Developments

Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice

Jan-Jaap Kuipers[*]

A. Introduction

The relationship between Community law and Private International Law (PIL) did not have an easy start. The original EEC Treaty merely made one reference to PIL. The notable exception was the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968), an international convention concluded on the basis of art. 220 EEC (293 EC). The Rome Convention on the Law Applicable to Contractual Obligations (1980) did not even have an explicit legal basis. After the adoption of the Rome Convention it remained relatively silent on the Community level. It did not help that due to the status of international convention the European Court of Justice (ECJ) was deprived of any power of interpretation. The problem was resolved in two separate protocols. The protocol on the Brussels Convention entered into force in 1975 and the protocol on the Rome Convention only entered into force in 2004. Whereas there has been a substantial amount of case-law on the Brussels Convention[1], the ECJ only delivered its first judgment on the Rome Convention in October 2009.[2]

PIL lawyers can no longer complain about a lack of Community attention for their subject. Not only have the Community competences in PIL been significantly enlarged, but the ECJ has also been – under the flag of European Citizenship and fundamental freedoms – increasingly willing to answer questions of a PIL nature.[3] The Brussels and Rome Conventions have been transformed into respectively the Brussels I Regulation and Rome I Regulation.[4]

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[1] JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: ECJ JUDGMENTS (P. Galizzi ed., 2002).

[2] Case C-133/08 *Intercontainer Interfrigo (ICF) SC v. Balkenende Oosthuizen BV and MIC Operations BV,* 2009 E.C.R. I-0000

[3] G. de Groot and J. Kuipers, *The New Provisions on Private International Law in the Treaty of Lisbon*, 15 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW NO. 1 109 (2008).

[4] The Brussels I Regulation applies to disputes arisen after 1 March 2002, whereas the Rome I Regulation will apply to contracts concluded after 17 December 2009. For the sake of simplicity, references to the Brussels and Rome Convention will be made as if it were to the Brussels I and Rome I Regulation. It will be indicated when a discrepancy between a provision in the Convention and Regulation exists.

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Due to a lack of review power, the ECJ has, within the framework of the Rome Convention, not yet been able to adopt an approach towards private autonomy, but its case-law under the Brussels Convention has been criticised for a failure to respect the rights of private parties derived from jurisdiction clauses.[5] The purpose of this paper is to analyse the role of party autonomy in Brussels I and on the other hand in Rome I and to answer the question of whether the interpretation of the ECJ regarding choice of court clauses might indicate its future approach towards choice of law clauses. For that purpose a comparison between choice of court and choice of law clauses will be conducted. The question that will be answered is whether we can expect a different approach towards choice of law clauses. Finally, this analysis will consider whether, even if a different approach can developed towards choice of law clauses, private autonomy will continue to be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations, as indicated by recital 11 to the Rome I Regulation.

B. The Background to Brussels and Rome

Before the conclusion of the Brussels Convention the rules on jurisdiction varied widely between the Member States. Moreover, enforcement of foreign decisions was not possible in all Member States. It was believed that a true internal market could only be achieved when adequate legal protection could be ensured.[6] Since 'the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments'.[7] Hence the Brussels Convention was adopted in 1968 and its core features were preserved when it was transformed into a Community instrument, the Brussels I Regulation, in 2001.

The Brussels instruments aim to do away with exorbitant grounds for jurisdiction. The main rule is that a person should be sued in the courts of the state where he is domiciled. Special rules on jurisdiction are available for specific types of actions. An action relating to a contract can, for example, be brought in the courts of the country where the obligation has to be performed, or, in an action involving a number of defendants, the defendant could be sued in the courts of the place where any one of the respective parties was domiciled. Moreover, a number of exclusive jurisdiction rules deviate from the main rule.

[5] T. Hartley, *The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective: General Course on Private International Law*, 9 RECUEIL DES COURS NO. 319, 183 (2006).

[6] P. GOTHOT AND D. HOLLEAUX, LA CONVENTION DE BRUXELLES DU 27.9.1968 (1985); A. DASHWOOD, R. HACON AND R. WHITE, A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION (1987); P. BYRNE, THE EEC CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS (1990).

[7] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1979) (Jenard Report), OJ C 59, .3.

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An example is that proceedings relating to a right in rem in an immovable property are to be brought in the courts of the country where the immovable property is situated. The Brussels instruments are centered on the confidence in the courts of other Member States and enhancing legal certainty. [8] Accordingly, Member States only possess a limited possibility to refuse to recognise a judgment from another Member State. The public policy exception is reserved for exceptional circumstances, such as the failure to respect the right to a fair trial as enshrined in art. 6 of the European Convention of Human Rights.[9]

The goal of legal certainty would only be half served when there would be uniform grounds for jurisdiction, but national courts would answer the question as to which law to apply on the basis of their own conflict of law rules. Member States were therefore anxious 'to continue in the field of private international law the work of unification of law that has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments'[10] The conflict of law norms on contractual obligations did however not differ to the same extent as the national grounds for jurisdiction. Member States recognised, albeit not to the same extent, the possibility for parties to designate the applicable law as the main rule. Choice of law in contracts was successful in the Member States because it was perceived as exponent of private autonomy on the international plane; it was observed that states could not exercise *de facto* control over international contracts anyway. It was also accepted that a sovereign must exercise more restraint when a situation has contacts outside its territory and finally that choice of law promotes legal certainty and economic efficiency.[11] Limitations on the private autonomy should therefore be based on good reasons and not go beyond what is necessary. Private autonomy as a core feature was preserved when the Rome Convention was transformed into the Rome I Regulation.

Since the Rome Convention was seeking to complement the Brussels Convention it was attempted to reach for a high degree of parallelism (*Gleichlauf*). Achieving an even higher

[8] Case 38/81, *Effer,* 1982 E.C.R. 825, par. 6; case C-440/97 *GIE Groupe Concorde and Others,* 1999 E.C.R. I-6307, par. 23; case C-256/00 Besix 2002 E.C.R. I-1699, par. 24.

[9] Case C-7/98 *Krombach,* 2000 E.C.R. I-1935; Case C-394/07 *Gambazzi,*2009 E.C.R. I-0000, see as well: Court of Appeal *Maronier v Larmer* 2002 EWCA Civ 774.

[10] See the 3rd preamble to the Rome Convention.

[11] J. JACQUET, LE CONTRAT INTERNATIONAL 37 (1992); P. NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS (1999); E. O'Hara and L. Ribstein, *From Politics to Efficiency in Choice of Law, George Mason Law and Economics Working Paper No. 00-04 (1999*); H. Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 7 ELECTRONIC JOURNAL OF COMPARATIVE LAW NO. 3 (2003), available at: http://www.ejcl.org/ejcl/73/art73-4.html, last accessed: 29 October 2009; S. Leible, *Parteiautonomie im IPR – Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?*, in FESTSCHRIFT FÜR ERIK JAYME, BAND I, MÜNCHEN: SELLIER, 485-503 (2004); G. Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, 3 CLPE RESEARCH PAPER NO. 1 4 (2007).

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degree of *Gleichlauf* was one of the aims when transforming the Conventions into Community instruments.[12] Grounds for jurisdiction will thus often coincide with the applicable law, so that if a French court is awarded jurisdiction it can apply French law. For example, the rule that proceedings relating to a right in rem in immovable property are to be brought in the courts of the country where the immovable property is situated is mirrored by art. 4 (1c) Rome I that declares that the law that is applicable to a contract relating to a right *in rem* is the law of the country where the property is situated. Another example is that the place of performance as grounds for jurisdiction (art. 5 (1) Brussels I) is determined in accordance with conflicts of law rules governing the contractual obligations of the court seised.[13]

C. Party autonomy in Brussels and Rome

Although not the central rule, party autonomy is not strange to Brussels I. Parties are allowed to designate a court to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.[14] The choice of court agreement, or prorogation of jurisdiction has the effect of displacing the otherwise competent court. Hence, if parties have made a choice of forum, that court shall have exclusive jurisdiction. Rome I does not apply to choice of court clauses in a contract. The existence, formal and material validity of a choice of court clause is thus assessed solely by Brussels I, while a choice of law is governed by Rome I.

Art. 23 Brussels I (art. 17 RC) allows for prorogation of jurisdiction. When one or more of the parties is domiciled in one of the Member States the consent must be a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.[15] Writing is

[12] ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION : CONVERGENCE AND DIVERGENCE BETWEEN BRUSSELS I AND ROME I (J. Meeusen, M. Pertegás and G. Straetmans eds., 2004); S. Rammeloo, *Via Romana. Van EVO naar Rome I – Nieuw Europees IPR inzake het recht dat van toepassing is op verbintenissen uit overeenkomst*, 24 NEDERLANDS INTERNATIONAAL PRIVAATRECHT NO. 3, 239-253 (2006).

[13] Case C-440/97 *GIE Groupe Concorde and Others v The Master of the Vessel Suhadiwarno Panjan and Others,* 1999 E.C.R. I-6307.

[14] P. KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS, ABINGDON: PROFESSIONAL BOOKS LIMITED 1031-1115 (1987); L. MARI, IL DIRITTO PROCESSUALE CIVILE DELLA CONVENZIONE DI BRUXELLES 564-568 (1999); J. KROPHOLLER, EUROPÄISCHES ZIVILPROZESSRECHT, HEIDELBERG: VERLAG RECHT UND WIRTSCHAFT, 7. AUFLAGE 269-317 (2002); P. VITTORIA, LA COMPETENZA GIURISDIZIONALE E L'ESECUZIONE DELLE DECISIONI IN MATERIAL CIVILE E COMMERCIAL NELLA GIURISPRUDENZA DELLA CORTE DI GIUSTIZIA 210-220 (2005); BRUSSELS I REGULATION 366-448 (U. Magnus and P. Mankowski eds., 2007).

[15] Sub c was only introduced in the 1978 Amendment to the Brussels Convention.

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to be understood as to include any communication by electronic means which provides a durable record of the agreement.[16] A choice could also be made in favour of a court in a Member State that has no factual connections to the case at hand. Exclusive jurisdiction means that the courts designated in the agreement shall also have exclusive jurisdiction in proceedings where one party is seeking a declaration that the contract containing that clause is void.[17] The choice of court clause is thus separable from the main contract. In case the prorogation of jurisdiction concerns parties who are both not domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The ECJ consistently held that in light of the consequence of displacing the general and special jurisdiction rules in the Brussels instruments, the formal requirements governing the validity of choice of court clauses should be constructed strictly.[18] What constitutes such an agreement is determined by the Convention autonomously.[19] The application of the formal requirements of art. 23 Brussels I cannot be circumvented. Parties may thus not designate a fictitious place of performance in their contract in order to trigger the jurisdiction of the courts of that place (art. 5 (1a).[20]

The goal of the formal requirements is to ensure that an actual meeting of the minds of parties takes place. A choice of court in general conditions of sale printed on the back of a contract only fulfils the requirements of art. 23 Brussels I when in the contract an express reference to those provisions was made.[21] Equally, the written confirmation of an oral agreement does not satisfy the formal requirements if the confirmation is not accepted by the other party in writing. After the Member States found the case-law overly restrictive, sub c was introduced to better meet the general expectations of private parties and the ECJ lowered its threshold in subsequent case-law. It was held that an oral agreement is duly confirmed when the confirmation was received by the other party and that the latter did not raise any objection.[22] The formal requirements were also satisfied when a choice of court clause formed part of a previous written agreement between the parties that was tacitly renewed, even though that agreement explicitly stipulates that it can only be

[16] Art. 23 (2) Brussels I.

[17] Case C-269/95 *Benincasa* 1997 E.C.R. I-3767

[18] Case 24/76 *Salotti,* 1976 E.C.R. 1831.

[19] Case C-214/89 *Powell Duffryn,* 1992 E.C.R. I-1745, para 14

[20] Case C-106/95 *MSG v Les Gravières Rhénanes SARL,* 1997 E.C.R. I-911.

[21] Supra note 18.

[22] Case 221/84 *Berghoefer,* 1985 E.C.R. 2699.

renewed in writing.[23] The formal requirements are however still to be interpreted strictly. In national case-law it has been accepted that when no existing practices exist between the parties and no common trading usages can be proved it is impossible to establish that parties were or ought to have been aware of the prorogation clause.[24]

Jurisdiction agreements can also be binding upon third parties without that party ever consenting to the choice of court provision. That might be particularly important in contracts for carriage whereby a new bill of lading is issued. The Court held that it was left for national law governing the original bill of lading to determine whether, as successor, the third party can be confronted with the prorogation of jurisdiction clause.[25]

Although the question of whether the formal requirements are met is a matter of Community law, the forum still has an important role to play in appreciating the circumstances to conclude whether a valid choice of court has been made. Interestingly enough, the forum that has to establish the validity of the prorogation and the existence of consent is however not necessarily the same court that has allegedly been designated by the parties in their agreement.[26] The difference with a choice of law clause is striking. Instead of imposing requirements for the formal validity of a choice of law, Rome I favours upholding a choice of law.[27] The choice of law shall be formally valid when it satisfies the formal requirements of the putative applicable law, the *lex loci contractus* when both parties, or their agents, were in that respective country[28], or the law of habitual residence of either party or the law of place where either party was present when the parties were at the time of the conclusion of the contract in different countries.[29] A contract could thus potentially have five chances to be formally validated.

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[23] Case 313/85 *Iveco Fiat SpAv Van Hool NV,* 1986 E.C.R. 3337.

[24] See for example: Corte Suprema di Cassazione, 22 January 2002, 718/2002. The precise requirements need further clarification: B. Hess *et al*, General Report of the Study on the Application of Regulation Brussels I (Heidelberg Report), Study JLS/C4/2005/03 (2007), 161.

[25] Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV,* 2000 E.C.R. I-9337. This led to a change of case-law in France: Cour de Cassation, 16 December 2008, 08-10460.

[26] Case C-116/02 *Gasser,* 2003 E.C.R. I-14693.

[27] DICEY, MORRIS & COLLINS: THE CONFLICT OF LAWS, 14th edition 1560-1580 (L. Collins ed., 2006); H. Heiss, *Party Autonomy*, in ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 1 (F. Ferrari & S. Leible eds., 2009); R. PLENDER AND M. WILDERSPIN, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS, 3rd edition 131-166 (2009),.

[28] Art. 11 (1) Rome I

[29] Art. 11 (2) Rome I

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Rome I does not preclude that a choice of law is expressed orally, as long as a meeting of minds is sufficiently clear. In fact, Rome I does not even require that a choice of law is explicit. An implicit choice of law will be assumed when a genuine will of the parties can with a reasonable degree of certainty be deducted from the contract and the surrounding circumstances.[30] It will thus depend much upon the factual circumstances.[31] Such a deduction will not be possible when too many connections with different jurisdictions exist.[32] On the other hand, the fact that parties base their submissions upon the arguments derived from one law only or an exclusive jurisdiction clause in a contract[33] are strong indications of an implicit choice of law.

The implicit choice of law has some similarities with jurisdiction by appearance. A court shall have jurisdiction if the defendant enters an appearance.[34] In that way, the defendant implicitly consents to the court chosen by the applicant. The rule does not apply if the defendant merely makes an appearance to contest the jurisdiction of the court. That exception is interpreted broadly. The defendant may bring both actions on inadmissibility and substance provided that the plaintiff and the court seised are able to determine that the intent of the defendant is to contest the jurisdiction of the court as a first defence.[35]

The discrepancy between the formal validity of a choice of court and a choice of law could thus have the result that a choice of law is upheld, but not a choice of court although both clauses are contained in the same contract. Imagine an oral contract for the sale of goods to be delivered in Paris between a French buyer and a German seller. The parties would like to elect a neutral law and discourage breach of contract as well as subsequent legal proceedings by choosing a foreign forum. Accordingly, Dutch law is chosen and the parties agree that the Amsterdam court shall have exclusive jurisdiction. If the French party fails to

[30] M. MAGAGNI, LA PRESTAZIONE CARATTERISTICA NELLA CONVENZIONE DI ROMA DEL 19 GIUGNO 1980 17 (1989); F. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE, DORDRECHT: MARTINUS NIJHOFF PUBLISHERS 213 (1993); P. Mankowski, *Stillschweigende Rechtswahl und wählbares Recht*, in DAS GRÜNBUCH ZUM INTERNATIONALEN VERTRAGSRECHT 63 (S. Leible ed., 2004).

[31] Other possible indicators are listed in: P. NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 113-120 (1999).

[32] For example: *Bundesgerichtshof* 26 June 2004, VIII ZR 273/03.

[33] The 12th recital in the preamble to the Rome I Regulation identifies an exclusive choice of court clause as one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated. Art. 3 (1) Proposal for a Regulation on the Law applicable to contractual obligations, COM (2005) 650 final even raised in these circumstances a presumption.

[34] Art. 18 Brussels Convention. Art. 18 has been applied to generate jurisdiction for a claim for set-off made by the defendant on the basis of a contract containing an exclusive jurisdiction clause in favour of another court. Case 48/84 *Hannelore Spitzley v Sommer Exploitation SA,* 1985 E.C.R. 787.

[35] Case 150/80 *Elefanten Schuh GmbH v Jacqmain,* 1981 E.C.R. 1671, par. 15; case 25/81 *C.H.W. v G.J.H.,* 1981 E.C.R. 01189; case 27/81 *Rohr v Ossberger,* 1981 E.C.R. 825, par. 7.

pay the price, the Amsterdam court cannot assume jurisdiction because the agreement is not evidenced in writing. It will have to declare itself not competent and the German party will have to initiate proceedings in French courts (art. 2 and art. 5 (1b) Brussels I). Dutch law does not impose any formal requirements as regards a choice of law clause. According to the putative applicable law, a choice of law could thus also be made orally. The result is that the exclusively competent French court will have to try the case on the basis of Dutch law.[36]

Brussels I does not impose any requirements as regards the material validity of the choice of court agreement. It is uncertain how the material validity of a choice of court agreement is to be determined.[37] It is not likely that ECJ will allow national courts to apply national law to that question.[38] The purpose of the formal requirements is to ensure that consensus between the parties is in fact established.[39] Insofar as the Court reasons that formal validity would imply material validity it would not be particularly convincing. There is no guarantee that the written clause was not agreed upon by fraud, misrepresentation or undue influence. A possible solution would be that on an autonomous construction 'agreement' is interpreted to require authentic consent and good faith of the parties.[40] In the lack of a freely formed will no agreement will have been formed. In that interpretation, the material conditions for consent would be harmonised at a European level. The material validity of a choice of law clause on the other hand is left to the Member States and in principle determined by the putative chosen law. However, a party may, in order to establish that he did not consent, invoke the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct.[41]

If we would set aside the differences as regards formal and material validity one can observe differences as regards the content. A choice of law could also be made in favour of the laws of a non-Member State. Moreover, contrary to the Rome Convention Rome I does not preclude private parties from electing a non-State body of law.[42] In our initial example,

[36] The German party can only hope that the French party honours its word and does not challenge the jurisdiction of the Amsterdam court. The Amsterdam court could then assume jurisdiction on the basis of appearance (art. 24 Brussels I).

[37] L. Merrett, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 545 (2009).

[38] Z. Tang, *The interrelationship of European Jurisdiction and Choice of Law in Contract*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW NO. 1 35, 46 (2008).

[39] *Powell Duffryn*, *supra,* note 19, 15.

[40] In favour: *supra,* note 38, See, *infra,* note 45; against: see, *supra,* note 377, 557-559.

[41] Art. 10 (2) Rome I.

[42] 13th recital to the preamble of Rome I.

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there is in principle nothing that precludes the French buyer and German seller from selecting New York law. Art. 23 Brussels I however only provides that parties may chose in favour of a court of another Member State. Can the parties make a choice of court in favour of a New York court? That choice of court would under art. 23 Brussels I not raise exclusive jurisdiction. Therefore the main rule of Brussels I applies again; the defendant shall be sued in his home Member State. There is an apparent contradiction with recital 14 that provides that '[t]he autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation'. The recital does not seem to make the exercise of private autonomy subject to the limitation that the courts of a Member State are chosen. The validity of such a choice has to be established on the basis of national law.[43] However, in the light of *Owusu* it appears the rules on jurisdiction in Brussels I are mandatory.[44] The fact that jurisdiction is declined in favour of a court in a non-Member State is irrelevant. It therefore seems that for example, the court of the place of habitual residence of the defendant cannot decline jurisdiction even when a valid choice of court agreement exists in favour of a court in a non-Member State.[45] The fact that Brussels I leaves the validity of choice of law clause in favour of a non-Member State to national law does not mean its effects cannot be contrary to the mandatory system of Brussels I. It appears therefore that a valid choice of court provision in favour of a court in a non-Member State only has effect when Brussels I does not confer any jurisdiction upon a court in a Member State.[46]

The consequence is again that effect has to be given to a choice of law, but not to a choice of court clause. The French courts would as a matter of Community law be bound to assume jurisdiction, but equally as a matter of Community law be bound to apply New York law. A choice of court and a choice of law are heavily interrelated, especially when made within the same contract. The parties have good reason to make a parallel between the competent court and the applicable law. Courts are the most familiar with their own law. Legal proceedings will thus be the simplest for the parties when they can argue their case on the basis of the *lex fori*. It should thus be regarded as highly unfeasible that effect is given to a choice of law clause, but not to a choice of court clause.

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[43] See*, supra,* note 25, 18.

[44] Case C-281/02 *Owusu v Jackson,* 2005 E.C.R. I-1383.

[45] Opposite view : A. BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 291 (2008). National courts have taken different views on the matter, see: T. KRUGER, CIVIL JURISDICTION RULES OF THE EU AND THEIR IMPACT ON THIRD STATES 234-245 (2008),.

[46] The author wishes to add that this appears to him the most likely interpretation of Community law as it stands, but that this does necessarily reflect his personal views on the feasibility of this interpretation.

D. Party Autonomy and the European Court of Justice

It appears that Rome I is more orientated towards upholding a choice made by the parties than Brussels I is. That becomes not only apparent from a comparison of the textual wording of the provision, but the Court has with regard to Brussels I favoured upholding the literal interpretation of a rule rather than the intention of the parties. Two notorious cases underline this point.

In *Gasser* a choice of court clause in favour of an Austrian court appeared on all invoices sent by an Austrian seller (Gasser) to an Italian buyer (MISAT), without the latter having raised any objection in that regard.[47] In accordance with the practice and relevant trade usage prevailing between Austria and Italy and between the parties themselves it was beyond doubt that a valid choice of court agreement had been concluded. MISAT however breached the prorogation of jurisdiction clause and launched proceedings in Italy seeking a declaration that the contract had been lawfully terminated and a declaration of non-liability. Gasser launched proceedings in Austria, but saw itself confronted with the *lis pendens* rule. A court shall of its own motion stay proceedings if a proceeding with the same cause of action and between the same parties has already been brought in the courts of a different Member State until such time as the jurisdiction of the court first seised is established.[48] The Austrian court asked whether it was obliged to apply that rule even when it was, in the light of the choice of court clause, clear that the other court did not have jurisdiction and/or whether it could displace the *lis pendens* rule when it took the other court an unjustifiably long time with the effect that it resulted in material detriment to one party?. The ECJ relied on the equivalence of courts and the mutual trust between them and gave precedence to the *lis pendens* rule. The risk would exist that the courts would render an irreconcilable judgment. It was for the court first seised to establish the existence of a valid choice of court agreement. Apparently an element of bad faith on the side of one of the parties to delay proceedings was irrelevant.

Private parties can thus even in bad faith lodge proceedings before a manifestly incompetent court in another Member State to delay proceedings.[49] The party selects on purpose a judicial system that has a notoriously bad reputation in the expediency of trials. Especially when one takes the case up to the highest courts, the party in bad faith can effectively block proceedings for many years. This might lead to detriment for the other party, and possibly even bankruptcy. In PIL terminology this technique is referred to as an

[47] See*, supra,* note 266.

[48] Art. 28 Brussels I.

[49] However, according to Nuyts the criticism to Gasser is exaggerated because the Court could not rule on a possible abuse of rights. A. Nuyts, *Enforcement of Jurisdiction Agreements Further to Gasser*, in FORUM SHOPPING IN THE EUROPEAN JUDICIAL AREA, 55, (P. de Vareilles-Sommières ed., 2007).

'Italian Torpedo'.[50] In *Gasser*, the ECJ did not award private autonomy an eminent place; rather the Court stressed the mandatory nature of Brussels I. *Gasser* seriously undermines the effectiveness of a jurisdiction clause.[51]

West Tankers is another decision of the Court that puts a heavy strain on party autonomy.[52] Damage occurred when a vessel owned by West Tankers and chartered by Erg collided in Italian waters with a jetty owned by Erg. The charterparty contained a clause providing for arbitration in London. Erg sought and obtained compensation from West Tankers' insurers. The insurance companies brought an action in Italian courts for recovery of the sums paid (subrogation). West Tankers lodged proceedings in England, the place of arbitration, and sought an injunction restraining the insurance companies from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings in Italy (anti-suit injuction). Could an English court restrain a person from commencing or continuing proceedings before an Italian court on the ground that the proceedings lodged in Italy were contrary to an arbitration agreement? Since arbitration agreements are excluded from the scope of Brussels I one could question whether this was a question that could be answered by the Regulation at all. The Court held however that if an arbitration is raised to contest the jurisdiction of the court before which the proceedings are brought in accordance with Brussels I, the validity of that arbitration agreement comes as an incidental question into the scope of Brussels I.[53] Since the jurisdiction of the courts in a Member State cannot be reviewed by a court in another Member State[54], an English court cannot restrain proceedings in Italy. An anti-suit injunction is therefore incompatible with Brussels I, at least insofar it aims to restrain proceedings in another Member State.

Although *West Tankers* fits well in the approach of the Court towards Brussels I, it raises serious issues with regards to private autonomy. The problem goes beyond upholding the

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[50] M. *Franzosi*, Worldwide Patent Litigation and the Italian Torpedo, 19 EUROPEAN INTELLECTUAL PROPERTY LAW REVIEW NO. 7 382 (2005); I. Betti, *The Italian torpedo is dead: long live the Italian torpedo*, 3 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE NO. 1 6-7 (2008).

[51] T. Hartley, *The European Union and the Systematic Dismantling of the Common Law Conflict of Laws*, 54 INTERNATIONAL LAW COMPARATIVE QUARTERLY NO. 4 813 (2005).

J. Harris, *Understanding the English response to the Europeanisation of Private International Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW NO. 3 347 (2008).

[52] Case C-185/07 *West Tankers,* 2009 E.C.R. I-0000. Academic views were expressed in a special online symposium available at: http://conflictoflaws.net/2009/west-tankers-online-symposium, last accessed 29 October 2009.

[53] See, *id* para. 26. For a critical view see, Martin George, *Dickinson on West Tankers Another One Bites the Dust*, available at http://conflictoflaws.net/2009/dickinson-on-west-tankers-another-one-bites-the-dust/ Last accessed 29 October 2009.

[54] Case C-351/89 *Overseas Union Insurance and Others,* 1991 E.C.R. I-3317, par. 24; Case C-159/02 *Turner*, 2004 E.C.R. I-3565, par. 26.

common law remedy of an anti-suit injunction. The acceptance of arbitration still differs from Member State to Member State. Treating arbitration as merely an incidental question does not appear to take arbitration seriously.[55] Every court that could seize jurisdiction on the merits is able to rule on the validity of the arbitration agreement. The problem arises that a party will seek to avoid an arbitration agreement by initiating a procedure in the Member State that is least likely to uphold the arbitration agreement. That would significantly undermine the effectiveness of arbitration agreements, and thus the exercise of private autonomy.

The problems of Brussels I regarding the effective exercise of private autonomy have been widely recognised. With regard to arbitration, the Heidelberg report on the Application of Brussels I in the Member States proposes to delete the exemption of arbitration but safeguard the priority of the New York Arbitration Convention. It proposes to adopt a new article:

> A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement.

Although parties remain capable of challenging the validity of an arbitration clause in a national court, the provision would rule out forum shopping. The negative consequences of *Gasser* could also be buttressed by legislative intervention. The Heidelberg Report provides that in case of an exclusive choice of forum agreement, courts other than the chosen court have no jurisdiction unless the chosen court has determined its jurisdiction.[56] The preference for the chosen court might raise other problems of legal opportunism, but that is unavoidable when one tries to capture justice in individual private relationships in a hard and fast rule. Introducing a certain amount of flexibility in the relationship between art. 23 I and *lis pendens* for the purpose of taking into account all the factual circumstances of a case, in particular the intention of the parties, seems hard to reconcile with the Community's emphasis in PIL on hard and predictable rules. The *Gasser* and *West Tankers* issues have been taken up by the Community legislator, which is at the time of writing in the process of revising Brussels I.[57]

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[55] Gilles Cuniberti, *Kessedjian on West Tankers*, available at http://conflictoflaws.net/2009/kessedjian-on-west-tankers/ last accessed 29 October 2009.

[56] HEIDELBERG REPORT, 167-168.

[57] EC No. 44/2001 of 22 December 2000, Hearing of with a view to the forthcoming review of Council Regulation on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels 9 February 2009, 5836/09.

If we look at Brussels I and Rome I as such, what could be a justification for the wider recognition by the ECJ of private autonomy in choice of law matters? The obvious argument would be that jurisdiction is considered to be a public law issue, whereas the law applicable to contractual obligations is generally regarded as a private law matter. A choice of court clause is therefore merely an invitation for a court to assume jurisdiction. Private parties cannot oblige the court to do this, nor can they remove jurisdiction from a court that has juridiction.[58] Private autonomy would thus be less appropriate in Brussels than in Rome. However, Community law does not formally recognize the distinction between public and private.[59] It would be extremely difficult to define the dividing line in Europe because on the Continent there is no consensus on what is considered to be public and what is considered to be private, while common law does not know the distinction as such. Indeed, prorogation of jurisdiction was considered to be a public law matter on the Continent, but was classified as a contract by common law.[60] Community law is not concerned with the national classification of a rule[61], but requires an effective and uniform application.

The initial goal of the Community was the creation of an internal market by removing barriers to trade artificially created by the Member States. The Brussels Convention conformed to that that approach by doing away with exorbitant grounds for national jurisdiction and eliminating the confinement of judicial decisions to the jurisdiction in which they were proclaimed. To achieve the free circulation of judicial decisions concepts such as mutual trust and equivalence of national courts were introduced. The perception that a choice of court agreement is an invitation for the courts to assume jurisdiction does not find any support in the wording of art. 23 Brussels I.[62] When the existence of a valid prorogation of jurisdiction has been established, the chosen court *shall* have jurisdiction. Moreover, that jurisdiction *shall* be exclusive unless the parties have agreed otherwise. The 14th recital to the preamble of Brussels I stipulates that subject to the exclusive grounds of jurisdiction the autonomy of private parties *must* be respected. The jurisdiction agreement is therefore not subject to any public law grace, but is binding upon the courts.

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[58] C. Knight, *The Damage of Damages: Agreements on Jurisdiction and Choice of Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW 3 501, 507 (2008).

[59] D. Kennedy, *The Stages of Decline of the Public/Private Distinction*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1349 (1982); M. LOUGHLIN, THE IDEA OF PUBLIC LAW (2004); D. Wyatt, *Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*, OXFORD LEGAL STUDIES RESEARCH PAPER NO. 20/2008.

[60] *Supra*, note 45 KRUGER at 237.

[61] D. Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, no. 9, JEAN MONNET WORKING PAPERS (1996); J. Baquero Cruz, *Free Movement and Private Autonomy*, 24 EUROPEAN LAW REVIEW NO. 6 603 (1999).

[62] Case 22/85 *Antérist v Crédit Lyonnais,* 1986 E.C.R. 1951, paras. 13 and 14.

The historical opposition between jurisdiction and applicable law along the lines of the public/private distinction is therefore not an effective barrier against the extrapolation of the ECJ attitude towards private autonomy.

There is therefore no *a priori* argument that because jurisdiction was generally regarded as public the Court will adopt a different rationale towards choice of law. The approach of the Court would be the same: grounds of jurisdiction can in principle be set aside by private parties and therefore, if those rules would not be harmonised but regulated at a national level, not be able to constitute a restriction upon the internal market.[63]

Nevertheless the formal requirements imposed by the Community legislator are stricter with choice of courts clauses than with choice of law clauses. As justification for the high threshold of clarity required for prorogation the court advances the consequences that prorogation may have for the position of the parties to the action. That reasoning does not appear to be particularly convincing. Are the consequences of a choice of court really more intrusive than a choice of law? The jurisdiction determines the procedure, the applicable law the substance. At both stages, a case could be won or lost.

However, the role and function of party autonomy is different in Rome I compared to Brussels I. Party autonomy is the cornerstone in the determination of the law applicable to contractual obligations. Only if parties have failed to make a choice of law and no implicit choice of law can be deducted from the circumstances the applicable law is established on the basis of the objective connecting factors.[64] Party autonomy is the rule; its restrictions are the exception. Providing parties with the possibility to choose the applicable law generates the largest degree of legal certainty and promotes economic efficiency. Brussels I, however, takes as a starting point that a defendant should be sued in the courts of the Member State where he is domiciled. Prorogation of jurisdiction is one of the exceptions to that rule. In order not to deprive the main rule of its practical effect, and enhance legal simplicity, the ECJ is in general inclined to interpret these exceptions narrowly.[65] Awarding a larger degree of private autonomy in choice of courts clauses would reduce the mandatory nature of EC law, whereas party autonomy in Rome I is the mandatory EC rule. Party autonomy thus has, in the Brussels I and Rome I, a different starting point. From an EC point of view this does make little sense. The possibility to choose the competent court would also enhance legal certainty and, from the point of view of the parties, economic

[63] J. Kuipers, *Cartesio and Grunkin-Paul: Mutual recognition as a vested rights theory based on party autonomy in private law*, in EUROPEAN JOURNAL OF LEGAL STUDIES (forthcoming).

[64] A. Marmisse, *Autonomie de la volonté et principe de proximité dans Bruxelles I et Rome I*, in ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION : CONVERGENCE AND DIVERGENCE BETWEEN BRUSSELS I AND ROME I, ANTWERPEN: INTERSENTIA 255 (J. Meeusen, M. Pertegás and G. Straetmans eds., 2004),.

[65] Case 266/85 *Shenavai v Kreischer,* 1987 E.C.R. 239, par. 17; Case C-280/90 *Hacker*, 1992 E.C.R. I-1111, par. 15; case C-73/04 *Klein,* 2005 E.C.R. 1-8667, par. 15.

efficiency. Prorogation of jurisdiction can confer exclusive jurisdiction to courts of a Member State. For the Community, the national courts are equivalent. The Community therefore has no public interest in awarding jurisdiction to courts in a particular Member State. The difference in rationale can however be explained from the fact that both the Brussels Convention and Rome Convention were negotiated by PIL experts, rather than Community lawyers. Consequently an approach was adopted that was as much as possible in line with existing national practices. Since the rules on jurisdiction were primarily developed in the period before the existence of the EEC and hence prior to concepts such as mutual trust and equivalence, Member States still completely applied their public policy considerations in full to other Member States. In the light of the emerging area of freedom, justice and security it seems therefore appropriate to attribute wider scope to the principle of party autonomy in Brussels I.

Party autonomy is thus treated as a separate issue in Brussels I and in Rome I. The different role of party autonomy however follows mainly from the structure of the instruments, rather than from a substantially different rationale on a Community level. It can therefore be doubted to what extent party autonomy in Brussels I and Rome I are really different issues. From the point of view of enhancing legal certainty as well as economic efficiency there is little that would prevent awarding private parties a choice between the courts of the Member States. As for the interpretation rationale of the ECJ, it is not likely that the Court will reduce private autonomy in Rome I as it did in Brussels I. Party autonomy is the main rule in Rome I and, although restrictions may be imposed, it cannot be made subordinate to other rules.

A glimpse of hope in favour of more flexibility, and hence possibility to focus upon the legitimate expectations of private parties, may be discovered in the ECJ's first ruling on the Rome Convention.[66] The Court was confronted with a contract where the parties had not chosen the applicable law. The success of the applicant depended upon the application of Belgian, instead of Dutch law. The presumptions to determine the applicable law in art. 4 Rome Convention were accompanied by an exception clause in case a closer connection with another country would exist. The scope of this exception has been interpreted differently by national courts varying from extremely narrow in the Netherlands to rather broad in England. Instead of following the Dutch solution in order to safeguard the uniform application of Community law, the Court favoured leaving national courts a certain degree of flexibility.[67]

E. Pressure on the choice of law

[66] *ICF (*note 2).

[67] J. Kuipers, *The Rome I Regulation: Ending the contradictory interpretation by national courts of art. 4 (5) Rome Convention?*, 1 PRAGUE YEARBOOK OF COMPARATIVE LAW (2009), forthcoming.

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The possibility for parties to choose the applicable law as the main rule in Rome I might not be sufficient to safeguard private autonomy as the main rule in the conflict of law norms relating to contractual obligations. If the future approach of the ECJ lies implicit in *Ingmar*, problems may be on the horizon. In *Ingmar* an agency contract between a New York principal and an UK agent contained a choice of law in favour New York law.[68] The Court held, using reasoning that could be applied to nearly every directive, that the Agency Directive was crucial for the functioning of the internal market and should therefore be applied regardless the applicable law. Although the ECJ did not challenge the validity of the choice of law in favour of New York law, such a choice could not prevent the application to the contract of UK implementing legislation protecting the agent after termination of the agency agreement. Also, national courts have recognised that a choice of law may not displace the application of rules whose observance is crucial for the safeguard of the political, social or economical organisation of the forum. Those rules then become not only domestically mandatory, but also mandatory in the international sense. What is worrying is not the methodological framework used by the ECJ, but the easy acceptance of Community legislation as mandatory on the international plane. In the Netherlands[69], the Dutch legislation implementing the Agency Directive was explicitly not found to be overriding (internationally) mandatory and the Cour de Cassation[70] held the same for the French implementing legislation merely nine days after the ECJ delivered its judgment in *Ingmar*.

If the scope of directives is going to be assessed on the basis of the object and purpose of the directive,[71] and not on the basis of the Rome I Regulation, parties would lose the possibility of a choice of law. Application of the directive would be mandatory as soon as the facts enter into its material scope of application. Given the vast amount of EC legislation in the field of employee, consumer and other weaker party protection, party autonomy would be severely undermined.[72] When one applies the reasons for party autonomy to national provisions originating in directives, one realises that it is perfectly plausible to award special treatment to national rules implementing a directive in a

[68] Case 381/98 *Ingmar,* 2000 E.C.R. I-9305.

[69] Rechtbank Arnhem (District Court) 11 July 1991, 10 NEDERLANDS INTERNATIONAAL PRIVAATRECHT 100 (1992).

[70] *Cour de Cassation*, 28 November 2000, No. 98 – 11.335.

[71] S. FRANCQ, L'APPLICABILITE DU DROIT COMMUNAUTAIRE DERIVE AU REGARD DES METHODES DU DROIT INTERNATIONAL PRIVE (2005).

[72] H. Verhagen, *Het spanningsveld tussen de vrijheid van rechtskeuze en het communautaire harmonisatie-proces*, 19 NEDERLANDS INTERNATIONAAL PRIVAATRECHT No. 1 27 (2001); R. Michaels and H. Kamann, *Grundlagen eines allgemeinen gemeinschaftlichten Richtlinienkollisionsrechts – "Amerikanisierung" des Gemeinschafts-IPR?*, 12 EUROPÄISCHES WIRTSCHAFTS- & STEUERRECHT No. 6 301 (2001); S. Schwarz, *Das internationale Handelsvertreterrecht im Lichte von "Ingmar" – Droht das Ende der Parteiautonomie im Gemeinschaftsprivatrecht?*, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 45 (2002); H. Verhagen, *The tension between party autonomy and European Union law: some observations on Ingmar*, INTERNATIONAL LAW AND COMPARATIVE LAW QUARTERLY 135 (2002).

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Community context. The situation might be international from the point of view of the Member States when a contract is concluded between a German and a French national, but all contacts are within the EC. The EC constitutes for the purpose of Brussels I and Rome I a single jurisdiction.[73] That single jurisdiction can exercise *de facto* control over those contracts and does not have to exercise restraint since it is the only competent creator of norms. In contrast to the Rome Convention, art. 3 (4) Rome I does therefore provide for a rule when all connecting factors are situated within the Community, but in different Member States: 'the parties choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.' On the international level, the Community should exercise the same restraint as has been done by the Member States. The international scope of directives should therefore as far as possible be based on Rome I.[74]

The Court appears to apply in *Gasser, Ingmar* and *West Tankers* public law interpretation mechanisms to horizontal relationships between private parties. The Court focuses upon the degree of mandatoriness of the rule involved in order to safeguard legal certainty rather than on the legitimate expectations of private parties.[75] The argument that if Member States do not agree with the outcome of a case they are free to pursue an amendment of Community law seems unfit for horizontal relations. The harm to the private parties has already been done. In pre-Maastricht area the case-law of the Court was primarily concerned with the relations between the Community and the Member States. By emphasising the mandatoriness of Community, the uniform application was guaranteed and opportunistic interpretation by Member States was prevented. Horizontal relations however concern the balancing of private interests. When the rule is manifestly unable to strike a fair balance it should be set aside, regardless of the mandatoriness it proclaims to have. The Court should not forget what private law is principally about: private parties.

The approach of the Court in *Ingmar* sits uneasily with its decisions in *Garcia Avello*[76], *Grunkin Paul*[77], *Centros*[78] and *Überseering*.[79] Whereas in *Ingmar* the Court restrained

[73] Case 398/92 *Mund & Fester,* 1994 E.C.R. I-467, par. 19. The statement of the ECJ with regard to the Brussels Convention can also be applied to Rome I.

[74] E. Jayme and C. Kohler, *L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté européene et des conventions de Bruxelles et de Rome,* 84 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE NO. 1 1, 16 (1995).

[75] A. Dickinson, *Legal Certainty and the Brussels Convention – Too Much of a Good Thing?*, in FORUM SHOPPING IN THE EUROPEAN JUDICIAL AREA 115 (P. de Vareilles-Sommières eds., 2007).

[76] Case C-148/02 *Garcia Avello* 2003 E.C.R. I-11613.

[77] Case C-353/06 *Grunkin Paul,* 2008 E.C.R. I-0000.

private autonomy for the mandatory application of the Agency Directive, party autonomy was deemed to be protection-worthy in the latter group of cases. From a public policy point of view of Member States, the observation of minimum capital requirements, or any other formal requirements for setting up a legal person as well as the determination of the surname of a natural person will be more mandatory than the protection of an agent of termination of the agency contract. The ECJ however held that individuals should take advantage of differences between the conflict of law systems of Member States. Member States could, in principle, not apply to their own conflict of law norms to a right duly acquired in another Member State.[80] The Court awarded an individual the possibility to choose between the PIL systems applicable when several Member States declare, or are declared, via connecting factors competent for the creation of that right. For example, in *Centros* Denmark could not apply its own connecting factor since a company had already been duly set up according to English (private international) law. The Court therefore seems adopt a functional approach towards private autonomy. It is protected when it contributes to the realisation of the internal market, but suppressed when it leads to the non-application of Community law.

The problem concerning under what circumstances directives take precedence over the instruments has not been clarified in the process of transforming the Convention into a Regulation. The issue appears to be left for the first revision of Rome I[81] and is until then left to the Court. It should be hoped that the Court is willing to take interests of private litigants in a simple and predictable conflict of law system seriously and will not exclusively focus upon the perceived needs of the internal market.

[78] Case C-212/97 *Centros,* 1999 E.C.R. I-1459.

[79] Case C-208/00 *Überseering* 2002 E.C.R. I-9919.

[80] *Supra,* note 633.

[81] Although the review clause of art. 27 (1b) only mentions the interface between consumer directives and art. 6 Rome I Regulation (protective connecting factor for consumers), it will most likely have to deal with wider issues.

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F. Conclusion

The role and function of private autonomy in Brussels I and Rome I is both in role and function different. Art. 23 Brussels I imposes formal requirements for the valid conclusion of a prorogation of jurisdiction clause. The clause should be in writing, evidenced in writing or should follow from an established trading usage between the parties or in the relevant sector. The ECJ seems to adhere to a strict interpretation. Art. 3 Rome I does not have any similar limitations. It favours the upholding of a choice of law by recognising its formal validity when it satisfies the formal requirements of the putative applicable law, the *lex loci contractus* when both parties, or their agents, were in that respective country, or the national laws of either party or the law of place where either party was present when the parties were at the time of conclusion of the contract in different countries. Whereas the Court has not allowed Member States to rely on national law to test the formal validity of a prorogation of jurisdiction clause and developed a uniform approach, the formal validity of the choice of law clause still depends upon national law.

The strict formal requirements of Brussels I have the goal of ensuring that a genuine meeting of minds took place. There seems to be no safeguard when, although the formal requirements are met, the consent has been obtained via illicit means. Art. 10 Rome I provides that in principle the material validity will be determined by the putative applicable law, unless the party that advances that he did not consent can demonstrate that in the light of all circumstances it would be unreasonable to determine the effect of his conduct according to the putative applicable law. In that case the question will be governed by the law of the place of habitual residence of that party. As to the substance, Brussels I only addresses choice of court agreements in favour of the courts of a Member State. Art. 3 Rome I in principle allows parties to designate any law. The provision is not limited to a choice between the legal systems of the Member States. Moreover, Rome I does not prevent private parties from electing a non-State body of law. In the light of the differences in formal requirements, as well as in the substance, it can occur that a choice of law is upheld, while a choice of forum is not. In the light of the strong relationship between a choice of court and a choice of law in the same contract, such a situation should be regarded as unfeasible.

Party autonomy in Brussels I and Rome do not is not root of a substantial different rationale on a Community level. The public and private law considerations that were popular on the Continent seem less evident on a Community level. Community law does not care about the classification of a rule but rather about its effects. The public/private paradigm thus has less force. From a Community perspective, national courts are equivalent. It seems that the public policy considerations that led Member States prior to the creation of the EEC to seise and decline jurisdiction cannot be applied in full to jurisdiction conflicts within a system based on mutual trust between the courts established in different Member States. A more eminent role for private autonomy in Brussels I might therefore be appropriate.

The different role that party autonomy performs in Rome I makes it unlikely that party autonomy will be limited in a similar way as in Brussels I. Stressing the mandatoriness of the rules on jurisdiction and the priority of the *lis pendens* rule over the freedom to choose an exclusive forum are the principal reasons why party autonomy is under pressure in Brussels I. The freedom to choose the applicable law is considered to be the cornerstone of Rome I. The stressing of the mandatoriness of the rule would in this case thus favour party autonomy. Art. 3 can be limited by other provisions, but not made subordinate to them. It does not mean that the party autonomy recognised in Rome I does not come under pressure from outside. Whereas party autonomy is supported by the Court if it ensures that private individuals can take advantages of the benefits of the internal market, the Court seems to treat party autonomy less favourably when it leads to the non-application of Community law. The autonomous testing of the international field of application of directives outside Rome I or the classification of the vast majority of directives as applicable regardless of the applicable law would seriously undermine the principle of party autonomy in Rome I. There is no role for the wishes and reasonable expectations of the parties when the scope of application of directives is assessed on the objective and purpose of the instrument involved. Equally private autonomy is excluded when most provisions in directives are classified to be overriding mandatory provisions.

Whereas from a Community perspective there is no substantial difference in prorogation of jurisdiction or choice of law clause, the dangers come from different angles. The main factor undermining the effectiveness of a choice of the court clause is derived from the placement of art. 23 in Brussels I. The Court perceives prorogation of jurisdiction to be an exception to the main rules of Brussels I and prefers to stress the mandatoriness of those rules, which results in a narrow construction of party autonomy. Since party autonomy is the corner stone of Rome I, this is not likely to happen in the area of conflict of laws. The main threat to party autonomy comes from outside of Rome I. The stressing of mandatoriness of directives significantly impairs contracting parties to choose the applicable law. Both threats for party autonomy might however stem from the same problem: an inward looking approach that exclusively focuses upon the needs of the Community legal order. Law that governs the horizontal relations between European citizens should focus on what it actually concerns: the reasonable expectations of private parties rather than on the exclusive needs of the internal market.