook* 2002, at 53; ROSSOLILLO G., *Mutuo riconoscimento e tecniche conflittuali*, Padova 2002, at 228; PULJAK M.P., Le *droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité*, Aix en Provence 2003, *passim*; HEUZE V., 'De la compétence de la loi du Pays d'origine en matière contractuelle ou l'anti-droit européen', in: *Mélanges Paul Lagarde* (note 5), at 393-415; JOBARD-BACHELLIER M.N., 'La portée du test de compatibilité communautaire en droit international privé contractuel', in: *Mélanges Paul Lagarde* (note 5), at 475-491; BERTOLI P., *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Milano 2005, *passim*; ROSSOLILLO G., 'Territorio comunitario, situazione interna all'ordinamento comunitario e diritto internazionale privato', in: *Riv. dir. int.* 2004, p. 695-713, at 711; ROSSI L.S., 'L'incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla 'comunitarizzazione' alla 'costituzionalizzazione'', in: *Riv. dir. int. priv. proc.* 2004, at 74; BENEDETTELLI M.V., 'Connecting factors, principles of coordination between conflict systems, connecting factors of applicability: three different notions for a «European Community Private International Law»', in: *Dir. un. eur*. 2005, at

The general topic is certainly interesting. The demarcation of the topic in this study prevents me from fully investigating the issue,[20] forcing me to examine it

423-440; PICCHIO FORLATI M.L., 'Critères de rattachement et règles d'applicabilité, à l'heure de la protection des droits de l'homme', in: *Rev. crit. dr. int. pr.* 2005, at 889-907; PUSTORINO P., 'Observations sur les principes généraux opérant dans le droit international privé et procédural communautaire', in: *RDUE* 2005, at 113-158. See also the studies noted below on the compatibility of the connecting factor of citizenship with Community law. For a different topic, which however is contiguous to the nature and methods used by the Community provisions of international private law, see POCAR F., 'La comunitarizzazione del diritto internazionale privato: una 'European Conflict of Laws Revolution'?', in: *Riv. dir. int. priv. proc.* 2000, at 873-884; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 1999 – die Abendstunde der Staatsverträge', in: *IPRax* 1999, at 401-413; MOURA RAMOS R.M., 'Un diritto internazionale privato della Comunità Europea: origine, sviluppo, alcuni principi fondamentali', in: *Studi in onore di Francesco Capotorti*, Milano 1999, at 273-305; BASEDOW J., 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', in: *C.M.L.Rev*. 2000, at 706; BOELE-WOELKI K., 'Unification and Harmonization of Private International Law in Europe', in: *Liber Amicorum Kurt Siehr*, The Hague 2000, at 61-78; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht', in: *IPRax* 2000, at 454-465; ID., 'Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR', in: *IPRax* 2001, at 501-514; REMIEN O., 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice', in: *C.M.L. Rev.* 2001, at 76; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2002: Zur Wiederkehr des Internationalen Privatrechts', in: *IPRax* 2002, at 461-471; BARIATTI S., 'Prime considerazioni sugli effetti dei principi generali e delle norme materiali del Trattato CE sul diritto internazionale privato comunitario', in: *Riv. dir. int. priv. proc.* 2003, at 671-706; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2003: Der Verfassungskonvent und das Internationales Privat- und Verfahrensrecht', in: *IPRax* 2003, at 485-495; PICONE P. (note 11), at 485-525; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2004: Territoriale Erweiterung und methodische Rückgriffe', in: *IPRax* 2004, at 481-493; ROSSI L.S. (note 19), at 63-84; PATAUT E., 'De Bruxelles à La Haye. Droit international privé communautaire et droit international privé conventionnel', in: *Mélanges Paul Lagarde* (note 5), at 661-695; JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2005: Hegemonialgesten auf dem Weg zu einer Gesamtvereinheitlichung', in: *IPRax* 2005, pp. 481-493; POCAR F., 'La codification européenne du droit international privé: vers l'adoption de règles rigides ou flexibles vers les États tiers?', in: *Mélanges Paul Lagarde* (note 5), at 697-705; ELVIRA BENAYAS M.J., 'El reparto de competencias entre la Unión europea y los Estados en materia de Derecho internacional privado. Drama en tres actos', in: *Homenaje Julio D. González Campos*, Madrid 2005, at 1453; KREUZER K.F., 'Typen Europäischer Kollisionsnormen', *ibidem*, at 1663-1686; VIRGÓS SORIANO M. / GARCIMARTÍN ALFÉREZ F.J., 'Estado de origen vs. Estado de destino: las diferentes lógicas del Derecho internacional privado', in: *Homenaje Julio D. González Campos*, at 1787-1814; BALLARINO T. / MARI L., 'Uniformità e riconoscimento. Vecchi problemi e nuove tendenze della cooperazione giudiziaria nella Comunità europea', in: *Riv. dir. int.* 2006, at 7.

[20] I leave aside the problem of whether the residence connecting factor is, either in large or small part, compatible with Community law, as regards the connecting factor of nationality. For this problem see among others: PICCHIO FORLATI M.L. (note 19), at 915; LAGARDE P., 'Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures', in: *RabelsZ* 2004, at 239; JUENGER F.K., 'The national

with regards to only the aspects concerning the specific problem of the capacity of natural persons. Let me state right away that from my point of view it is impossible to reach a single uniform solution, even in the restricted scope I examine. I will thus focus on two different situations, mainly the capacity forming part of personal status, as opposed to negotiating capacity in international commerce. I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law's provision on personal status.[21] In contrast, I believe that by analysing the negotiating capacity in international commerce anew, it is possible to agree with and maintain the idea that applying the connecting factor of nationality to negotiating capacity is incompatible with the Community principle of non-discrimination.[22]

III. Discriminations Inherent in the Effects of the Connecting Factor of Nationality and in the Content of the *Lex Causae*

In order to show the types of discrimination that are possibly created by the use of nationality as a connecting factor, it seems useful to employ a few examples.

---

law principle', in: GERKENS J.F. / VIGNERON R. / PETER H. / TRENK-HINTERBERGER P. (ed.), *Mélanges Fritz Sturm*, Liège 1999, at 1519; BOGDAN M. (note 18), at 1286; DAVÌ A., 'Riflessioni sul futuro del diritto internazionale privato europeo delle successioni', in: *Riv. dir. int.* 2005, at 313.

[21] See BALLARINO T. / UBERTAZZI B. (note 18), at 100. See also JAYME E., 'Identité culturelle et intégration: le droit international privé postmoderne', in: *Recueil des Cours* 1995, t. 253, at 172; PULJAK M.P. (note 19), *passim*; KINSCH M.P., 'Principe d'égalité et conflits de lois', in: *Trav. Com. fr. dr. int. privé* 2002-2004, at 125; BERTOLI P. (note 19), at 274; BORRAS A. / GONZALEZ CAMPOS J.D., 'La loi nationale à l'heure de la réforme du droit international privé espagnol', in: *Mélanges Paul Lagarde* (note 5), at 141; PUSTORINO P. (note 19), at 120; PICCHIO FORLATI M.L. (note 19), at 918; DAVI A. (note 20), at 313 and 318. Specifically, PULJAK M.P. and PUSTORINO P. do not distinguish between personal and international commerce status, but rather hold that the connecting element of nationality used in neutral conflict of laws rules is always compatible with Community law. They hold instead that the connecting factor of citizenship is always unjustifiedly discriminating. Also in matters relating to personal status, see the following authors: BERGÉ J.S., *La protection internationale et communautaire du droit d'auteur. Essai d'une analyse conflictuelle*, Paris 1996, at 366; JUENGER F.K. (note 20), at 1536; BASEDOW J., 'The effects of globalization on Private International Law', in: BASEDOW J. / KONO T., *Legal Aspects of Globalization*, 's-Gravenhage-London-Boston 2000, at 8; BOGDAN M. (note 18), at 1286.

[22] See DROBNIG U. (note 13), at 636-662; ID. (note 13), at 526-543; FALLON M. (note 19), at 128; SANCHEZ LORENZO S. (note 19), at 73; BERGÉ J.S. (note 21), at 366; JUENGER F.K. (note 20), at 1536; BASEDOW J. (note 21), at 8; BOGDAN M. (note 18), at 1286.

An Italian Christian man wants to get married. He has a choice from among three different girls, one of whom is Italian, another Egyptian, and the third Iranian. All the three women are Muslims. The relevant national laws would give the man the capacity to get marry the Italian girl (notwithstanding her being Muslim) but not to the Egyptian or and Iranian girls (specifically because they are Muslims).[23] The problems relating to religious faith pertain to the IPL category of the capacity to marry. The man doesn't want to wait for permission to get married ('nulla osta') to come from the Islamic countries, which is necessary to get married in Italy (ex art. 116 of the Italian civil code), and he doesn't want to wait for an Italian judgment declaring the Islamic State's negotiation of marriage capacity contrary to Italian public order. Therefore he marries the Italian girl.

Another example involves an Italian antiques dealer who required to sell the same artistic object across a large distance to three different persons residing abroad, who are Italian, French, and Spanish citizens respectively. The three different possible clients' capacity to stipulate the contract is determined by the law of their respective home States. The dealer reasonably knows the rules related to the capacity to act established by Italian law, but ignores the ones established by foreign laws. He doesn't then want to take the risk of seeing his contract declared void by reason of the foreign client's incapacity. Therefore he stipulates the agreement with the Italian citizen.

A final example is partially based on the issues examined by the European Court of Justice in the *Boukhalfta* decision. In this case, the German embassy in Algeria wants to hire an employee. The embassy has the choice of three persons residing in Algeria. Those three persons have three different nationalities, Belgian, Italian, and German, respectively. The embassy wants to enter into an employment agreement that contains a choice of law clause which submits the contract (and the related capacity to stipulate it) to German law. Nevertheless, German law regulates the German citizens' capacity to conclude an employment contract with a German embassy, but doesn't regulate the same capacity with respect of foreign citizens. The embassy knows the German discipline related to the capacity to work, but ignores the ones established by the foreign laws. The German embassy doesn't then want to take the risk of seeing its employment contract declared void by reason of the foreign workers incapacity. Therefore the German embassy hires the German employee.

These examples show that the connecting factor of nationality can lead to three different types of discrimination. The first type of discrimination is indirect or factual. Notice that in all of the three of the above examples the factual situations have the same elements, except for individual nationalities of the persons involved, and yet they are not treated the same way by applying the same law but are treated differently because of the reference to different applicable laws. Here, the discrimination is specifically found in the abstract difference between the laws required to regulate the case.

[23] On the Muslim incapacity to marry because of different religions, see paragraphs 25 and 30 of my monograph quoted under the asterisk that appears at the beginning of this study.

The second type of discrimination is also indirect or factual, but it arises from the effects of applying the connecting factor of nationality, which in some cases affirms and in other cases denies the capacity of a natural person: here, the discrimination is not caused by the mere difference of applicable laws like in the first kind of discrimination, but rather from the effects of the concrete application of the one or other laws referred to.

Last but not least, the third type of discrimination, which differs from the first two, is direct. It arises where the national law referred to by the provision of private international law only applies to citizens, not to aliens.

At this point, the three abovementioned types of discrimination, as well as their compatibility with the community principle of non-discrimination, must be examined. To simplify our analysis, it is conducive to start with the simplest hypothesis, the second one, and then to examine third one and first types of discrimination in that order.

The second type of discrimination, which consists in the effects of the concrete application of the one or other law referred to, is objectively justified due to the lack of uniformity between the substantive laws in the different Member States of the EU.[24] Since the *Walt Wilhelm* case, the European Court of Justice has stated that 'Article 7' (now 12) 'of the EEC Treaty prohibits every Member State from applying its law on cartels differently on the ground of the nationality of the parties concerned. However, Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various member States.'

The third type of discrimination arises where the PIL rule refers to a national law that has a discriminating content, as it provides for a different treatment of citizens and aliens. With regards to this type of discrimination, the ECJ expressly stated in the *Walt Wilhelm* case that 'the laws of the various member States' shall 'affect all persons subject to them, in accordance with objective crite-

[24] Since the 1969 judgment in *Walt Wilhelm*, the ECJ has expressly stated that 'Article 7 of the EC Treaty (now Article 12 EU) prohibits Member States from applying their laws on cartels differently on the ground of the nationality of the parties concerned. Article 7 is only concerned with disparities in treatment resulting for persons and companies subject to Community law from divergences in the laws of the Member States.' See point 13 of the grounds in the judgment in Walt Wilhelm. See also point 15 of the ECJ's judgment of 24 January 1991, C-339/89, *Alsthom Atlantique*, in: *Rec.*, I-107 on which see HERMITTE M.A., 'Note to Alsthom Atlantique', in: *Clunet* 1991, at 488-489; GONZALEZ CAMPOS J.D., 'La Cour de justice des Communautés européennes et le non-droit international privé', in: *Festschrift für Eric Jayme*, München 2004, at 267; BALLARINO T. / UBERTAZZI B. (note 18), at note 59; PUSTORINO P. (note 19), at 121, note 23. See also point 17 of the ECJ'S judgment of 1 February 1996, C-177/94, *Perfili*, in: *Rec*., I-161, and also the aforementioned references to jurisprudence. For this judgment see ADOBATI E., in: *Dir. com. scambi int.* 1996, at 337-338; SANCHEZ LORENZO S. (note 19), at 73; GONZALEZ CAMPOS J.D. (this note), at 270.

ria and without regard to their nationality.'[25] In the case at hand, the Community principle of non-discrimination operates and has effects at the level of application of the national law referred to with the specific aim to bar the application of such a law, as far as it leads to discrimination. In the same case, the Community principle of non-discrimination may operate as a limit to the application of the law referred to, as a mandatory rule or (depending on the case) as a public policy principle, and it impedes the application of the part of the national provision that is discriminating.[26]

IV. The Discrimination Arising from the Mere Adoption of the Connecting Factor of Nationality

The problem becomes more complex as it turns to the first type of discrimination, i.e. the one that arises from the mere adoption of the connecting factor of nationality.

In this context, one opinion holds that the Community principle of non-discrimination does not operate at the level of a provision of private international law that contains the connecting factor of nationality, but rather at the different level of the application of the national law referred to: its objective is to bar the application of such law as far as this application would lead to discrimination. This first thesis obviously acknowledges that, according to the ECJ, the laws of each Member State must be applied to each person falling under the provision in accordance with objective connecting factors and without regard to nationality.[27] According to the same opinion, although the ECJ apparently includes all types of national provisions in its reasoning, including those on private international law, so that the ECJ jurisprudence could be interpreted to prevent national provisions from employing connecting elements that are subjective or dependent on nationality, in reality, this was not the ECJ's purpose. The ECJ did not use the expression 'objective connecting factors' to refer to the connecting element of nationality adopted in the PIL rules, but rather to refer to the criteria of application of the substantive law rules that limit (or do not limit) their application to only citizens. It follows that the objective connecting factors referred to by the ECJ do not include connecting elements of the

[25] See point 13 of the Walt Wilhelm judgment. This formulation is consistently used by the ECJ in its jurisprudence. See e.g. point 17 of the ECJ's judgment in Perfili cited under note 22 and also the aforementioned references to jurisprudence.

[26] E.g. provisions that are analogous to those in force in Belgium, according to which the existence of obligations arising from cheques and bills of exchange are regulated by national law or the lex loci, are incompatible with Article 12 EU. In this sense see RIGAUX F., *Droit international privé, I., Théorie générale*, Bruxelles 1987, at 220; RIGAUX F. / FALLON M., *Droit international privé, II, Droit positif belge*, Bruxelles 1993, at 579; PULJAK M.P. (note 19), at 249; BERTOLI P. (note 19), at 284.

[27] See note 26.

conflict of laws rules of the Member States, but only the 'connecting factors of application' (i.e., the conditions of applicability) of the respective substantive national law of the Community States. This first opinion concludes that the use of the connecting factor of nationality in private international law rules of the States does not conflict with the Community principle of non-discrimination.[28]

This opinion is undoubtedly correct, so far as it holds that the application of national law to capacity discriminates in two ways: (1) by choosing the connecting factor of nationality to regulate certain cases, and (2) by creating discriminating effects that arise from the application of a substantive law that applies to only citizens. The first kind of discrimination consisting in choosing the connecting factor of nationality to regulate certain cases operates exclusively at an abstract level and is purely formal, whereas the second type of discrimination consisting in creating discriminating effects that arise from application of a substantive law that applies only to citizens operates at a concrete level and actually has a substantial nature. The opinion outlined here is then perfectly right when it highlights this last type of discrimination, since this is the more immediately relevant one. Nevertheless, the first discrimination consisting in choosing the connecting factor of nationality to regulate certain cases also constitutes a treatment differentiation, which is logically preliminary to any other discrimination so far considered here; therefore it is also necessary to examine whether also the choosing of the connecting factor of nationality to regulate certain cases is compatible with the Community principle of non-discrimination. I will now turn to this question.

For this purpose, I first observe that discriminations that arise from the connecting factor of nationality cannot be justified solely by the fact that they are pro-

[28] Meaning that due to their nature the bilateral conflict of law rules are always exempt from Community control, according to Article 12 EU, and that the latter instead exclusively regards the substantive law that is referred to by the PIL rule see BALLARINO T. (note 15), at 10; ID., 'From Centros to Überseering. EC Right of Establishment and the Conflict of Laws', in this *Yearbook* 2002, at 203-216; ID., 'Les règles de conflit sur les sociétés commerciales à l'épreuve du droit communautaire d'établissement', in: *Rev. crit. dr. int. pr.* 2003, at 373-402; ID., 'Sulla mobilità delle società nella Comunità europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie', in: *Riv.Soc.* 2003, at 669-698; LAGARDE P., 'Nationalité en droit international privé', in: *Annales de Droit de Louvain* 2003, at 215; GONZALEZ CAMPOS J.D. (note 24), *passim*. By contrast, for holding that the conflict of laws rules of the Member States are subject to EU control, according to Article 12 EU, see the following authors: DROBNIG U. (note 13), at 636-662; ID. (note 13), at 526-543; FALLON M. (note 19), at 128; KOHLER C., 'La Cour de justice des Communautés européennes et le droit international privé', in: *Trav. Com. fr. dr. int. privé* 1993-1994/1994-1995, at 73; BERGE J.S. (note 21), at 366; SANCHEZ LORENZO S. (note 19), at 73; GARDEÑEZ SANTIAGO M., 'La imperatividad internacional del principio comunitario de no discriminación por razón d la nacionalidad. Reflexiones en torno a la Sentencia del TJCE Boukhalfa de 30 de abril de 1996, desde la óptica del Derecho internacional privado', in: *RIE* 1996, at 863-877; JUENGER F.K. (note 20), at 1536; BASEDOW J. (note 21), at 8; BOGDAN M. (note 18), at 1286; BERTOLI P. (note 19), at 280; BENEDETTELLI M.V. (note 19), at 434.

vided for by a private international law provision, more specifically by a neutral bilateral conflict of laws rule, rather then a substantive law norm.

First, the Community principle of non-discrimination is a general principle and has been formulated in a sufficiently broad way so as to apply to all types of discrimination, without regard to its legal source. Thus, it also applies when discrimination arises from a PIL rule.

Second, the ECJ principle that the Member State laws shall not be applied through subjective connecting factors or factors that depend on nationality is also formulated in such a broad way that it applies to all types of discrimination without regard to its legal source. As a result, it too applies where discrimination arises from a PIL rule.

Third, the ECJ has already, at least in the following cases, applied the Community principle of non-discrimination to some substantive State provisions that expressly limit their scope of application and, therefore, fall into the category of a self-limited norm: *Walt Wilhelm*,[29] *Phil Collins*,[30] and *Boukhalfta*.[31] In all three cases (which are German), provisions that apply to only German citizens were in dispute. Specifically, all three judgments stated (in the context of preliminary ruling proceedings according to Article 234 EC Treaty) that the German provisions in question were contrary to the Community principle of non-discrimination.[32] Now

[29] *Supra* note 10.

[30] ECJ, 20 October 1993, Joined cases C-92/92 and C-326/92, *Phil Collins*, in: *Rec.*, I-5145. Regarding this judgment see ROSSI L.S., 'Principio di non discriminazione e diritti connessi al diritto d'autore, Note to *Phil Collins'*, in: *Foro it.* 1994, at 316-320; FABIANI M., 'Divieto di discriminazioni in ambito CEE e protezione degli artisti esecutori comunitari contro i Bootlegs, Note to *Phil Collins*', in: *Il dir. d'autore* 1994, at 284-288; DWORKIN G / STERLING J.A.L., '*Phil Collins* and the Term Directive', in: *EPIL* 1994, at 187-190; BOUTARD-LABARDE M.C., in: *Clunet* 1994, at 501; SMITH L.J., 'Rules of reciprocity and non-discrimination: national and international copyright in a European framework, Note to *Phil Collins'*, in: *ELR* 1994, at 405-412; WALTER M., 'Il divieto di discriminazione nell'accordo sullo spazio economico europeo ed i suoi riflessi sulla tutela del diritto d'autore e dei diritti connessi (con particolare riferimento al diritto austriaco ed ai rapporti tra Austria e Italia)', in: *AIDA* 1994, at 143-160; VERLOREN VAN THEMAAT W. / WEFERS BETTINK W., 'Another Side of the Story. Why the Phil Collins Judgment does not Necessarily Mean the End of the Reciprocity Principle?', in: *EPIL* 1995, at 307-310; FLYNN L., 'Note to Phil Collins', in: *C.M.L. Rev.* 1995, at 997-1011.

[31] ECJ, 30 April 1996, C-214/94, *Ingrid Boukhalfta v Bundesrepublik Deutschland*, in: *Rec.* I-2253. See GARDEÑEZ SANTIAGO M. (note 28); LHOEST O., in: *C.M.L. Rev.* 1998, at 247-267; GONZALEZ CAMPOS J.D. (note 24), at 274.

[32] The above-mentioned case, *Walt Wilhelm*, is from 1969 and concerned the antitrust law of the Federal Republic of Germany; the latter was exclusively applicable in the interest of German national companies. The ECJ has expressly stated that Article 7 is not concerned with disparities in treatment that can result from objective connecting factors. But at the same time, it has also stated that such objective connecting factors did not exist in the case at hand before the court seised. The second previously mentioned case (Phil Collins) is from 1993 and concerned, once again, German law, more specifically, a German law provision on author's rights, whose protection was reserved for German citizens. The ECJ held that 'precluding the legislation of a Member State from denying to authors and performers

self-limited provisions are within a conceptual framework which is related to the one of "imbalance" conflict of laws rules in favour of the *lex fori* as well as to the public policy one'.[33] Accordingly, the three ECJ judgments mentioned above show an infringement of Community law in a conceptual framework that is close to or even part of private international law and the connecting factor of nationality.[34]

Even more interesting are the ECJ's judgments concerning provisions that require aliens, wanting to enforce assets of the alleged debtor abroad, to provide a security deposit before they can bring proceedings in the forum. On this subject, in particular, the judgments in *Hubbard*[35] of 1 July 1993 and *Mund & Fester*[36] of 10 February 1994 have been issued on the basis of Article 234 EU and have declared

---

from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory' (conclusion of the judgment). The third abovementioned case (Boukhalfta) is from 1996 and once again concerns German law. More specifically, it dealt with a provision in German law that 'governs, *inter alia*, the status of staff of diplomatic representations […] and distinguishes between local staff having German nationality and those not having German nationality' (point 3 of the judgment). The German law at issue in this case stated that the German labour law rules relating to 'all aspects of the employment relationships' (point 1 of the judgment) were applicable exclusively to German citizens. The claim was that the abovementioned provisions could therefore not be applied to a Belgian citizen who worked for a German embassy, who was as a result subject to the national laws of the host country, in this case, Algerian law; the ECJ held that 'the prohibition of discrimination based on citizenship [...] applies to a national of a Member State who is permanently resident in a non-member contry' (point 1 of the judgment), in this case the Belgian citizen Boukahlfta. For more on this case and its relevance to maintaining the idea that neutral bilateral PIL rules can contain some kind of discrimination that is not justified according to Article 12 EU, see LHOEST O. (note 31), at 266; BERTOLI P. (note 19), at 283.

[33] See MOSCONI F. / CAMPIGLIO C., *D.i.pr. Parte generale e contratti*, Torino 2004, at 190, according to whom 'amongst the methods which the respective legal systems apply in order to regulate cross border issues there is also the material one which comprehend the adoption of substantive law rules' that constitute mandatory provisions or 'which determine their scope of application'. See also GARDEÑEZ SANTIAGO M. (note 28), at 877; FALLON M. / MEEUSEN J. (note 19), at 53.

[34] See GARDEÑEZ SANTIAGO M. (note 28), at 877; FALLON M. / MEEUSEN J. (note 19), at 53.

[35] ECJ, 1 July 1993, C-20/92, *Hubbard*, in: *Rec.*, I-3777. On this judgment see AGUILAR BENÍTEZ DE LUGO, 'La cautio judicatum solvi a la luz de la sentencia del Tribunal de Justicia de las comunidades europeas de 1 de julio de 1993 en el caso *Hubbard/Hamburger'*, in: *BIMJ* 1993, at 5310-5322; DROZ G., in: *Rev. crit. dr. int. pr.* 1994, at 637-643; BORRÀS RODRIGUEZ A., 'Note to *Hubbard*', in: *RJC* 1994, at 541-545; BOUTARD-LABARDE M.C., in: *Clunet* 1994, at 500; GONZALEZ CAMPOS J.D. (note 24), at 270.

[36] ECJ, 10 February 1994, C-398/92, *Mund & Fester*, in: *Rec.*, I-467. On this judgment see BISCHOFF J.-M., in: *Clunet* 1994, at 535-539; GAUDEMET-TALLON H., in: *Rev. crit. dr. int. pr.* 1994, at 392-397; GARCIMARTÍN ALFÉREZ F.J. / HEREDIA CERVANTES I. (note 8), at 39-79; PIETROBON A., in: *Foro it.* 1995, at 239-241.

German provisions of the abovementioned type contrary to the Community principle of non-discrimination on the basis of nationality.[37] A well-established doctrine suggests that both rules regarding *cautio iudicatum solvi* and preventive injunctions constitute PIL rules; it emphasizes that the ECJ held that they were incompatible with the principle of non-discrimination according to Article 12 EU and concludes that 'les règles nationales de droit international privé n'échappent, en tant que telles, en aucune manière à l'emprise du droit communautaire, et doivent céder dans la mesure où elles sont incompatibles avec celui-ci.'[38] The above mentioned judgments thus demonstrate that the prohibition against discrimination on the basis of nationality directly affects the PIL rules of the States and, in particular, directly affects the PIL rules that operate on the basis of the connecting factor of nationality.

The ECJ's judgments regarding the Member States' conflicts of law rules that resolve positive conflicts of citizenship are even more interesting. On this subject, the judgments *Micheletti*[39] and *Avello*[40] were rendered in 1992 and 2003 respectively. Both judgments were concerned rules analogous to Article 19(2) of Italian private international law, according to which 'where the person has various citizenships the law of the State is applied with which the person has the closest connection. Where one of the citizenships is Italian, it prevails.' In both judgments, the Court held that the abovementioned PIL rules of the Member States were contrary to Community law. Ballarino and I have already dissected the content of the two judgments[41] and have shown that according to the ECJ's jurisprudence, Community law has a direct effect on national PIL rules and, in particular, directly affects PIL rules that are based on nationality.

Finally, it is extremely interesting to note that on October the 14th 2008, the ECJ held in the *Grunkin* case that a German private international law provision that adopted the connecting factor of nationality to determine a person's surname was contrary to Community law when it obliges the national authorities to 'refuse to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.'[42] With this judgment the ECJ maintained that the German PIL rule utilizing the connecting factor of nationality for the determination of a person's surname should not be totally over-

[37] See the conclusion of the Hubbard judgment. Moreover, this conclusion is also clear for the case Mund & Fester. As such, the rules that authorise the preventive injunction of an alleged debtor's assets where the judgment has to be enforced abroad mostly affect foreigners, who typically have their assets abroad, and activates the connecting factor of nationality with regard to them.

[38] See KOHLER C. (note 28), at 73. See also GARCIMARTÍN ALFÉREZ F.J. / HEREDIA CERVANTES I. (note 8), at 65; PUSTORINO P. (note 19), at 121.

[39] *Supra* note 17.

[40] *Supra* note 18.

[41] See BALLARINO T. / UBERTAZZI B. (note 18), at 89.

[42] *Supra* note 18.

come, as long as it also allows the application of a law different than the national law in 'exceptional cases.' This decision is therefore completely consistent with the thesis maintained here, since it demonstrates that according to the ECJ's jurisprudence, Community law has a direct effect on national PIL rules and, in particular, directly affects PIL rules that are based on nationality.

V. The Objective Justification for this Last Discrimination with Regard to the Capacity Related to Personal Status

When the connecting factor of nationality is applied to capacity, it contains some discriminating elements that cannot be justified by the fact that they arise from rules of private international law. At this point, whether the application of the connecting factor of nationality to capacity can be objectively justified by other reasons remains to be seen. For this purpose, the capacity that falls under personal status and the capacity regarding international commerce have to be distinguished.

The application of the connecting factor of nationality to the capacity that falls under personal status seems to be objectively justified, above all, by the need to issue uniform decisions regarding the subjective conduct of a person, and thus, to apply a uniform rule of personal status to the same person. Consequently, application of the connecting factor to personal status capacity is also justified by the opportunity reasons that always suggested that States submit personal status to subjective connecting factors, such as nationality.[43]

The conclusion proposed here,[44] on the other hand, seems to implicitly share the view expressed in the ECJ's judgments that were not rendered on capacity

[43] Due to the lack of space, I cannot at this point cover the historic and traditional outline of the application of the lex patriae in matters relating to capacity in Italian law, foreign laws, and conventions regarding PIL law. On this subject, I thus refer to Chapter 1 of my monograph quoted under the asterisk that appears at the beginning of this study.

[44] There are two groups of authors who hold that the connecting factor of nationality is compatible with the Community principle of non-discrimination, where it is used in matters relating to personal status in a neutral way by bilateral conflict of law rules. The first group includes DROBNIG U. (note 13), at 538; FALLON M. (note 19), at 128; BALLARINO T. / UBERTAZZI B. (note 18), at 100: and holds that the connecting factor of nationality is contrary to Community law in only matters relating to international commerce, but not in matters of personal status. The second group includes JAYME E. (note 21), at 172; PULJAK M.P. (note 19), *passim*; KINSCH M.P. (note 21), at 125; BERTOLI P. (note 19), at 274; BORRÁS A. / GONZALEZ CAMPOS J.D. (note 21), at 141; PUSTORINO P. (note 19), at 120; PICCHIO FORLATI M.L. (note 19), at 918; LAGARDE P. (note 28), at 215; DAVÌ A. (note 20), at 313 and 318: and holds that the connecting factor of nationality used in bilateral conflict of laws provisions never is contrary to Community law. Dissenting BERGÉ J.S. (note 21), at 366; BOGDAN M. (note 18), at 1286 according to whom the connecting factor of nationality is always incompatibile with Community law, even where it is used in neutral, bilateral

matters, but on other personal status ones in PIL law. Among these judgments are *Avello* and *Grunkin*,[45] which concerned private international law rules relating to individual's names – a concept of personal status – that, at the same time, referred to national law. These cases are obviously comparable to the negotiating capacity cases previously discussed that also referred to national law. In *Avello* and *Grunkin* the ECJ decided not to declare this reference totally incompatible with Community law. It is reasonable to imagine that it would adopt the same conclusion to the question of capacity relating to personal status.[46]

---

conflict of laws provisions in matters of personal status. 'De iure condendo' and whithout a principal consideration of the problem of compatibility between the connecting factor of nationality and EC and WTO law, see MOSCONI F., 'A Few Questions on the Matter of International Uniformity of Solutions and Nationality as a Connecting Factor', in: BASEDOW J. (ed.), *Liber amicorum Kurt Siehr* (note 19), at 480, in whose view the connecting factor of nationality constitutes an obstacle to general international harmonisation and, therefore, should not be applied in matters relating to personal status.

[45] *Supra* note 18.

[46] See BALLARINO T. / UBERTAZZI B. (note 18), at 100. See also ECJ 10 June 1999, C-430/97, *Jutta Johannes/Hartmut Johannes*, in: *Rec*., I-3475, by which the ECJ 'upheld' the German conflict of law rules that use the connecting factor of nationality in matters relating to divorce, as it held that divorce did not (yet) fall within the scope of Community jurisdiction. The communitarization of family law has had the consequence of today making divorce fall within the scope of Community law. ON this judgment, see RIGAUX F., 'Versongungsausgleich and Art.12 EC: Discriminations based on the nationality and German private international law (zu EuGH, 10.6.1999 – Rs C-430/97', in: *IPRax* 2000, at 287-288, who criticises the ECJ's failure to define its position; QUIÑONES ESCÁMEZ A., 'Compatibilidad de la norma de conflicto relativa a los efectos del divorcio con el derecho comunitario', in: *Revista de derecho comunitario europeo* 2001, at 645-661; FRANCQ S., 'Droit civil, droit familial et droit international privé: un cocktail qui plaît peu à la Cour', in: *Zeitschrift für europäisches Privatrecht* 2002, at 597-610; LAGARDE P. (note 28), at 215; GONZALEZ CAMPOS J.D. (note 24), at 268; BALLARINO T. / UBERTAZZI B. (note 18), at note 67. On the communitarisation of family law see MCGLYNN C., 'A Family Law for the European Union?', in: SHAW J. (ed.), *Social Law and Policy in an Evolving European Union*, Oxford-Portland, 2000, at 223-241; MCELEAVY P., 'The Brussels II Regulation: how the European Community has moved into family law', in: *ICLQ* 2002, at 883-908; JÄNTERÄ-JAREBORG M., 'A European Family Law for Cross-border Situations – Some Reflections Concerning the Brussels II Regulation and its Planned Amendments', in: this *Yearbook* 2002, at 67-82; BARRETT G., 'Family Matters: European Community Law and Third-country Family Members', in: *C.M.L. Rev.* 2003, at 369-421; STALFORD H., 'Regulating Family Life in Post-Amsterdam Europe', in: *ELR* 2003', at 39-52; REICH N. / HARBACEVICA S., 'Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons', in: *C.M.L. Rev.* 2003, at 615-638; CARACCIOLO DI TORELLA E. / MASSELOT A., 'Under Construction: EU Family Law', in: *ELR* 2004, at 32-51; BALLARINO T. / UBERTAZZI B. (note 18), at 88; MENGOZZI P., 'I problemi giuridici della famiglia a fronte del processo di integrazione europa', in: *Famiglia e diritto* 2004, at 643-647; GONZALEZ-BEILFUSS C., 'Relaciones e interacciones entre Derecho comunitario, Derecho Internacional Privado y Derecho de familia europeo en la construcción de un espacio judicial común', in: *AEDPIL* 2004, at 117-187; BARATTA R., 'Verso la 'comunitarizzazione dei principi fondamentali del diritto di famiglia', in: *Riv. dir. int. priv.*

VI. The Lack of an Objective Justification for this Discrimination with Regard to the Negotiating Capacity in International Commerce and the Following Inapplicability of the Nationality Connecting Factor

The application of the connecting factor of nationality to the capacity regarding international commerce, however, does not seem objectively justifiable.[47] This conclusion is based mainly on two principal collections of arguments.

The first collection of argument consists of opportunity reasons that, with regards to the negotiating capacity in international commerce, suggest that the *lex substantiae actus* should apply and, therefore, rejects the connecting factor of nationality. In particular:

(i) The provisions regarding negotiating capacity in international commerce that submit it to the *lex substantiae actus* allow for a uniform determination for different aspects of the same facts.[48]

(ii) The same provisions spare any recourse to the method of adaptation, which is difficult to apply but necessary where the capacity to act is made subject to a law different than the one applicable to the act itself.[49]

---

proc. 2005, at 573-606; BARIATTI S. / RICCI C. (eds.), *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma III*, Padova 2007. See also the ECJ judgment of 28 April 1994, C-305/92, *Albert Hoorn v Landesversicherungsanstalt Westfalen*, in: *Rec.*, I-1525 (see BALLARINO T. / UBERTAZZI B. (note 18), at 103) by which the ECJ tacitly 'upheld' the German conflict of law rule that used the connecting factor of citizenship in matters relating to pension law and, thus, in a matter that does not fall within the scope of international commerce. See ECJ 5 November 2002, C-208/00, *Überseering BV v. Nordic Construction Company GmbH*, in *Rec*., I-9919 (on which see BALLARINO T. (note 28), at 203-216; BENEDETTELLI M., 'Criteri di giurisdizione in materia societaria e diritto comunitario', in: *Riv. dir. int. priv. proc.* 2002, at 879-922; LAGARDE P., 'Note to Überseering', in: *Rev. crit. dr. int. pr.* 2003, at 524-536; LUBY M., 'Note to Überseering', in: *Clunet* 2003, at 608-611; BALLARINO T. (note 28), at 669-698, by which the ECJ once more tacitly 'upheld' the German conflict of laws rule that uses the connecting factor of citizenship in matters relating to personal status of legal entities.

[47] See DROBNIG U. (note 13), at 650; ID. (note 13), at 526-543; FALLON M. (note 19), at 128; BERGÉ J.S. (note 21), at 366 ; SANCHEZ LORENZO S. (note 19), at 73.

[48] See in: *Annuaire IDI* 1987, at 62, I, the observations of GANNAGÉ P., at 366; JAYME E., at 374; CARRILLO-SALCEDO J., at 361; GRAVESON R., at 372 and LOUSSOUARN Y., at 335. *Cf.* also MOSCONI F., 'Le norme relative alla capacità dei contraenti nella convenzione CEE sulla legge applicabile alle obbligazioni contrattuali', in: *Dir. com. sc. int*. 1983, p 1-15, at 2; ID., 'La legge regolatrice della capacità delle persone fisiche: dalle proposte di Pasquale Stanislao Mancini alla prassi convenzionale', in: *Studi in onore di Roberto Ago*, Milano 1987, at 212.

[49] For the adaptation method in private international law in general, see CANSACCHI G., *Scelta e adattamento delle norme straniere richiamate*, Torino 1939, *passim*; BOUZA

(iii) In cases where the parties' are allowed to choose the applicable law, submitting the capacity considered here to the *lex substantiae actus* also allows that the capacity regarding the principal transaction and the capacity necessary for the choice of law are subject to the chosen law. Viewed from this angle, this approach leaves the maximum space possible to private autonomy.[50]

VIDAL N., *Problemas de adaptación en Derecho internacional privado y interregional*, Madrid 1977, *passim*; JAYME E. (note 21), at 145; FERNÁNDEZ ROZAS J.C. / SÁNCHEZ LORENZO S., *Derecho Internacional privado*, Madrid 2004, at 138.

[50] For the importance of allowing free choice of law in matters relating to personal status, and thus also capacity, see *Annuaire IDI* 1987, at 62, I, the observations by LOUSSOUARN Y., at 341; GANNAGÉ P. (note 48), at 360. See also JAYME E., 'Considérations préliminaires pour la délimitation de l'objet des travaux', in: *Annuaire IDI* 1992, at 63. See also CARLIER J.-Y., *Autonomie de la volonté et statut personnel*, Bruxelles 1992, *passim*; GANNAGE P., 'La pénétration de l'autonomie de la volonté dans le droit international privé de al famille', in: *Rev. crit. dr. int. pr.* 1992, at 425-454; ALUFFI BECK-PECCOZ R., 'Cittadinanza e appartenenza religiosa nel diritto internazionale privato. Il caso dei Paesi arabi', in: *Teoria politica* 1993, at 109; VIARENGO I., *Autonomia della volontà e rapporti patrimoniali tra coniugi*, Padova 1996; DROZ G., 'L'activité notariale internationale', in: *Recueil des Cours* 1999, t. 280, at 96; CARELLA G., *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, Bari 1999, *passim*; BUCHER A., 'La famille en droit international privé', in: *Recueil des Cours* 2000, t. 283, at 72; JAYME E., 'Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation', in: *Recueil des Cours* 2000, t. 282, at 31; DE CESARI P., *Autonomia della volontà e legge regolatrice delle successioni*, Padova 2001, *passim*; QUIÑONES ESCAMEZ A. (note 18), at 507-529; LAGARDE P. (note 18), at 192-202; ILIOPOULOU A. (note 18), at 565-579; LARA AGUADO A. (note 18), at 1-12; LAGARDE P., 'Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures', in: *RabelsZ* 2004, at 236-238; BALLARINO T. / UBERTAZZI B. (note 18), at 99, note 49. On the relevance of the connecting factor of the free choice of the parties in general, see CURTI GIALDINO A., *Il valore della volontà delle parti nel diritto internazionale privato*, Milano 1964, at 453-456; VON GIULIANO M., 'La loi d'autonomie: le principe et sa justification théorique', in: *Riv.dir. int. priv. proc.* 1979, at 217; STOJANOVIC S., *Die Parteiautonomie und der Internationale Entscheidungseinklang unter Besonderer Berücksichtigung des internationalen Ehregüterrechts*, Zurich 1983, at 31; STURM F., *Parteiautonomie als bestimmender Faktor im internationalen Familien und Erbrecht, in Rechts und Rechtserkenntnis. Festschrift für Ernst Wolf*, Köln-Berlin-Bonn-Munchen 1985, at 637; DAVÌ A., 'Le questioni generali del diritto internazionale privato nel progetto di riforma', in: *Riv. dir. int.* 1990, at 563-564; FORLATI PICCHIO M.L., 'Contratto nel diritto internazionale privato', in: *IV Dig. civ.*, Torino 1989, at 202; BALLARINO T., 'Codification du droit international privé italien', in: *Trav. Com. français dr. int. pr.* 1990-1991, at 103; HAY P., 'Flexibility versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law', in: *Recueil des Cours* 1991, t. 226, at 281-412; BOSCHIERO N., 'Norme di diritto internazionale privato 'facoltative'?', in: *Riv.dir. int. priv. proc.* 1993, at 541; DE BOER T., 'Facoltative Choice of Law – The Procedural Status of Choice of Law Rules and Foreign Law', in: *Recueil des Cours* 1996, at 225; VON OVERBECK A., 'L'irrésistible extension de l'autonomie en droit international privé', in: *Nouveaux itinéraires en droit: Hommage à François Rigaux*, Bruxelles 1993, at 619-636; BUREAU D., 'L'influence de la volonté individuelle sur les conflit de lois', in: *Mélanges en hommage à François Terré*, Paris 1999, at 285; HARTENSTEIN H., *Die Privatautonomie im*

(iv) Submitting the here examined capacity to the *lex substantiae* overcomes the traditional difference between States that apply the connecting factor of nationality to personal status (and thus also to capacity) and those that instead use the connecting factor of domicile or residence.[51] As a result, international harmonisation is increased and the way is paved for the introduction of uniform international PIL rules.[52]

(v) The PIL systems of the civil law States usually subject the negotiating capacity to the *lex personae*,[53] while common law States refer to the *lex contractus* or the *lex substantiae actus* and generally apply the principal of *favor actus* (Validity Rule). The common law States can therefore preserve the agreement or act when the *lex contractus* or the *lex substantiae actus* determine that the contractor lacks capacity, whereas the law of the person's domicile qualifies the person as having capacity.[54] The different orientations of the civil and common law can, in

---

Internationalen Privatrecht als Störung des europäischen Entscheidungseinklangs. Neueste Entwicklungen in Frankreich, Deutschland und Italien, Tübingen 2000; FERNÁNDEZ ROZAS J.C., *Ius Mercatorum. Autoregulación y unificación del Derecho de los negocios transnacionales, Colegios notariales de España*, Madrid, 2004, *passim*; ID., 'Lex mercatoria y autonomía conflictual en la contratación transnacional', in: *AEDIP* 2004, at 35-78. See also the resolution of the Institut de droit international of 31 August 1991 by Basilea on 'l'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées', in: *Annuaire IDI* 1992, at 14-79, 127-213 and 382-387.

[51] Due to reasons of space I cannot give an overview of the connecting factors used in matters relating to personal status by different States and by international conventions in this context. For this purpose I refer to Chapter 1 of my monograph quoted under the asterisk that appears at the beginning of this study.

[52] See VON OVERBECK A., 'La professio iuris comme moyen de rapprocher les principes du domicile et de la nationalité en droit international privé', in: *Liber Amicorum Baron Louis Frédéricq*, Gent 1966, at 1085-1112 and in: *Annuaire IDI* 1987, at 62, I, the observations made by LOUSSOUARN Y., at 341; GANNAGE P. at 360. See also JAYME E. (note 50), at 63. Also see CARLIER J.-Y. (note 50), *passim*; GANNAGÉ P. (note 50), at 425-454.

[53] See CARASSO M., *Des conflits de lois en matière de capacité civile spécialement en droit Suisse*, Lausanne 1938, at 182; CAPOTORTI F., 'La capacité en droit international privé', in: *Recueil des Cours* 1963, t. 110, at 153; ID., *Lezioni di diritto internazionale privato. Parte speciale: la capacità*, Bari 1966, *passim*; VON OVERBECK A.E., 'Existence and Capacity of natural persons, III, Private International Law, Chapter 15: Persons', in: *Int. Enc. Comp. Law*, Tübingen-Dordrecht-Boston-Lancaster 1972, at 3; GLENN H.P., *La capacité de la personne en droit international privé français et anglais*, Paris 1975, at 21 and CARLIER J.-Y. (note 50), at 174. See also in: *Annuaire IDI* 1987, at 62, I, the observations made by GANNAGÉ P., at 366 ss.; JAYME E., at 374 ss.; CARRILLO-SALCEDO J., at 361 ss.; GRAVESON R., at 372 ss.; LOUSSOUARN Y., at 335 ss.; CAPOTORTI F., at 356 ss..

[54] See EHRENZWEIG A.A., 'Contractual Capacity of Married Women and Infants in the Conflict of Laws', in: *Minnesota Law Rev.* 1959, p. 899-905, at 901 according to which 'were it not for a complex history of the problem reaching into a distant feudal past, and the more recent dogmatic deviation of our conflicts law, no one would doubt that the Rule of Validation is the law. Analysis of the case law governing contracts of married women and infants supports this proposition.' See VON OVERBECK A.E. (note 53), at 3 ss.; GLENN H.P. (note 53), at 21 ss. and CARLIER J.-Y. (note 50), at 174. See also *Annuaire IDI* 1987, at 62, I,

the abstract, lead to the application of two different laws to the capacity to negotiate. This can create a situation where one of the laws determines that the person lacks capacity, while the other law determines that the person has capacity; consequently, the agreement or the act that is void in one State is valid in the other. This situation is unsatisfactory. Thus, a uniformly applicable law governing the capacity of a party to conclude an agreement or to perform an act must be determined. This is especially true when there is a uniform Convention that designates a certain law for a special matter and even allows a choice of the applicable law. In such a case, subjecting the capacity to conclude an agreement or to perform an act to the *lex substantiae actus* seems necessary, as it would oblige all Contracting States to apply the same rules to both the act and the capacity to conclude and perform that act, or allow the parties to choose the law that would regulate it. This would maximise the unifying force of the Convention itself.[55]

(vi) In absence of an international convention, the reference to the *lex substantiae actus* in the rules considered here overcomes the traditional differences between the States that apply the connecting factor of nationality/domicile/residence to determine the law governing capacity and those that refer instead to the *lex substantiae actus*, thus contributing to international harmonisation.[56]

(vii) Where the PIL rule applies the *lex substantiae actus* to maximize the protection provided to the weaker party,[57] the corresponding rules on negotiating capacity in international commerce also subject the party's capacity to the law that provides the weaker party with the most protection.

(viii) Application of national law creates obvious inconveniences with regard to long distance contracts between persons in different States when one contracting party does not have all the necessary time to trace back the national law applicable to the other contracting party capacity to act. It also creates problems in internet contracts, where it is impossible to even identify the nationality of the other contracting party, let alone to trace back the national law applicable to his

---

observations by GANNAGÉ P., at 366 ss.; JAYME E., at 374 ss.; CARRILLO-SALCEDO J., at 361 ss.; GRAVESON R., at 372 ss.; LOUSSOUARN Y., at 335 ss.; CAPOTORTI F.,at 356 ss..

[55] See DE NOVA R., 'Obbligazioni', in: *Enc. Dir*., Milano 1979, at 468; MOSCONI F. (note 48), at 13; ID. (note 48), at 220-221.

[56] See MOSCONI F. (note 48), at 13; ID. (note 48), at 220-221.

[57] See POCAR F., 'La legge applicabile ai contratti con i consumatori', in: TREVES T. (ed.), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padova 1983, at 303-316; ALPA G., 'La tutela dei consumatori nella convenzione europea sulla legge applicabile in materia di obbligazioni contrattuali', *ibidem*, at 317-338; POCAR F., 'La protection de la partie faible en droit international privé', in: *Recueil des Cours* 1984, t. 188, at 393; FALLON M. / FRANCQ S., 'Towards Internationally Mandatory Directives for Consumer Contracts', in: *Liber Amicorum Kurt Siehr* (note 19), at 155-178; PICCHIO FORLATI M.L. (note 19), at 922; SINAY-CYTERMANN A., 'La protection de la partie faible en droit international privé. Les exemples du salarié et du consommateur', in: *Mélanges Paul Lagarde* (note 5), at 741; PIZZOLANTE G., 'L'incidenza del diritto comunitario sulla determinazione della legge applicabile ai contratti dei consumatori', in: *Riv. dir. int. priv. proc.* 2005, at 377-406.

capacity to act. These inconveniences are countered by a reference to the *lex contractus* in the rules on negotiating capacity and, *a fortiori*, when the *lex contractus* is freely chosen by the parties.[58]

(ix) In the hypothesis considered above, the parties have the burden to reasonably inform themselves and to know the different laws applicable to the different elements of the act. This is of course a minor burden when all the elements of the contract are subject to the same legal provisions. On the other hand, the burden becomes greater when the different elements of the contract or act are subject to different laws, which, for example, happens when the law that applies to capacity is different from the law that applies to the substance. Subjecting the capacity to conclude a contract or to perform an act to the *lex substantiae actus* seems useful from this point of view, as it is successful in helping the parties meet their burdens.

(x) Businesses involved in international commerce are generally governed by the law chosen by the parties. According to several national (i.e. Article 23(2) and 23(3) of the Italian PIL statute) and international (Article 11 of the Rome Convention, Article 13 of the Rome I Regulation) PIL rules, 'in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence' (as such Article 13 of the Rome I Regulation). Those national and international PIL rules derogate from the *lex substantiae actus* or chosen law in favour of the *lex loci*,[59] but their application requires one of the contracting parties to be unaware of the other party's capacity. Nevertheless the party who chooses a law still the burden of reasonably informing itself beforehand about the law's content. Consequently, it is possible that one party's poor knowledge of the (provisions on capacity provided by) foreign law cannot be qualified as a 'lack of awareness.' Therefore, the rule submitting the negotiating capacity in international commerce to the law of the contractual relationship can rarely be derogated from on the basis of the national and international PIL rules under discussion. Applying the *lex substantiae actus* to negotiating capacity is therefore the general approach. From this point of view, submitting the capacity to conclude a contract or to perform an act to the *lex substantiae actus* seems useful, as it (1) broadens the scope of application of the general rule (regarding the submission of negotiating capacity to the *lex substantiae actus*) and (2) reduces the scope of application of the exception (regarding the submission of negotiating capacity to the *lex loci*) Accordingly, applying the *lex substantiae actus* provides legal certainty.[60]

---

[58] See FERNÁNDEZ ROZAS J.C. / SÁNCHEZ LORENZO S. (note 49), at 306-307.

[59] For this derogation and its analogous application, see Chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.

[60] For the relevance of the value of legal certainty in international private law, see among others: HAY P., 'Flexibility versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law', in: *Recueil des Cours* 1991, t. 226, at 281-412; PAGANO E. (note 11), at 82. On the relevance of legal certainty in general, see AAVV., *La certezza giuridica. Un valore da ritrovare*, Milano 1993, *passim*.

(xi) Community law promotes the predictability of jurisdiction. Prorogation clauses allow the parties to choose the competent court. Subjecting the capacity to choose the competent court to the law applicable to the jurisdiction agreement or to the principal agreement in which the jurisdiction clause is included, and thus to a law which is predictable for the parties, serves two very connected functions. First, it allows the parties to pre-determine the validity of their jurisdiction agreement. Second, and in the same line of thought, it allows the parties to predetermine the jurisdiction of the court seized. Subjecting the necessary capacity to conclude a jurisdiction agreement to the *lex substantiae actus* is necessary, as it helps to ensure the predictability of the competent court and the '*effet utile*' of Community law.[61]

In summary, applying the *lex substantiae actus* to determine capacity with respect to international commerce allows the above-mentioned objectives to be reached, at least in part. Furthermore, such an approach is very helpful and conforms to the development of private international law: hence, all the opportunity reasons discussed correspond to a progressive line of development in national and international PIL rules that tends toward the abandonment of the traditional private international law technique of *dépeçage*.

So far, this is the first collection of arguments showing that the discriminations arising from the connecting factor of nationality cannot be objectively justified. A second collection of arguments consists of all the other opportunity reasons that support applying the *lex loci* to the parties' capacity to contract when they are both at the same location. The *lex loci* has been used to make this determination since the French cassation court's *Lizardi* judgment in 1861.[62] This same approach

[61] FRANZINA P., 'Il coordinamento fra lex fori e norme uniformi nell'accertamento del titolo di giurisdizione secondo il regolamento (CE) n.44/2001', in: *Riv. dir. int.* 2004, at 352; PUSTORINO P. (note 19), at 128.

[62] See judgment of 16 January 1861 in ANCEL B. / LEQUETTE I., *Les grands arrêts de la jurisprudence français de droit international privé*, Paris 2001, at 41. In a favourable way towards the theory of national interest expressed in *Lizardi*, see among others: NIBOYET J.P., 'Des modifications à apporter au statut des français en pays étrangers et des étrangers en France', in: *Rev. crit. dr. int. pr.* 1929, at 205, according to whom this theory constitutes a 'véritable nécessité pratique'; ARMINJON P., *Précis de droit international privé. II. Les personnes: les biens, les actes juridiques et les obligations*, Paris 1958, at 84; BATIFFOL H., *La capacité civile des etrangers en France. Influence de la loi française*, Paris 1929, at 248 and ID., *Les conflits des lois en matière des contrats. Etude de droit international privé comparé*, Paris 1938, at 333. Conversely against the interest theory thesis, see LAURENT F., *Le droit civil international*, Bruxelles-Paris 1881, at 307 (I) and 86 (II); ROLIN A., *Principes du droit international privé et d'application aux diverses matières du Code civil*, Paris 1897, at 238 (I); PILLET A., *Traité pratique de droit international privé*, Paris 1923, at 510; ID., 'Le droit international privé. Essai d'un système général de solution des conflits des lois', in: *Clunet* 1895, at 504; DESPAGNET F., *Précis de droit international privé*, Paris 1891, at 473; BARTIN E., *Etudes de droit international privé*, Paris 1899, at 194-195; AUDINET E., *Principes élémentaires de droit international privé a l'usage des étudiants en droit*, Paris 1894, at 236; WEISS A., *Traité théorique et pratique de droit international privé, III. Le conflits des lois*, Paris 1892, at 149; SURVILLE F., 'De la validité des contrats passés en France par un étranger incapable d'après sa loi nationale, mais capable d'après la loi

was later adopted by the already mentioned national (for instance Article 23(2) and 23(3) of the Italian PIL statute) and international (Article 11 of the Rome Convention, Article 13 of the Rome I Regulation) PIL rules.[63] The *Lizardi* rule protects the local trader that has no knowledge of either the other party's foreign nationality or, generally, the foreign law governing that party's capacity to act. Overall, the *Lizardi* rule favours the validity of international agreements, legal certainty, and, last but not least, the efficiency of international transactions.[64]

Both of the above arguments consider the aforementioned discriminations to be unreasonable: to the extent they arise from subjective connecting factors that lead to inappropriate and unreasonable discrimination and which prejudice the interests of both the public and individual persons. The same arguments also particularly relate to the balancing of the relevant interests involved. The argument that arises from this balancing is highly significant, as it is well established that when interpreting rules which are placed at a constitutional level (which also encompass the Community principle of non-discrimination outlined above), the jurisprudence of the higher courts typically try to balance the relevant interests.[65]

It remains to be said that the conclusions proposed in this study cannot be contradicted by the fact that the ECJ has not yet had the opportunity to either expressly nor impliedly take a decision on the thesis advocated in this paper.

It is well known that the Community principle of non-discrimination is not only a programmatic rule but a rule that is immediately applicable and has direct effect. In matters relating to capacities connected to international commerce and services or goods that have their origin or destination within the Community territory,[66] Community law prevails over the national Italian PIL law's general rule in

---

française', in: *Clunet* 1909, at 636 according to whom '*si des règles plus complètes sur des conflits des lois doivent être inscrites dans notre Code Civil, la théorie mesquine de l'intérêt français lésé doit en être bannie*'.

[63] Due to the lack of space, I can at this point neither make an evaluation of these rules nor determine their scope of application. For this purpose, I refer to Chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.

[64] See among the doctrines in favour of the Lizardi decision indicated at note 62 and BALLADORE PALLIERI G., *Diritto internazionale privato*, Milano 1950, at 153; MONACO R., 'L'efficacia della legge nello spazio', in: VASSALLI F., *Trattato di diritto civile italiano*, Torino 1964, at 145-146; CAPOTORTI F. (note 53), at 224-225; VITTA E., *Diritto internazionale privato. II Stato e capacità delle persone-forma degli atti-diritto di famiglia*, Torino 1973, at 39; BALLARINO T., *Diritto internazionale privato*, Padova 1982, at 130; MOSCONI F. / CAMPIGLIO C., 'Capacità nel diritto internazionale privato', in: *Dig. civ., Aggiornamento*, Torino 2000, at 128.

[65] See BIN R., *Diritti e argomenti: il bilanciamento degli interessi nella giurisprudenza costituzionale*, Milano 1992, at 184.

[66] On the territorial scope of application of Community law and on the erosion of the requirement of internationality of the case, see PAPADOPOULOU R.E., 'Situations purement internes et droit communautaire: un instrument jurisprudential à double function ou une arme à double tranchant', in: *Cahier dr. eur*. 2002, at 95-129; GARRONE P., 'L'interdiction des discriminations entre situations internes et transfrontalières: un principe général du droit communautaire', in: *SZIER* 2003, p. 211-242, at 232 ; BALLARINO T. / UBERTAZZI B. (note

Article 23(1) part 1, which makes the general capacity to act subject to the connecting factor of nationality.[67] In summary, and to be more specific, Community law renders inapplicable the Italian rule referring to the nationality as the connecting factor for the negotiating capacity of private persons related to international commerce.[68]

18), at 90; IDOT L., 'Variations sur le domaine spatial du droit communautaire', in: *Mélanges Paul Lagarde* (note 5) at 431-453; ROSSOLILLO G. (note 19), at 711; ROSSI L.S. (note 19), at 74; MEOLI R., 'Ancora sulla rilevanza della questione 'puramente interna': la sentenza della Corte di giustizia nel caso Salzmann', in: *Dir. com. scambi int.* 2005, at 51.

[67] See for all: UBERTAZZI G.M. (note 7), at 385 according to whom 'au juge saisi s'offre la possibilité d'évincer une règle de conflit discriminatoire, à cause de son incompatibilité avec une règle d'égalité' as it is art.12 TCE, 'en faisant appel à la hiérarchie [...] de cette dernière. Le critère de hiérarchie joue notamment au niveau des interdictions de discriminer contenues dans la loi fondamentale, dans la mesure ou elles ne se bornent pas à énoncer un programme (ou, d'une manière plus contraignante, un ordre à l'intention du législateur) mais où elles sont immédiatement applicables'.

[68] For the determination of the law to be then applied to this capacity in Italy, see chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.

INDEX

Yearbook of Private International Law, Volume 10 (2008), pp. 737-743

Printed in Germany