

Jurisdiction in, and the Law Applicable to, Cross-Border Contractual Obligations: the Objectives and Impact of the EU's Legislative Journey

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Abstract

This thesis researches EU private international law rules relating to contracts, including its historical development, its rules and its policy objectives. In order to evaluate EU private international law and its policy objectives, English and Belgian private international law rules are investigated as exemplars of domestic law systems within the EU.

In this approach lies one of the unique contributions to knowledge of the project. In particular the research takes an original and unique approach by investigating issues from an EU as well as a comparative national perspective. English and Belgian law represent different legal histories and systems (common law and civil law) and are therefore representative of the types of compromises that have to be made at an EU level.

Moreover, the relevant legal instruments in the area of research have undergone some changes, some of which are significant and very recent. Particular reference must be made here to the Brussels I Regulation recast 2012. Due to its recent nature, very little publications are available, a gap the research wants to help fill by a detailed textual analysis of the relevant provisions.

Finally, there is as of yet little detailed research on the EU's policy objectives in the area of private international law. To some extent this holds true for English and Belgian law as well. The research aims to help fill that gap.

Introduction

1. Area of research

The area of private international law, or the conflict of laws, is the area of law which is concerned with situations in which there is an international element, i.e. a connection with more than one country, or, a foreign element.¹ In this thesis the term “private international law” will be used, rather than “conflict of laws”. The reason for this is that the term “conflict of laws” seems to suggest that the area covers situations in which there is a conflict between one or more substantive laws.² Although this is one of the problems private international law seeks to address, the area covers more than that.

Firstly, private international law determines the country whose courts have jurisdiction to hear claim with an international element. Secondly, private international law determines which law is to be applied by the competent court, i.e. the court with jurisdiction, because it will not necessarily have to apply its own national law to the dispute before it. Thirdly, private international law determines whether and how foreign decisions can be recognised and enforced.³

This research project investigates EU private international law relating to contracts, including its historical development, its rules and its policy objectives. In order to evaluate EU private international law and its policy objectives, English and Belgian private international law and policy objectives are investigated as exemplars of domestic law systems within the EU.

The choice of these particular national legal systems was made in order to compare both a civil law system with a common law system, and a founder Member State with a Member State which joined years later when the private international law system of the EU was already underway. Furthermore, from a political and policy point of view, the United

¹ McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris. The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 2.

² Briggs, A., 2013. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 1-2.

³ Van Calster, G., 2013. *European Private International Law*. Oxford: Hart Publishing. p. 1

Kingdom has tended to be in favour of a broader Europe, supporting for example the accession of Turkey to the EU, whereas Belgium has always been in favour of a deeper Europe, supporting more European integration.⁴

The researcher chose to focus on two aspects of private international law, namely jurisdiction and applicable law, because the scope of the project did not allow for an in-depth study of all three areas of private international law. In one of the two areas chosen, there have been developments, some of which significant, since the research project was started.

The EU instruments key to the research are the Brussels I Regulation on jurisdiction and enforcement of judgments in civil and commercial matters and the Rome I Regulation on the law applicable to contractual obligations. Brussels I was revised recently and this revision has of course formed part of the focus of the research project.

The two relevant instruments are part of wider historical and legal developments in the EU and must be seen as instruments facilitating and contributing to the single European market which is aimed at establishing fair competition between undertakings and is based on four freedoms: free movement of persons, goods, services and capital.⁵ In particular Brussels I and Rome I state as their general objective the maintenance and development of an area of freedom, security and justice in which the free movement of persons is ensured through measures which are necessary for the sound operation of the internal market.

Against this background it is investigated what the EU policy objectives underlying the rules in these instruments are. Bearing these policy objectives in mind, an in-depth analysis of several provisions is conducted in order to assess whether, and to what extent, the rules in them achieve their underlying objective. This approach was inspired by the fact that, when interpreting and applying EU legislation the CJEU has traditionally applied a teleological method i.e. a method whereby legislation is interpreted in accordance with its purpose.⁶

An investigation of English and Belgian law is also conducted as a basis for assessing whether and to what extent EU law has been influenced by national law and vice versa. Furthermore, insofar as elements of the national law and policy examined in this thesis have

⁴ See also: Dinan, D. (ed.), 2006. *Origins and Evolution of the European Union*. Oxford: Oxford University Press. p. 110, 155, 174.

⁵ Art. 26 TFEU.

⁶ Oren, J., 2003. International Jurisdiction over Consumer Contracts in E-Europe. *International and Comparative Law Quarterly* [online], 52(3), 668. Available via: Westlaw.

not apparently influenced EU law, they may provide some insight in the feasibility and desirability of possible solutions for problems identified in EU law.

2. Methodology

A legal doctrinal study is being carried out, which is historically and currently the method expected and required by legislators, lawyers and other legal interest groups in this area of law. Legal doctrinal research provides a systematic exposition of the rules governing a certain area of law and it analyses the relationship between rules. Furthermore areas of difficulty are identified and future developments are predicted. The research is also reform-oriented because it intensively evaluates the adequacy of current legal rules and seeks to recommend changes to those current rules which are considered inadequate or only partly adequate, meaning that there is room for improvement.⁷

For this doctrinal study several resources are being used. Firstly a detailed textual analysis of the legal rules themselves is conducted. For EU law and English law these are contained in the relevant legislation as well as the case law relating to it. For Belgian law the legal rules are solely contained in legislation as Belgium does not recognise case law as actual law but rather as an application and interpretation of the law. This of course does not make case law irrelevant or unimportant; it is just a matter of attaching the correct level of authority to the source.

Secondary resources used are diverse. Textbooks, journal articles, case comments etc. are used to research EU, English and Belgian law and policy although they are not equally numerous for all these research subjects. More specifically there are less of these types of resources available on the Brussels I recast and on Belgian law. For EU law and Belgian law in particular, important secondary resources consist of preparatory works such as parliamentary documents containing debates, explanations and amendments, responses to consultation papers and proposals of legislation.⁸

⁷ Pearce, D., Campbell, E. and Harding, D., 1987. *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*. Canberra: Australian Government Publishing.

⁸ The Belgian documents used are in Dutch and French. They were translated into English by the author of the thesis.

EU resources have been examined first because this has enabled an analysis of EU law, and an identification and evaluation of EU policies, to be made. The focus has been on the most relevant documents for the project, with particular attention to the relevant official documents. With these secondary resources and commentaries taken into account, current problems with, as well as possible issues for, the future development of EU law were identified. These provided the focus for the investigation and analysis of national law and policy. English private international law has been widely documented although the Civil Procedure Rules, which form a part of this law, pose a particular challenge because, although they are essential in private international law, they change very often and changes and amendments are not always documented very transparently. Therefore any research relating to them has been double checked from time to time. Regarding Belgian law a lot of the resources investigated consisted of very lengthy parliamentary documents as doctrine is somewhat scarce.

3. Aims of the Research

- 1) To critique the development and current state of EU private international law relating to contracts.
- 2) To critique the policy objectives of the EU in this area of law.
- 3) To evaluate the impact of the interrelationship of EU law and policy, and that of the Member States, with particular reference to the domestic law of England and Wales and Belgium.

4. Objectives of the Research

- 1) Investigate EU private international law relating to contracts, including its historical development.
- 2) Investigate EU policy objectives in this area.

- 3) Research English and Belgian private international law relating to contracts, and the policy objectives underlying these laws, as exemplars of Member State law and policy in this area.
- 4) Investigate the impact of EU law and policy on these two national laws and vice versa.
- 5) Identify and evaluate problems with current law and those likely to arise in its future development.
- 6) Suggest solutions to these problems and assess their feasibility.

5. Research Questions

- 1) What is the current state of EU law in the area of private international law relating to contracts?
- 2) What are the EU's policy objectives in this area?
- 3) Taking into account the answers to question 2 and 3, to what extent does EU private international law achieve its own policy objectives and what other criticisms may be made of it?
- 4) To what extent are the policy objectives and achievements of EU law influenced by national law?
- 5) What is the impact of EU developments on English and Belgian law in this area, and does any difference in impact relate to the dichotomy between civil law and common law or the different history of those countries' relationship with the EU?
- 6) What solutions may address the criticisms identified and, given the interrelationship of EU law and national law, to what extent are these feasible and desirable?

6. Original Contribution to Knowledge

In the application for project approval it was pointed out that there was a lack of specialised analysis of many of the provisions of Rome I and the resulting legal and policy issues since it was relatively new then. Since project approval and transfer to PhD there have been publications on this Regulation but several of these lack depth. Furthermore, publications on both the Brussels I Regulation and the Rome I Regulation generally lack a combined EU law and comparative private international law perspective. This research will thus still provide an original contribution to knowledge in this area with its detailed textual analysis of the relevant provisions.

Furthermore there is as yet little detailed research on the EU's policy objectives and approach regarding private international law. If addressed, authors usually limit their analysis to a mentioning of one particular objective relating to a specific rule. Hardly ever are the policy objectives underlying the rules the red thread in the analysis, let alone the interplay between those objectives. The same holds true for Belgian policy objectives and even English policy objectives to some extent. The identification and evaluation of these policy objectives therefore constitutes a considerable contribution to knowledge, particularly in relation to EU private international law where particular attention is paid to the interaction between these objectives and how that impacts, not just on the rules, but also on the possible solutions for problems identified.

Furthermore, due to its recent nature, only very limited publications on the Brussels I Regulation recast are available. As such, the in-depth analysis and evaluation of several of its provisions will aid in filling that gap.

A very particular contribution to knowledge is that this research takes an original and unique approach by investigating issues from an EU as well as a comparative national perspective. English and Belgian law represent different legal histories and systems (common law and civil law) as well as differences in opinion on EU integration. These two countries will therefore provide a particular insight in the type of compromises that have to be made on an EU level, not just or not necessarily from a political point of view, but in terms of designing private international law rules for the EU which are sensible, feasible and desirable in such a diverse organisation.

7. Structure of the Thesis

Chapter 1 discusses the historical development of EU private international law against the background of the historical development of the EU, after which the key policy objectives underlying EU private international law are identified and described.

Chapter 2 outlines the EU private international law instruments subject to this research, with a particular emphasis on those provisions that will form part of the in-depth discussion, analysis and evaluation in chapters 5 to 8.

Chapter 3 introduces English private international law rules with attention for its underlying policy objectives.

Chapter 4 discusses Belgian private international law, again, with attention for its underlying policy objectives.

Chapter 5 identifies and discusses EU private international law rules relevant to the policy objective of access to justice, after which an assessment is carried out.

Chapter 6 focuses on several EU private international law provisions and assesses these in view of the overall underlying policy objective of legal certainty and predictability.

Chapter 7 centres around party autonomy and in how far this policy objective is enhanced through the relevant EU private international law provisions. Suggestions for improvement are made, taking into account the conclusions reached in the previous two chapters.

Chapter 8 researches in how far weaker parties are protected by EU private international law provisions and, if so, whether this protection is detrimental to the other policy objectives pursued.

Chapter 1. EU Private International Law History and Policies

1. Introduction

This chapter aims to investigate the historical development of EU private international law, with an emphasis on EU private international law relating to contracts, as well as the EU's policies in this area. The focus will be on those historical events particularly relevant for the purposes of this thesis.

The policies underlying EU private international law rules are not always easily identifiable. There is no exhaustive list of 'policies', or 'aims', or 'goals', or a document from any EU institution which clearly sets out what the relevant rules aim to achieve or remedy. The relevant literature in the field often touches on one or more of the underlying policy objectives but has not given a clear overview of the underlying policy objectives identified. This chapter aims to do just that, supported by research from a diverse range of sources.

2. EU Private International Law History

2.1 Introduction

The history of the EU has been widely discussed in several academic fields because it has an impact in many areas and is therefore relevant to a range of academic disciplines. This thesis does not aim to provide an extensive overview and in-depth discussion and analysis of European and EU history as this is an endeavour better left to historians. It is, however, impossible to discuss the historical development of EU private international law without discussing how the EU came into existence and how it developed. Similarly the roots of the EU as well as its development must be discussed in the wider context of European history.

The focus in this section will be on the key historical events leading to the foundation of the EU (originally the EEC) and the elements in its development which are believed to be

particularly relevant for the discussion of the inception of EU-wide private international law and its subsequent development. The creation, development and evolution of the relevant legal instruments will form part of this discussion.

2.2 The events leading to the foundation of the EU

Modern European history, and in particular the two World Wars and the subsequent Cold War, played a crucial role in the EU's conception and political reality has dictated its growth, in terms of vertical as well as horizontal integration.

The history of Europe was a violent one, characterised by nation states fighting each other in pursuit of power over the continent and beyond. The roots of the European Union date back principally to the years immediately after the Second World War in 1945, which left the continent in ruins and its population devastated. It is estimated that about 50 million people lost their lives during the Second World War, around 45 million became homeless and even more were displaced.⁹ The resulting strong political spirit of “never again” in Europe gave rise to discussions between politicians on how to take steps towards integration on a supra-national level.¹⁰ This is illustrated by the goal of the 1948 Hague Congress, as formulated by President Kerstens, “to promote a freely and democratically united Europe”.¹¹ At this Congress Winston Churchill captured the spirit in the following words:

“The movement for European unity must be a positive force deriving its strength from our sense of common spiritual values, it is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. At the centre of our movement stands a charter of human rights, guarded by freedom and sustained by law. It is impossible to separate economics and defence from general political structure. Mutual aid in the economic field and a joint military defence must inevitably be accompanied, step by step, with a parallel policy of closer political unity.”¹²

⁹ Kaczorowska, A., 2009. *European Union Law*. 2nd ed. Oxon: Routledge. p. 3.

¹⁰ George, S. and Bache, I., 2001. *Politics in the European Union*. Oxford: Oxford University Press. p 46-47.

¹¹ Congress of Europe Report, The Hague May 1948, p. X. Available via: <http://bookshop.europa.eu/en/congress-of-europe-the-hague-7-to-11-may-1948-pbAX1998669/>.

¹² Ibid.

As pointed out by the President of the European Parliament in the preface for the new edition of the resolutions adopted at the Hague Congress, Churchill was making these pronouncements for the Continent only at the time.¹³ That does not take anything away from the fact, however, that he played a crucial role in the establishment of the first steps towards the European Union. Furthermore his speech illustrates that political cooperation and integration was to be pursued through economic cooperation and integration.

The fact that the emphasis was on economic cooperation can be explained by the Marshall Plan, which offered American financial support to European countries provided that they would work together towards economic reconstruction.¹⁴ However, given the division which existed between Western Europe, and the Soviet Union which influenced Eastern Europe, only Western Europe took steps in order to achieve such cooperation.¹⁵ Although the USA had initially intended economic cooperation and integration for the whole of Europe, the attitude of the Soviet Union changed the approach and made the USA believe that economic integration and cooperation in Western Europe would strengthen this part of the continent against a further spreading of communism.¹⁶

2.3 The Foundation of the EEC

Some initial clarification of certain concepts is needed before further discussion of the EU and its development. For the purposes of EU law and history vertical integration (the ‘deepening’ of the EU) refers to the process whereby competencies are increasingly shared across EU Member States or delegated to autonomous supra-national EU institutions. It can therefore be defined as “the distribution of competencies between EU institutions in integrated policy sectors”.¹⁷ Horizontal integration (the ‘widening’ of the EU) refers to the process whereby the EU expands territorially by accepting new Member States. It can be defined as “the territorial extension of [...] vertical integration”.¹⁸ As this research focuses on a particular area of EU law, vertical integration is more important in discussing its

¹³ Ibid.

¹⁴ Kaczorowska, A., 2009. *European Union Law*. 2nd ed. Oxon: Routledge. p. 4.

¹⁵ Dinan, D. (ed.), 2006. *Origins and Evolution of the European Union*. Oxford: Oxford University Press. p 37.

¹⁶ George, S. and Bache, I., 2001. *Politics in the European Union*. Oxford: Oxford University Press. p. 49-51.

¹⁷ Richardson, J.J., ed., 2006. *European Union: Power and Policy-Making*. 3rd ed. Abingdon: Routledge. p. 75.

¹⁸ Op.cit. p. 76.

development. For the purpose of comprehensiveness however, reference will also be made to horizontal integration in this chapter.

The first attempt towards European economic integration consisted of the European Coal and Steel Community (ECSC), which was described by its architect, the French Foreign Minister at the time, Robert Schuman, as “the first concrete foundation of a European federation indispensable to the preservation of peace”.¹⁹ He was clearly inspired by Winston Churchill’s²⁰ speech in Zürich in 1946, to the effect that the European family should be re-created and should be provided with a structure under which it could dwell in peace, safety and freedom.²¹ The ECSC tied together the coal industries of Belgium, the Netherlands, Luxembourg, Italy and, importantly, France and Germany and put them under the control of a supranational body, the High Authority. The aim was to aid economic recovery but also to make future war politically and practically impossible.²²

It has been said that the ECSC only knew limited success because it appeared that the national authorities remained reluctant to transfer part of their sovereign powers to a supranational entity.²³ In terms of political powers and against the background of distrust which still existed between France and Germany in particular, this is probably true, at least if the ECSC is viewed as a step towards an immediate European federation. The failed attempt at establishing the European Defence Community further illustrates this. Where the ECSC was aimed at preventing Germany from taking up arms again, the EDC would result in its rearmament, which was still feared.²⁴ After a change of government, the French Parliament voted against the EDC, probably due to an easing of tension between the East and the West.²⁵ Although this was a setback in terms of creating a European federation, the six ECSC Members, remained determined that there was a need for further vertical integration, first of all in the economic field.²⁶ This was achieved through the establishment of the European Atomic Energy Community (EURATOM) for the development of atomic energy for peaceful purposes, and through the establishment of a European common market.

¹⁹ Schuman Declaration 9 May 1950. To be consulted at: http://europa.eu/abc/symbols/9-may/decl_en.htm.

²⁰ Who was the British Prime Minister from 1940-1945 and 1951-1955.

²¹ Churchill, W., 1946. Speech to the Academic Youth at the University of Zürich 19 September 1946. To be consulted at: <http://www.churchill-society-london.org.uk/astonish.html>.

²² Foster, N., 2011. *Foster on EU Law*. 3rd ed. Oxford: Oxford University Press. p. 7.

²³ George, S. and Bache, I., 2001. *Politics in the European Union*. Oxford: Oxford University Press. p. 80.

²⁴ Foster, N., 2011. *Foster on EU Law*. 3rd ed. Oxford: Oxford University Press. p. 8.

²⁵ Dashwood, A. et al., 2011. *Wyatt and Dashwood’s European Union Law*. 6th ed. London: Sweet & Maxwell. p. 5.

²⁶ Dashwood, A. et al., 2011. *Wyatt and Dashwood’s European Union Law*. 6th ed. London: Sweet & Maxwell. p. 7; Kaczorowska, A., 2009. *European Union Law*. 2nd ed. Oxon: Routledge. p. 9.

Since EURATOM is not relevant for the purposes of this thesis and is only of marginal importance compared to the common market, it will not be discussed further.

The Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957,²⁷ was a milestone regarding European economic integration because it recognised that, in order to remove existing obstacles, concerted action was needed to guarantee steady expansion, balanced trade and fair competition²⁸. In its first Article the Treaty therefore set the Community of the then six Member States, the same six who founded the ECSC,²⁹ the task to establish a common market through several activities and measures to be undertaken, which were specified further in the Treaty.³⁰ The common market created a single economic area establishing fair competition between undertakings and was based on four freedoms, namely the free movement of persons, services, goods and capital.³¹

No extensive references were made to private international law in the Treaty as the emphasis was mainly on essential measures which had to be taken first and foremost in order to remove obstacles and achieve a common market such as prohibition of duties³² or quantitative restrictions on the free movement of goods across borders,³³ the abolition of work permits for Member State nationals seeking to work in another Member State³⁴, the prohibition of anti-competitive behaviour³⁵ etc.³⁶

The issue of private international law was touched upon by Article 220 of the Treaty, which stated that “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.” From this provision it is clear that legislation harmonising or unifying rules of private international law was not to be made by the

²⁷ Treaty Establishing the European Economic Community (EEC), signed in Rome on 25 March 1957. Hereinafter called the EEC Treaty.

²⁸ Preamble EEC Treaty.

²⁹ Belgium, France, Germany, Italy, Luxembourg, the Netherlands.

³⁰ Art. 2 and 3 EEC Treaty.

³¹ Art. 14 (2) EC ; Part Three, “Community Policies”, title I and III EEC Treaty.

³² Part Three, title I, chapter 1 EEC Treaty.

³³ Part Three, title I, chapter 2 EEC Treaty.

³⁴ Part Three, title III, chapter 1 EEC Treaty.

³⁵ Part Three, title VI, chapter 1 EEC Treaty.

³⁶ See also: Bogdan, M., 2006. *Concise Introduction to EU Private International Law*. Groningen: Europe Law Publishing. p 6.

Community through its own institutions, but through intergovernmental negotiations between the Member States in the form of international conventions³⁷.

The first step taken by the then six and original Member States of the Community, including Belgium, was the Brussels Convention in 1968,³⁸ which expressly stated that it implemented Article 220 by securing the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals;³⁹ thus affirming the impact of the Community on private international law despite the fact that this area of law was only marginally mentioned in the Treaty⁴⁰ and had attracted very little attention in literature.⁴¹ The Convention laid down uniform rules regarding jurisdiction of Member State courts as well as enforcement of their judgments. By acceding to the Convention the Member States went further than the Treaty had prescribed as jurisdiction was also regulated by the Convention, despite the fact that it was only recognition and enforcement which were mentioned in Article 220 of the Treaty.

2.4 Development of the Community

The Community (now the EU) expanded substantially over the years from its six Founding Members to its current twenty-eight Members.⁴² Particularly noteworthy in the context of this thesis is the accession of the United Kingdom, in 1973, to the Community and, in 1978, to the Brussels Convention.⁴³

³⁷ Basedow, J., 2000. The Communitarization of the Conflict of Laws under the Treaty of Amsterdam. *Common Market Law Review*, 37, 687.

³⁸ 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *O.J. L* 299, 31.12.1972, 32. Hereinafter called the Brussels Convention.

³⁹ Preamble of the Brussels Convention.

⁴⁰ Drobnič, U., 1966-67. Conflict of Laws and the European Economic Community. *American Journal of Comparative Law* [online], 15, 204. Available via: HeinOnline.

⁴¹ A contrario: Drobnič, U., 1966-1967. Conflict of Laws and the European Economic Community. *American Journal of Comparative Law* [online], 15, 204. Available via: HeinOnline.

⁴² In chronological order: the six Founding Members and Denmark, Ireland and the United Kingdom (1973), Greece (1981), Portugal and Spain (1986), Austria, Finland and Sweden (1995), Cyprus, Czech republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (2004), Bulgaria and Romania (2007) and Croatia (2013).

⁴³ Council Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and

In 1980 the then nine Member States, including the United Kingdom which joined in 1973, signed the Rome Convention, which contained uniform rules regarding the law applicable to contractual obligations in the Community.⁴⁴ No express reference was made in this instrument to article 220 of the EEC Treaty. It was said in the Preamble however that the Contracting Parties were anxious to continue in the field of private international law the work of unification of law which had already begun within the Community by the accession of Member States to the Brussels Convention.⁴⁵

Because these private international law rules were in the form of conventions they were not directly applicable in the Member States in the sense of automatically becoming part of national law, but had to be ratified first by each Member State, which sometimes lead to severe administrative or bureaucratic delays delaying or preventing their entry into force.⁴⁶ Furthermore, because they were not part of Community law, with the accession of new Member States to the Community, accession conventions to the initial conventions had to be signed after detailed negotiations to accommodate the wishes and demands of these new Member States.⁴⁷ These negotiations resulted in several changes to the original instruments such as, for example, the insertion of jurisdiction rules regarding trusts upon the accession of the UK, Ireland and Denmark to the Brussels Convention in 1978.⁴⁸ With regards to the jurisdiction of the European Court of Justice⁴⁹ it must also be noted that both for the Brussels

Commercial Matters and to the Protocol on its Interpretation by the Court of Justice (78/884/EEC), *OJ L* 304, 30.10.1978, 1.

⁴⁴ 1980 Rome Convention on the Law Applicable to Contractual Obligations, *O.J.* L266, 09.10.1980, 1. Hereinafter called the Rome Convention.

⁴⁵ Preamble Rome Convention.

⁴⁶ 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, 15. Belgium seems to have a particularly bad reputation in this respect. See e.g. Plender, R. and Wilderspin, M., 2009. *The European Private International Law of Obligations*. 3rd ed. London: Sweet&Maxwell. p 4.

⁴⁷ Regarding the Brussels regime an overview of commencement dates for each Member State and each version can be found in: Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 18-19 *juncto* p. 50-51. The preparatory work on the Rome Convention and the Rome I Regulation is discussed in-depth by Plender, R. and Wilderspin, M., 2009. *The European Private International Law of Obligations*. 3rd ed. Thomson Reuters: London. p. 6-13.

⁴⁸ Council Convention of Accession of 9 October 1978 of the United Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice (78/884/EEC), *O.J.* L304, 30.10.1978, art. 5, 11 and 23.

⁴⁹ Since the Treaty of Lisbon this court has been named the Court of Justice of the European Union, and it will further be referred to as such; article 9 (1) Treaty on EU as amended by the Lisbon Treaty.

Convention and the Rome Convention protocols were signed to give that court jurisdiction in order to ensure a uniform application of their provisions.⁵⁰

For the purpose of comprehensiveness a brief mention and outline of the Single European Act⁵¹ is necessary. It revised the Treaties of Rome to add new momentum to European integration, with a clear aim and associated deadlines to complete the internal market by the end of 1992, as well as European Political Cooperation. The Act amended the rules governing the operation of the European institutions and expanded Community powers. Although not of specific importance for EU private international law, the SEA was the first Treaty to amend the EEC Treaty and illustrated that the Member States aimed for further integration.

The Treaty on European Union, signed in Maastricht in 1992,⁵² changed the name of the European Economic Community to simply the “European Community” and created the European Union which consisted of three pillars: 1) the European Communities, 2) common foreign and security policy (CFSP) and 3) justice and home affairs (JHA). The first pillar, the European Communities, consisted of the European Community (EC), the European Coal and Steel Community (ECSC) and EURATOM. Matters residing under this first pillar were to be administered by the Community institutions, whereas matters residing under the second and third pillars, such as private international law, were to be administered by means of an intergovernmental decision-making process, giving the Community institutions only very limited competence in these areas.⁵³

Because of the limited scope of the previous European Treaties in relation to private international law, the Treaty of Amsterdam 1997⁵⁴ was a milestone with regards to European private international law. It not only renumbered the EU and EC Treaties but it introduced

⁵⁰ Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – Signed in Luxembourg on 3 June 1971, *O.J.* C189, 28.07.1990, 25; 89/128/EEC: First protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Obligations, Opened for Signature in Rome on 19 June 1980, *O.J.* L48, 20.02.1989, 1; 89/129/EEC: Second Protocol Conferring on the Court of Justice of the European Communities Certain Powers to Interpret the Convention on the Law Applicable to Contractual Obligations, Opened for Signature in Rome on 19 June 1980, *O.J.* L48, 20.02.1989, 17.

⁵¹ Single European Act, *OJ* L169, 29.6.1987, 1.

⁵² Treaty on European Union, *OJ* C 191, 29.07.1992, 1.

⁵³ http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm

⁵⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain related Acts, *O.J.* C340, 10.11.1997, 1.

into the EC Treaty a Title IV on Visas, Asylum, Immigration and other Policies related to Free Movement of Persons, requiring that “in order to establish progressively an area of freedom, security and justice, the Council shall adopt...measures in the field of judicial cooperation in civil matters.”⁵⁵ This meant that private international law was transferred from the third pillar to the first pillar, giving the Community, as opposed to the Member States, competence in the area. This meant future rules, if legislated in the form of Regulations, could be directly applicable in the Member States regardless of their national legislation and without the need for prior ratification or subsequent transposition.⁵⁶ Furthermore the European Court of Justice would automatically have jurisdiction regarding these instruments so that protocols explicitly giving this court jurisdiction would no longer be necessary⁵⁷.

Important to note here is that, through a protocol attached to the Treaty of Amsterdam⁵⁸, the United Kingdom took the position that it would opt out of measures taken pursuant to the aforementioned Title IV (ex Title IIIa)⁵⁹ unless it expressly chose to opt in to a particular measure⁶⁰. It seems, however, that the United Kingdom negotiated this opt out primarily with a view to avoid being bound by European measures in areas other than private international law covered by this title, for they have so far participated strongly in the negotiations of new instruments in the area of private international law⁶¹ and they have also decided to opt in to most such instruments. Furthermore it has been reported that certain last minute changes were made by then UK Head of Government, Tony Blair, to those provisions of the Treaty providing the legal basis for European competence in the area of private international law.⁶² It is hard to see why these last minute restrictions were negotiated if the UK had no intention to opt in to these measures from the outset.

The Treaty of Nice reformed the EU institutions but was technical rather than substantive. The Treaty of Lisbon, on the other hand, entailed more drastic changes, in general as well as

⁵⁵ Art. 61 (c) EC Treaty (as revised by the Treaty of Amsterdam).

⁵⁶ Art. 288 TFEU

⁵⁷ Art. 267 and 263 TFEU.

⁵⁸ Protocol to the Treaty of Amsterdam on the Position of the United Kingdom and Ireland; a different Protocol regarding the opt outs of Denmark is also attached to the Treaty.

⁵⁹ Art. 1 and 2 Protocol on the Position of the United Kingdom and Ireland.

⁶⁰ Art. 3 and 4 Protocol on the Position of the United Kingdom and Ireland.

⁶¹ Fiorini, A., 2008. The Evolution of European Private International Law. *International and Comparative Law Quarterly* [online], 57 (4), 979. Available via: Westlaw.

⁶² Betlem, G. and Hondius, E., 2001. European Private Law after the Treaty of Amsterdam. *European Review of Private Law*, 1, 10.

relating to private international law. It renamed the EC Treaty the Treaty on the Functioning of the EU⁶³ and renumbered the EU and EC Treaties. Furthermore the EC was renamed the EU and the Court of Justice was renamed the Court of Justice of the EU. The TFEU contains a chapter, although consisting of just one article, entirely devoted to private international law. This means that, rather than a fraction of the Title on ‘Visas, Asylum, Immigration and other Policies related to Free Movement of Persons’, private international law is now a separate field of focus of the EU. Or so it seems. It has been argued that the new title of the chapter dedicated to private international law is really a missed opportunity as it refers to ‘Judicial Cooperation in Civil Matters’⁶⁴, which is not very reflective of the area covered. This is illustrated by the developments in the area since the Treaty of Amsterdam, which gave a new impetus to EU private international law. After that Treaty, the EU was and has been particularly active in the field with two developments at the heart of this thesis.

The first development to be noted is the Brussels I Regulation which contains rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.⁶⁵ A few years later the Rome I Regulation on the law applicable to contractual obligations was adopted.⁶⁶ These two instruments are the EU mirror of the Brussels Convention 1968 and the Rome Convention 1980 respectively. That is not to say nothing has changed however. Where relevant, the differences between each instrument and its predecessor will be discussed in this thesis for two main reasons. First, as the Regulations are fairly recent, case law on their application is so far limited. An investigation of the available case law on their predecessors can therefore be helpful in interpreting and assessing them. Second, changes made to certain rules may indicate that the old rules did not achieve the policy objectives underlying them. As such it is interesting to see why the old rules did or did not work and whether the changes made have remedied the problems experienced or whether further change is needed.

Finally it is important to note that the Brussels I Regulation has been reviewed recently. Although not yet applicable,⁶⁷ the recast Regulation will be discussed with a particular

⁶³ Treaty on the Functioning of the European Union, *OJ* C83, 30.3.2010, 47.

⁶⁴ Chapter 3 TFEU, containing Article 81.

⁶⁵ 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.* L12, 16.01.2001, 1.

⁶⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, *O.J.* L177, 04.07.2008, 6.

⁶⁷ Art. 66 Brussels I recast.

emphasis on the relevant changes made, as compared with the current Regulation, and the reasons for those changes.

3. EU Private International Law Objectives

As mentioned in the introduction to this chapter there is no formal and authoritative list of EU private international law policy objectives. An investigation of several resources is therefore needed in order to discover what they are. This subsection will identify them and give a brief explanation, but a more in-depth discussion and an evaluation and assessment as to whether the rules achieve their underlying objectives will follow in subsequent chapters of this thesis.

Although the EU private international law project was given significant impetus by the Treaty of Amsterdam, it is clear from its historical development that certain policy objectives were sought to be achieved by the Member States collectively long before private international law became a matter of EU competence under the umbrella of the ‘area of freedom, security and justice’ or the current umbrella of ‘judicial cooperation in civil matters’. When discussing EU private international law policy objectives it is therefore relevant to look at historical as well as current instruments. Reference will therefore be made to certain instruments no longer in force and strategies superseded, because policy objectives of the EU, pursued through its legal instruments, such as the Brussels I and Rome I Regulations, can be viewed as the policy objectives of the Member States collectively, historically pursued through the instruments of the Conventions.

First, both the Brussels I Regulation and the Rome I Regulation expressly state in their Preambles that their general objective is to maintain and develop an area of freedom, security and justice in which the free movement of persons is ensured through measures which are necessary for the sound operation of the internal market.⁶⁸ In consequence, reference is made to the articles which gave the Community competence in the field of private international law such as Article 65 EC that provides for measures in the field of private international law to be taken insofar as necessary for the proper functioning of the internal market and under

⁶⁸ (1) Preamble Rome I and Brussels I.

the umbrella of the free movement of persons⁶⁹, which is one of the constituent elements of the internal market.

Second, Article 81 TFEU expressly identifies private international law, at least to a certain extent, as one of the areas in which EU action is needed for the proper functioning of the internal market. However, even before these changes were made by the Treaty of Amsterdam to the EC Treaty,⁷⁰ and before the Treaty of Lisbon incorporated the new title, the signatories to the Brussels Convention had already expressed their will to strengthen the legal protection of persons established within the territories of the Member States to the EEC, despite the fact that the conflict of laws was then only marginally mentioned in the EEC Treaty.⁷¹ In terms of policy objectives underlying European private international law rules this is not surprising as differences in national rules in this area of law could very well create obstacles for the proper functioning of the common market,⁷² as will become clear from the following discussion of the general policy objective, legal certainty, and the specific policy objectives pursued to achieve the general objectives of the single market.

3.1 The General Objective: Access to Justice

The EU considers that EU citizens have a right to expect it to simplify and facilitate the judicial environment in which they live in the European Union context.⁷³ The overriding aim sought to be achieved by the transfer of competences in the area of private international law in the Treaty of Amsterdam was to create a European judicial area in civil matters, where

⁶⁹ Title IV EC.

⁷⁰ Cf. supra EU Private International Law History.

⁷¹ Preamble Brussels Convention.

⁷² (2) Preamble Brussels I; Cf. Bogdan, M., 2006. *Concise Introduction to EU Private International Law*. Groningen: Europe Law Publishing. p 7.

⁷³ Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, *O.J. C19*, 23.01.1999, 4.

EU citizens have a common sense of justice throughout the European Union and where justice facilitates their day-to-day life.⁷⁴ Thus the notion of EU citizenship, introduced by the Treaty of Maastricht 1992,⁷⁵ is strongly introduced in the area of private international law because, in order to facilitate the everyday life of EU citizens, this area of law was considered important if recent activity here is at all indicative.

According to the European Commission, in order to achieve a European judicial area European individuals and businesses must be able to approach courts and authorities in any Member State as easily as in their own. They should not be prevented or discouraged from exercising their rights by the complexity of the legal and administrative systems in the Member States.⁷⁶ It is true that the best access to justice, as well as the highest level of legal certainty, could be achieved through a full harmonisation or even unification of national substantive and procedural law.⁷⁷ Substantive law is law which gives individuals, businesses and states rights and imposes obligations on them. Or, it is the part of the law that deals with rights, duties and all other matters that are not matters purely of practice and procedure.⁷⁸ Adjective or procedural law is the law which determines how these rights can be enforced and how these obligations are enforced from a practical perspective. In other words, it is the part of the law that deals with practice and procedure in the courts.⁷⁹ As such, private international law is procedural rather than substantive. Insofar as harmonisation or unification on a substantive level does not (yet) exist however, private international law provides solutions in transnational legal conflicts.⁸⁰ It is an example of an area of procedural law in which the EU has made significant efforts of unification, which is therefore definitely underpinned by the objective of improving access to justice.

3.2 Legal Certainty and Predictability

⁷⁴ Explanatory Memorandum Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a European Judicial Area in Civil Matters, COM (2001), 221 final, 15.05.2001, 1.2.

⁷⁵ Article 20.

⁷⁶ Explanatory Memorandum Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a European Judicial Area in Civil Matters, COM (2001), 221 final, 15.05.2001, 1.2.

⁷⁷ Remien, O., 2001. European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice. *Common Market Law Review*, 38, 64.

⁷⁸ Martin, E. and Law, J., 2006. *Oxford Dictionary of Law*. 6th ed. Oxford: Oxford University Press.

⁷⁹ Martin, E. and Law, J., 2006. *Oxford Dictionary of Law*. 6th ed. Oxford: Oxford University Press.

⁸⁰ Betlem, G. and Hondius, E., 2001. European Private Law after the Treaty of Amsterdam. *European Review of Private Law*, 1, 9.

The Rome I Regulation states that, in order to “contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable”.⁸¹ Similarly, Brussels I says that “the rules of jurisdiction must be highly predictable”.⁸² There is no real dispute on the fact that this is indeed one of the main policy objectives underlying EU private international law rules.⁸³

It seems logical that a true common market cannot exist without a reasonable degree of legal certainty. One of the consequences of the four freedoms and the internal market is that international disputes are more commonplace. If these are not dealt with in a manner safeguarding legal certainty and predictability, this will, in turn, undermine the internal market as people and businesses could be discouraged from exercising the freedoms. It is hard to see how legal certainty could exist if every Member State applies its own national private international law rules, a situation which has been referred to as “the chaos of insecure divergent national choice of law rules”.⁸⁴ Therefore the policy of legal certainty underlying uniform conflict of laws rules is essential as these rules should increase the predictability of which court has jurisdiction⁸⁵ as well as the predictability of the outcome of a dispute.⁸⁶

Legal certainty implies the identification of the competent jurisdiction and a clear designation of the applicable law,⁸⁷ areas of private international law covered, by Brussels I and Rome I, respectively, regarding contract disputes. It also implies the clarity of the content of the domestic law which then applies, although this is not a private international law issue and will therefore not be discussed. Furthermore the importance of legal certainty in this area of law is stressed by the fact that it is highlighted as one of the core elements of EU private international law in several official EU documents as well as EU press releases regarding the Regulations. It is argued that legal certainty needs to be provided to individuals

⁸¹ (16) Preamble Rome I.

⁸² (11) Preamble Brussels I.

⁸³ Affirming this objective e.g. Remien, O., 2001. European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice. *Common Market Law Review*, 38, 64; Hartnell, H.E., 2002-2003. EUstitia: Institutionalizing Justice in the European Union. *Northwestern Journal of International Law and Business* [online], 23, 84. Available via: HeinOnline.

⁸⁴ Remien, O., 2001. European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice. *Common Market Law Review*, 38, 64.

⁸⁵ (11) Preamble Brussels I.

⁸⁶ (6) Preamble Rome I.

⁸⁷ Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, *O.J. C19*, 23.01.1999, 4.

and business because foreseeable and simple rules enable citizens and firms to make more of the possibilities offered by the internal market and the basic freedoms in that market,⁸⁸ which, in turn, profits the functioning of the internal market.⁸⁹

3.3 Party Autonomy

Party autonomy is recognised in the vast majority of legal systems throughout the world⁹⁰ and can in fact be seen as the private international law aspect of the freedom of contract which exists in contract law in general.⁹¹ Prior to the Brussels Convention it had already been rightly pointed out that this principle was in fact the only principle in Member State private international law accepted unanimously by the then Member States.⁹² The fact that it has been embodied in EU private international law is therefore not at all surprising.

The principle of party autonomy in private international law regarding contracts means that the parties to a contract have a basic freedom to choose the country whose court or courts will have jurisdiction in disputes arising out of the contract⁹³ as well as the freedom to choose which country's law these courts will have to apply to the dispute before them.⁹⁴ Both freedoms are expressly recognised in the Preambles to, and, more importantly, the text of, Brussels I⁹⁵ and Rome I⁹⁶ Regulations and have, as such, been largely undisputed ever since they were recognised in the Conventions.⁹⁷ In fact, the only real debate that has evolved around the principle of party autonomy throughout the years has focussed on how "to further

⁸⁸ Press Release: Adoption of Two Commission Proposals Is a Vital Step in Completing the European Law-Enforcement Area for Individuals and Firms, IP/05/1605, 15.12.2005.

⁸⁹ Press Release: European Citizens and Business to Benefit from Greater Access to Justice – Strengthening Co-operation in Civil and Commercial Matters, IP/09/606, 21.04.2009; Press Release: European Citizens and Businesses to Benefit from Greater Legal Certainty and Greater Access to Justice, IP/07/1872, 07.12.2007; Basedow, J., 2000. The Communitarization of the Conflict of Laws under the Treaty of Amsterdam. *Common Market Law Review*, 37, 703.

⁹⁰ Radicati di Brozolo, L.G., 1993. L'Influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation. *Revue critique de droit international privé*, 82 (3), p. 410.

⁹¹ McClean, J.D. and Beevers, K., 2009. Morris. *The Conflict of Laws*. 7th ed. London: Sweet & Maxwell. p 335.

⁹² Drobnič, U., 1966-67. Conflict of Laws and the European Economic Community. *American Journal of Comparative Law* [online], 15, 212. Available via: HeinOnline.

⁹³ Art. 23 Brussels I.

⁹⁴ Art. 3 Rome I.

⁹⁵ (14) Preamble Brussels I.

⁹⁶ (11) Preamble Rome I.

⁹⁷ Art. 17 Brussels Convention; art. 3 Rome Convention.

boost the impact of the parties' will".⁹⁸ As will be explained later on in this thesis this debate has highlighted certain conflicts with other policy objectives underlying EU private international law though, such as the protection of weaker parties to a contract and legal certainty and predictability.

Because of the desire to give as much effect to the parties' will as possible, without infringing other policies too much, and acknowledging common practice⁹⁹ as well as the relevance of party autonomy in international commerce,¹⁰⁰ the rules reflecting this principle have been adapted since the Conventions. It is submitted that they may continue to change in the future since the topic has been discussed again recently in the context of the recast of the Brussels I Regulation which illustrates that it is a very current issue still.¹⁰¹

As already touched upon, despite the argument that party autonomy should not only be respected¹⁰² but even be one of the cornerstones of the conflict of laws regarding contractual obligations,¹⁰³ this autonomy is not unlimited. Other policy objectives could limit party autonomy, the most important one of which is the protection of weaker parties to a contract, which will be discussed in the next paragraph.

3.4 Protection of Weaker Parties

Certain types of contracts are characterised by an inherent imbalance between the parties to it. Most discussed in the literature are consumer contracts and employment contracts where respectively the consumer and the employee are regarded as socio-economically weaker than

⁹⁸ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final, 5.

⁹⁹ 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, 22.

¹⁰⁰ Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final, 5.

¹⁰¹ *Ibid.*

¹⁰² (14) Preamble Brussels I.

¹⁰³ (11) Preamble Rome I.

their contracting partners.¹⁰⁴ Similarly, although somewhat less discussed in literature, the insurance policy holder or beneficiary are the weaker parties to a contract with an insurer.¹⁰⁵

It is accepted in the literature that the protection of weaker parties is a policy objective underlying European private international law rules¹⁰⁶ and this is indeed affirmed by the discussion of this topic in EU preparatory documents,¹⁰⁷ reports,¹⁰⁸ preambles¹⁰⁹ etc. Moreover the Court of Justice of the European Union has, with regards to consumer contracts, repeatedly ruled that the party who is economically weaker and less experienced in legal matters than the other party, should be protected in order not to be discouraged from suing.¹¹⁰

Aiming to reduce the imbalance between the parties to consumer, employment and insurance contracts, the conflict of laws rules governing these contracts depart from the general rules reflecting party autonomy as the basic principle.¹¹¹ This does not mean that there is no party autonomy for these types of contracts but it is limited. Furthermore, the rules determining jurisdiction and applicable law in the absence of choice by the parties also aim to protect the weaker party. As the Court of Justice has explained, the basic idea underlying these special rules is to safeguard access to justice for weaker parties.¹¹²

4. Conclusion

This chapter has given an overview of the history of EU private international law with attention for the relevant historical events in a wider context. It is clear that, although the EU law project has been underway for many decades, it is not yet completed, and in the private

¹⁰⁴ Plender, R. and Wilderspin, M., 2009. *The European Private International Law of Obligations*. 3rd ed. London: Sweet & Maxwell. p. 223 (consumer contracts) and p. 301 (employment contracts).

¹⁰⁵ Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (1999) 348 final, 15.

¹⁰⁶ E.g. Van den Eeckhout, V., 2008. Promoting Human Rights within the Union: the Role of European Private International Law. *European Law Journal*, 14 (1), 109-110.

¹⁰⁷ E.g. 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.

¹⁰⁸ E.g. Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde, *OJ* C282, 31.10.1980, 1.

¹⁰⁹ (13) Preamble Brussels I; (23) Preamble Rome I.

¹¹⁰ Case C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] E.C.R. I-139, at 18; Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] E.C.R. I-439, at 34.

¹¹¹ See *supra*.

¹¹² Cf. *infra*.

international law context this is illustrated by the recent review of Brussels I. As such recent changes have been made by way of the Brussels I recast. Several of these will be analysed in-depth in this thesis.

Four policy objectives underlying EU private international law rules have been identified and briefly explained. They will form the spine of this thesis in relation to the discussion and assessment of the Brussels I and Rome I Regulations. Before that however, an overview of the rules in these instruments will be given in the next chapter.

Chapter 2. EU Private International Law: The Rules

1. Introduction

This chapter will outline EU private international law on jurisdiction and applicable law regarding contractual obligations as currently in force. The aim of the chapter is to give an overview of the law currently in force, to facilitate the analysis and evaluation of the rules in the chapters to follow. Furthermore it will provide the background to the analysis and evaluation and will situate it within the framework of the Regulations.

It must be noted, as explained in chapter I, that the current instruments do not exist in a vacuum and therefore their predecessors may definitely be relevant for several reasons. Firstly, the current Regulations contain many provisions which are identical to the corresponding provisions in the earlier Conventions. Case law and academic commentary on those can therefore be used for the purposes of evaluating and assessing both the Conventions and the Regulations. Secondly, the changes which have been made over the years may be indicative of problems regarding the application or practical results of the rules. An investigation and analysis of the old as well as the current rules will also contribute, therefore, to the evaluation of current law. Reference to predecessors of the instrument currently in force will therefore be made where particularly relevant for the purposes of this research.

As mentioned, the Brussels I Regulation has been revised recently.¹¹³ The Brussels I recast was published in the Official Journal in December 2012 and will enter into force on 10 January 2015.¹¹⁴ Evidently this development cannot be ignored, because the recast will be the law within less than one year. Furthermore, due to its recent nature, academic writing on the recast is limited and, where available, often lacks depth.

It must be noted that the recast, generally speaking, is not a dramatic departure from the original Brussels I Regulation. Some significant changes are introduced though.

¹¹³ See Chapter 1.

¹¹⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), *OJ* L351, 20.12.2012, 1.

These will be discussed in so far as relevant to this thesis. The changes in relation to recognition and enforcement will therefore not form part of the analysis. The changes in relation to jurisdiction relating to contractual obligations, however, are discussed in order to analyse whether they reflect any changes in policy or, if not, whether they improve or reduce the achievement of existing policy aims.

Both Brussels I and Rome I contain an extensive set of rules, not all of which need detailed analysis within the scope of this thesis. The Brussels I rules on jurisdiction and enforcement will not be discussed at all because they are not subject to the research project. Furthermore, for Brussels I as well as Rome I, the main focus will be on the provisions most relevant to the research project.

2. Jurisdiction

2.1 Outline of the Brussels I Regulation

The first chapter of the Regulation defines its material scope. The second chapter, entitled “Jurisdiction” contains general provisions on jurisdiction in its articles 2 to 4. Its second section consists of Articles 5 to 7 which contain provisions regarding so called special jurisdiction, which give the plaintiff additional forums to sue. Grounds for jurisdiction in matters relating to insurance are contained in section 3 of chapter 2, in Articles 8 to 14. Jurisdiction on consumer contracts is the subject of section 4 of chapter 2, which comprises of Articles 15, 16 and 17. Section 5, containing Article 18 to 21 is entitled “Individual contracts of employment”. Section 6 is made up of just one Article, Article 22, which contains so called exclusive grounds of jurisdiction. These relate to subject matters in which a certain court has jurisdiction regardless of other provisions. Section 7, entitled “Prorogation of Jurisdiction” contains Article 23, which provides for jurisdiction based on agreement by the parties, and Article 24, which envisages the situation in which the defendant submits by appearance. Provisions relating to *lis pendens* and related actions are contained in articles 27 to 30, which make up section 9 of chapter 2. Article 31 is the only provision in section 10 on provisional, including protective, measures.

2.2 Scope

In terms of scope a distinction must be made between the territorial scope of the Regulation and its material scope. Because the instrument is a Regulation, territorially it applies in all EU Member States (apart from Denmark which has opted out of it).¹¹⁵

Regarding its material scope, the Regulation applies in civil and commercial matters, whatever the nature of the court or tribunal.¹¹⁶ It does not extend to revenue, customs or administrative matters.¹¹⁷ This provision aims to draw the line between private law claims as opposed to public law claims, as seems from a fairly large body of case law on this provision in the Brussels Convention, which was in the exact same wording as the provision in the Regulation.¹¹⁸ This case law is important because the concepts of private law and public law are not entirely the same in all Member States so they are given an autonomous meaning under EU law.¹¹⁹ Concisely put, civil and commercial claims are claims between either private persons or between private and public persons but whereby the latter do not act in the exercise of their public powers.¹²⁰

Certain matters are expressly excluded from the scope of the Regulation. Firstly it does not apply to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.¹²¹ It must be pointed out here that several of these matters are regulated by other EU private international law instruments.¹²² Secondly the Regulation excludes claims relating to bankruptcy,

¹¹⁵ Art. 1 (3) Brussels I.

¹¹⁶ Art. 1 (1) Brussels I.

¹¹⁷ Art. 1 (1) Brussels I.

¹¹⁸ Case 29-76 *LTU Luftrtransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541; Case 814-79 *Netherlands State v Reinhold Rüffer* [1980] ECR 3807; Case C-271/00 *Gemeente Steenberg v Luc Baten* [2002] ECR I-10489; Case C-266/01 *Préservatrice foncière TIARD SA v Staat der Nederlanden* [2003] ECR I-4867; Case C-292/05 *Irini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ECR-I 1519.

¹¹⁹ See also Stone, P., 2006. *EU Private International Law. Harmonization of Laws*. Cheltenham: Edward Elgar Publishing. p. 22.

¹²⁰ Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541; Case 814/79 *Netherlands v Rüffer* [1980] ECR 3807; Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963.

¹²¹ Art. 1 (2) (a) Brussels I.

¹²² Council Regulation (EC) No. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, *OJ* 23.12.2003, L 338, p. 1; Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition

proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.¹²³ Again a different EU instrument covers these types of claims.¹²⁴ Thirdly social security claims are excluded¹²⁵ and fourthly the Regulation does not apply to arbitration.¹²⁶

2.3 General Provisions

The main connecting factor in the Brussels I Regulation is the defendant's domicile because article 2 provides that persons domiciled in a Member State shall be sued in the courts of that Member State, whatever their nationality.¹²⁷ They can only be sued in the courts of another Member State when this is provided for by articles 5 to 24 of the Regulation¹²⁸ and national private international law rules will not apply as against them.¹²⁹

This basic rule presupposes that the defendant can usually defend himself most easily in his country of domicile.¹³⁰ It has also been pointed out that this ground for jurisdiction allows the defendant to appear before a "friendly court" and, if he were to be held in the wrong, most of his assets against which enforcement is sought are probably located in his country of domicile.¹³¹

Alternative or additional grounds for jurisdiction can only be drawn from other provisions in the Regulation, which have different or additional policy objectives underlying them.¹³² It is emphasised that national rules containing grounds for

and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, *OJ* 27.07.2012, L 201, p. 107.

¹²³ Art. 1 (2) (b) Brussels I.

¹²⁴ Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, *OJ* 30.06.2000, L 160, p. 1.

¹²⁵ Art. 1 (2) (c) Brussels I.

¹²⁶ Art. 1 (2) (d) Brussels I.

¹²⁷ Art. 2 (1) Brussels I.

¹²⁸ Art. 3 (1) Brussels I.

¹²⁹ Art. 3 (2) Brussels I.

¹³⁰ Case C-26/91 *Handte v TMCS* [1992] ECR I-3967.

¹³¹ Stone, P., 2006. *EU Private International Law. Harmonization of Laws*. Cheltenham: Edward Elgar Publishing. p. 46-47.

¹³² Cf. *infra*; the discussion of the other provisions of the Regulation.

jurisdiction do not apply. For the UK specific reference is made to certain grounds which have been called excessive.¹³³

Article 4 contains the general rule for so called “external defendants”. It states that, if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to articles 22 and 23, be determined by the law of that Member State.¹³⁴ From this provision it is immediately apparent that domestic private international law rules have not lost all relevance yet at all. Indeed, every time a plaintiff brings a claim before a Member State court against a defendant not domiciled in the EU, the court will apply its domestic law to solve the issue of jurisdiction before them. This seems problematic in terms of the EU’s policy objective of access to justice for EU citizens because these cannot sue a third country defendant based on EU law but have to rely on their domestic law to be able to sue either in the EU or elsewhere. Failing to achieve the EU policies in this respect it is therefore not surprising that this provision was under revision.¹³⁵ This will be further explained in chapter 5.

2.4 Special Jurisdiction

Additional to the general ground for jurisdiction, the defendant’s domicile, articles 5 to 7 contain alternative grounds. These are based on a close link between the court and the action and the underlying aim is to facilitate the sound administration of justice.¹³⁶ Most of these provisions fall outside the scope of this thesis. Therefore the focus will solely be on those provisions specifically relating to claims regarding contracts.

Article 5 (1) Brussels I states that a person domiciled in a Member State may, in another Member State, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question.¹³⁷ For the purpose of this provision, and unless the parties have agreed otherwise, it is specified what the place of performance of the obligation in question shall be. In the case of the sale of goods it is the place in a

¹³³ ANNEX I Brussels I; cf. Chapter 3 on English private international law.

¹³⁴ Art. 4 (1) Brussels I.

¹³⁵ Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2010) 748 final.

¹³⁶ Recital (12) Brussels I.

¹³⁷ Art. 5 (1) (a) Brussels I.

Member State where, under the contract, the goods were delivered or should have been delivered. In the case of the provision of services it is the place in a Member State where, under the contract, the services were provided or should have been provided.¹³⁸ If the contract is neither for the sale of goods, nor for the provision of services, the place of performance of the obligation has to be identified.¹³⁹

Following other provisions in the Regulation, this provision does not apply to all contracts. In particular it does not apply to insurance contracts,¹⁴⁰ consumer contracts,¹⁴¹ individual employment contracts,¹⁴² matrimonial contracts¹⁴³ etc. For all other contracts this provision seems to make sense in terms of establishing jurisdiction for a court with a close link to the action. It appears, however, that the application of it is not as straightforward as one might think. The Brussels Convention simply referred to the place of performance of the obligation in question.¹⁴⁴ The question then arises what the obligation in question is. The ECJ has held on several occasions that this is the obligation on which the claim is based.¹⁴⁵ When a claim involves several obligations the court must identify the principal obligation as the obligation in question.¹⁴⁶

After determining the relevant obligation the question arises what the place of performance of that obligation is. The Brussels Convention did not contain any clue and rather than to provide an autonomous definition, the ECJ held that the court should apply its domestic private international law rules in order to first determine the law applicable to the legal relationship and then determine the place of performance in accordance with that applicable law.¹⁴⁷ Not surprisingly this highly complicated approach suffered severe criticism.¹⁴⁸ An effort to clear things up has been made in the Regulation by defining the place of performance for the sale of goods and the provision of services, provided that this place is within the EU. The effort seems to have failed as

¹³⁸ Art. 5 (1) (b) Brussels I.

¹³⁹ Art. 5 (1) (c) Brussels I.

¹⁴⁰ Cf. *infra* under e).

¹⁴¹ Cf. *infra* under f).

¹⁴² Cf. *infra* under g).

¹⁴³ Cf. *supra*: certain matters are excluded from the material scope of the Regulation.

¹⁴⁴ Art. 5 (1) Brussels Convention.

¹⁴⁵ E.g. Case 14/76 *De Bloos v Bouyer* [1976] ECR 1497.

¹⁴⁶ E.g. Case 266/85 *Shenavai v Kreischer* [1987] ECR 239.

¹⁴⁷ Case 12/76 *Tessili v Dunlop* [1976] ECR 1473.

¹⁴⁸ Fawcett, J. and Carruthers, J.M., 2008. *Cheshire, North and Fawcett. Private International Law*. 14th ed. Oxford: Oxford University Press. p. 237.

the definition only applies to a limited number of situations. In all other cases the highly complex approach does not seem to exist and this has prompted some to propose the deletion of article 5 (1) altogether.¹⁴⁹

The Brussels I Regulation also provides some additional grounds for jurisdiction in cases where there are a number of defendants. In such a case a person may be sued in the courts of the place where any of the defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.¹⁵⁰ This rule seems quite difficult to apply and one could even say that it would require a trial before a trial to assess whether the claims are so closely connected that not hearing them together would lead to irreconcilable judgments. Furthermore the question arises what irreconcilable judgments are. The ECJ has determined that a mere divergence in the outcome of the dispute is not sufficient to conclude to a risk of irreconcilable judgments. There must also be a divergence in the context of the same situation of fact and law.¹⁵¹

2.5 Jurisdiction in Matters Relating to Insurance

In order to ensure the protection of weaker parties to a contract, which is one of the main policy objectives underlying EU private international law rules,¹⁵² the Brussels I Regulation contains special rules determining jurisdiction for insurance contracts. These provisions contain different rather than additional grounds for jurisdiction, which means that the other grounds for jurisdiction in the Regulation do not apply to insurance contracts.¹⁵³

An insurer may be sued in the court of the Member State where he is domiciled¹⁵⁴ or in another Member State, in the case of actions brought by the policyholder, the insured

¹⁴⁹ E.g. Stone, P., 2006. *EU Private International Law. Harmonization of Laws*. Cheltenham: Edward Elgar Publishing. p. 86.

¹⁵⁰ Art. 6 (1) Brussels I.

¹⁵¹ Case C-539/03 *Roche Nederland BV v Primus* [2007] IL Pr 9.

¹⁵² See Chapter 1.

¹⁵³ Art. 8 Brussels I.

¹⁵⁴ Art. 9 (1) (a) Brussels I.

or the beneficiary, in the courts for the place where the plaintiff is domiciled.¹⁵⁵ If he is a co-insurer, he may be sued in the courts of a Member state in which proceedings are brought against the leading insurer.¹⁵⁶ In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred.¹⁵⁷ In respect of liability insurance the insurer may also, if the law of the courts permits it, be joined in proceedings which the injured party has brought against the insured.¹⁵⁸

An insurer may bring proceedings only in the courts of the Member state in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.¹⁵⁹

Departure of these rules is possible by an agreement which is entered into after the dispute has arisen¹⁶⁰ or which allows the weaker party to the contract to bring proceedings in courts other than those indicated in the special jurisdiction rules regarding insurance contracts.¹⁶¹ In case the policyholder and the insurer are domiciled or habitually resident in the same Member State at the time of conclusion of the contract, and the agreement provided that the courts of that State have jurisdiction, departure of the rules is also possible provided that the law of that State allows such agreement.¹⁶² An agreement concluded with a policyholder who is not domiciled in a Member State may also depart from the jurisdiction rules regarding insurance contracts except in so far as the insurance is compulsory or relates to immovable property in a Member State.¹⁶³ Finally, departure of the rules by agreement is allowed if the contract covers certain specific risks.¹⁶⁴

In this respect it is important to note that a novelty in the Brussels I Regulation, as compared to the Brussels Convention, was that a clear distinction was made between mass risk insurance and large risk insurance. In mass risk insurance contracts, a

¹⁵⁵ Art. 9 (2) (b) Brussels I.

¹⁵⁶ Art. 9 (1) (c) Brussels I.

¹⁵⁷ Art. 10 Brussels I.

¹⁵⁸ Art. 11 (1) Brussels I.

¹⁵⁹ Art. 12 Brussels I.

¹⁶⁰ Art. 13 (1) Brussels I.

¹⁶¹ Art. 13 (2) Brussels I.

¹⁶² Art. 13 (3) Brussels I.

¹⁶³ Art. 13 (4) Brussels I.

¹⁶⁴ Art. 13 (5) juncto Art. 14 Brussels I.

jurisdiction agreement is allowed if in accordance with Article 13 (1) to (4), as explained in the previous paragraph. For large risk insurance contracts, a wider option is available, as large risks fall under Article 13 (5),¹⁶⁵ which allows jurisdiction agreements for such contracts without further requirements.

2.6 Jurisdiction over Consumer Contracts

For reasons similar to those regarding insurance contracts, the Regulation contains special rules determining jurisdiction for consumer contracts. These rules, like those on insurance contracts, contain different rather than additional grounds for jurisdiction.¹⁶⁶

The Regulation defines a consumer contract as a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession.¹⁶⁷ The contract is either a contract for the sale of goods on instalment credit terms,¹⁶⁸ a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods,¹⁶⁹ or in all other cases a contract concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State, and the contract falls within the scope of such activities.¹⁷⁰

A problem to flag up here is the fact that a person is only regarded as a consumer when he contracts for a purpose outside his trade or profession. This notion will be discussed further, as well as assessed, in chapter 8 because it seems from an initial assessment that, because of this notion, some deserving parties do not get extra protection because they are not considered weaker.

Article 16 provides that a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.¹⁷¹ Proceedings may be

¹⁶⁵ Read in conjunction with Art. 14 (5) Brussels I.

¹⁶⁶ Art. 15 (1) Brussels I.

¹⁶⁷ Art. 15 (1) Brussels I.

¹⁶⁸ Art. 15 (1) (a) Brussels I.

¹⁶⁹ Art. 15 (1) (b) Brussels I.

¹⁷⁰ Art. 15 (1) (c) Brussels I.

¹⁷¹ Art. 16 (1) Brussels I.

brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.¹⁷²

Departure of the special jurisdiction rules for consumer contracts is only possible by an agreement which is entered into after the dispute has arisen¹⁷³ or which gives the consumer additional options in terms of competent courts.¹⁷⁴ Finally, if the consumer and the other party are domiciled or habitually resident in the same Member State, an agreement conferring jurisdiction on the courts of that State is allowed, provided that such an agreement is not contrary to the law of that Member State.¹⁷⁵

It is clear that these grounds for jurisdiction seek to protect the consumer as the weaker party to the contract. He can sue either in the country where the defendant is domiciled, in accordance with the general ground for jurisdiction in the Brussels I Regulation, or in the country where he is domiciled. When the consumer is defendant on the other hand, he can only be sued in his country of domicile.

2.7 Jurisdiction over Individual Contracts of Employment

The Brussels I Regulation also contains special rules to determine jurisdiction for individual employment contracts because here there is also a contractual relationship where one of the parties to the contract, the employee, is the weaker party to the contract. The same policy objective underlying the rules on consumer contracts is therefore also underlying these rules and the special grounds for jurisdiction are also different grounds rather than alternative grounds.¹⁷⁶

Article 19 Brussels I provides that an employer domiciled in a Member State may be sued in the courts of the Member State where he is domiciled.¹⁷⁷ This is fully in line with the general ground for jurisdiction in the Regulation. He can also be sued in another Member State in the courts for the place where the employee habitually carries

¹⁷² Art. 16 (2) Brussels I.

¹⁷³ Art. 17 (1) Brussels I.

¹⁷⁴ Art. 17 (2) Brussels I.

¹⁷⁵ Art. 17 (3) Brussels I.

¹⁷⁶ Art. 18 (1) Brussels I.

¹⁷⁷ Art. 19 (1) Brussels I.

out his work or in the courts for the last place where he did so,¹⁷⁸ or, if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.¹⁷⁹

These provisions take account of the possibility that the employee may want to sue his employer after his employment contract has already been terminated because they refer to the last place where he habitually carried out his work.¹⁸⁰ Furthermore several atypical work relationships or work situations are covered by the rules in the sense that solutions are provided for employees who work in different countries. Case law has also specified that the place where the employee habitually carries out his work is the place where he has established the effective centre of his working activities, at or from which he performs the essential part of his duties towards his employer.¹⁸¹

Departure from the jurisdiction rules on employment contracts is only possible by an agreement which is either entered into after the dispute has arisen¹⁸² or which gives the employee additional grounds for jurisdiction.¹⁸³

Parallel with the provisions on consumer contracts and insurance contracts, as well as the general provisions, the employee can only be sued in the courts of the Member State where he is domiciled.¹⁸⁴

2.8 Exclusive Jurisdiction

The Regulation contains some rules holding grounds for exclusive jurisdiction. This means that these rules apply, regardless of domicile,¹⁸⁵ appearance by the defendant¹⁸⁶ or even agreement between the parties.¹⁸⁷ The reason for this is that the courts of a certain Member State were deemed to be uniquely well placed to hear claims regarding

¹⁷⁸ Art. 19 (2) (a) Brussels I.

¹⁷⁹ Art. 19 (2) (b) Brussels I.

¹⁸⁰ Cf. STONE, P., 2006. *EU Private International Law. Harmonization of Laws*. Cheltenham: Edward Elgar Publishing. p. 129.

¹⁸¹ Case C-125/92 *Mulox v Geels* [1993] ECR I- 4075; Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57.

¹⁸² Art. 21 (1) Brussels I.

¹⁸³ Art. 21 (2) Brussels I.

¹⁸⁴ Art. 20 (1) Brussels I.

¹⁸⁵ Art. 22 Brussels I.

¹⁸⁶ Art. 24 Brussels I.

¹⁸⁷ Recital (14) Brussels I.

certain subject matters.¹⁸⁸ Examples of the subject matters in article 22 are rights in rem in immovable property, validity of entries in public registers etc.

When a court of a Member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of article 22, it must of its own motion declare that it has no jurisdiction.¹⁸⁹

2.9 Prorogation of Jurisdiction

One of the cornerstones of EU private international law, and private international law in general, is party autonomy.¹⁹⁰ The Brussels I Regulation therefore recognises the possibility for the parties to agree on which court or courts will have jurisdiction. In particular, if the parties, one of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.¹⁹¹

This means that a choice by the parties will be respected regardless of any other provision. Important to note however, is that the exclusive grounds for jurisdiction laid out in article 22 will still apply so that in these specific subject matters a choice by the parties will not be respected.¹⁹² In all other cases their choice prevails, albeit that there are additional requirements for choice of court agreements regarding insurance contracts, consumer contracts and individual employment contracts.¹⁹³ The Regulation specifies however, how such an agreement conferring jurisdiction shall be made. It shall be in writing or evidenced in writing,¹⁹⁴ or in a form which accords with practices which the parties have established between themselves,¹⁹⁵ or in international trade or

¹⁸⁸ FAWCETT, J. and CARRUTHERS, J.M., 2008. *Cheshire, North and Fawcett. Private International Law*. 14th ed. Oxford: Oxford University Press. p. 275.

¹⁸⁹ Art. 25 Brussels I.

¹⁹⁰ See chapter 1.

¹⁹¹ Art. 23 (1) Brussels I.

¹⁹² Cf. *supra*.

¹⁹³ Art. 23 (5) Brussels I juncto arts. 13, 17 and 21 Brussels I.

¹⁹⁴ Art. 23 (1) (a) Brussels I.

¹⁹⁵ Art. 23 (1) (b) Brussels I.

commerce, in a form which accords with a usage of which parties are or ought to have been aware and which in such a trade or commerce is widely known to, and regularly observed by, the parties to contracts of the type involved in the particular trade or commerce involved.¹⁹⁶ Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.¹⁹⁷

At first sight it seems that party autonomy is fairly well established and achieved through these provisions. The exhaustive¹⁹⁸ requirements for, as well as the limitations to, a choice made by the parties seem reasonable and useful. This will be further discussed and assessed in chapter 7.

In addition to the other grounds for jurisdiction in the Regulation, it also provides that a court of a Member State before which a defendant enters an appearance shall have jurisdiction, unless where appearance was entered to contest the jurisdiction, or where another court has [exclusive] jurisdiction by virtue of article 22.¹⁹⁹ This rule is straightforward and seems fair in the light of the possibility for parties to agree on which court will have jurisdiction. If a defendant is sued in a court and he does not contest this court’s jurisdiction, he in effect agrees to it. Very similar provisions also exist in English²⁰⁰ and Belgian²⁰¹ law so it can be assumed that this ground for jurisdiction is fairly widely spread.

2.10 *Lis Pendens* – Related Actions

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.²⁰² Where the jurisdiction of the court first seized is

¹⁹⁶ Art. 23 (1) (c) Brussels I.

¹⁹⁷ Art. 23 (2) Brussels I.

¹⁹⁸ Case 150/80 *Elefanten Schuh v Jacqmain* [1981] ECR 1671.

¹⁹⁹ Art. 24 Brussels I.

²⁰⁰ Chapter 3.

²⁰¹ Art. 6 §1 Code PIL.

²⁰² Art. 27 (1) Brussels I.

established, any court other than the court first seized shall decline jurisdiction in favour of that court.²⁰³

This rule aims to avoid parallel proceedings which could result in incompatible judgments. However problems have arisen regarding it. It seems that this rule has been misused, or one could even say abused, by parties to delay proceedings. This has been especially striking in cases where there was a clear choice of court agreement between the parties but where one party, sensing imminent litigation, rushed to an incompetent court, preferably in a so called “slow-moving” jurisdiction, with a view to delay proceedings.²⁰⁴ Even in such a case, where it is quite obvious that the plaintiff has brought his case before a court with a malicious intent, the court not first seized must still stay its proceedings under this rule. This outcome is highly undesirable because it undermines legal certainty and predictability, access to justice and party autonomy.

Similar problems arise where related actions are pending in the courts of different Member States because, although it is not an obligation, any court other than the court first seized may stay its proceedings.²⁰⁵ These provisions will therefore be critically evaluated in the relevant chapters.

3. Applicable Law

3.1 Outline of the Rome I Regulation

²⁰³ Art. 27 (2) Brussels I.

²⁰⁴ Franzosi, M., 1997. Worldwide Patent Litigation and the Italian Torpedo. *European Intellectual Property Review* [online], 19(7), 382-385. Available via: Westlaw.

²⁰⁵ Art. 28 (1) Brussels I.

The first chapter of the Regulation defines its material scope and its universal application. The second chapter contains the so called uniform rules in its articles 3 to 18. Various other provisions are contained in chapter III, article 19 to 28.

3.2 Scope

The Rome I Regulation applies in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It does not apply, in particular, to revenue, customs, or administrative matters.²⁰⁶ The second and third paragraph of the same article contain several subject matters excluded from the scope of the Regulation. This means that for claims regarding those matters the domestic private international law rules of the Member States will apply.

Although some exceptions will always be made and could also make sense, it is regrettable that there are so many exceptions to the scope of this Regulation. It sets itself the goal to improve the predictability of the outcome of litigation and to achieve certainty as to the applicable law. To achieve this, the conflict of law rules in the Member States must designate the same national law irrespective of the country of the court in which an action is brought.²⁰⁷

Evidently this aim is achieved for all the claims falling within the scope of the Regulation but this aim is undermined where claims fall outside its scope because the courts of different countries will apply different conflict of laws rules.

The Regulation formulates the principle in its second article where it says that any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

3.3 Party Autonomy

Party autonomy is of utmost importance in the Rome I Regulation as the parties' freedom to choose the applicable law is considered one of the cornerstones of the

²⁰⁶ Art. 1 (1) Rome I.

²⁰⁷ Recital (6) Rome I.

system of conflict of law rules in matters of contractual obligations.²⁰⁸ Therefore the first article in chapter II of the Regulation on uniform rules contains the provisions regarding freedom of choice. It states that a contract shall be governed by the law chosen by the parties.²⁰⁹

Although excluded under its predecessor, the Rome Convention, the Rome I Regulation may be interpreted as allowing the parties to a contract to choose a non-state law as the law applicable to their contractual relationship. Obviously that leads to problems in terms of legal certainty and predictability when the parties want to choose a non-state legal system to apply to their contract. This will be further evaluated and assessed in chapter 7.

The Regulation says that a choice of law cannot only be express but can also be clearly demonstrated by the terms of the contract or the circumstances of the case.²¹⁰ The aim of this provision is to enhance party autonomy by not only giving effect to an express but also an implied choice of law by the parties. In terms of achieving this aim it can hardly be argued that no effect should be given to an implied choice. The way in which it is done however, causes some concerns regarding legal certainty and predictability. It seems from the researched case law and doctrine that this rule has been applied differently by courts of different Member States. English courts in particular have been quite likely to conclude that an implied choice had been made, which can be easily understood as it is fully in line with English domestic rules.²¹¹ Continental courts, on the other hand, have been far more reluctant to recognise a tacit choice.²¹² This difference in application of the same rule throughout the EU undermines legal certainty and predictability as to which law will apply to a certain contractual obligation.

3.4 Absence of Choice

Article 4 (1) and (2) of the Regulation contain some fixed rules in order to determine the applicable law in case the parties have not made a choice. This provides legal

²⁰⁸ Recital (11) Rome I.

²⁰⁹ Art. 3 (1) Rome I.

²¹⁰ Art. 3 (1) Rome I.

²¹¹ STONE, P., 2006. *EU Private International Law. Harmonization of Laws*. Cheltenham: Edward Elgar Publishing.

²¹² FAWCETT, J. and CARRUTHERS, J.M., 2008. *Cheshire, North and Fawcett. Private International Law*. 14th ed. Oxford: Oxford University Press.

certainty and predictability. As a result of a compromise between different positions as to how rigid or how flexible private international law rules should be, which seems to have been driven partly by differences between common law and civil law,²¹³ a general exception to these fixed rules was introduced. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country or where there is an impossibility to determine the applicable law, the fixed rules are abandoned.²¹⁴

Although there is obviously a need for a rule providing a solution where the applicable law cannot be determined, there is the inherent risk that some courts will all too easily resort to this rule in order to avoid the fixed rules. This risk exists even more regarding the other exception as it has become clear from case law that English courts and civil courts have a tendency to interpret a more close connection very differently. Thus legal certainty and predictability could be seriously compromised.

This problem becomes all the more poignant when looking at the second default rule set out by article 4, which states that where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of the points in 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.²¹⁵ This concept of the characteristic performance has been called one of the most difficult concepts in the Rome Convention,²¹⁶ and it has been pointed out that it can be very hard to identify in concrete situations.²¹⁷ This could therefore again lead some courts to avoid applying the basic rules and resort too quickly to the exceptions, which, in turn, undermines legal certainty and predictability because different courts might apply different thresholds towards exceptions. The relevant provisions will therefore be discussed and analysed in detail in chapter 6.

²¹³ E.g. Response of the UK and the Netherlands 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 Modernization, COM (02) 654, final.

²¹⁴ Art. 4 (3) and (4) Rome I.

²¹⁵ Art. 4 (2) Rome I.

²¹⁶ North, P. and Fawcett, J.J., 1999. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths.

²¹⁷ COLLINS, L., 1976. Contractual Obligations. The EEC Preliminary Draft Convention on Private International Law. *International and Comparative Law Quarterly* [online], 35. Available via: HeinOnline.

3.5 Consumer Contracts

Because of the aim to protect weaker parties to a contract there are special rules for consumer contracts regarding applicable law just as there are regarding jurisdiction. Since the definition of a consumer contract in the Rome I Regulation is consistent with the definition in the Brussels I Regulation, it will not be repeated here, nor will the comments regarding possible exclusion of certain deserving persons be repeated.²¹⁸

Rome I provides, as a rule different to the general rules, that a consumer contract shall be governed by the law of the country where the consumer has his habitual residence, subject to conditions, again, very similar to the conditions set out in the Brussels I Regulation.²¹⁹

The fact that, as a rule, the applicable law will be the law where the consumer has his habitual residence means that there is a clear intention to apply the law with which he is probably most familiar. The fixed rules in article 4 provide, quite oppositely, as the applicable law the law of the country in which e.g. the seller or the service provider have their habitual residence. Furthermore, where the parties decide to make a choice of the applicable law, additional criteria must be fulfilled in order for this to be a valid choice.²²⁰ The relevant provision will be subject to in-depth discussion in chapter 8.

3.6 Individual Employment Contracts

²¹⁸ See *supra* under jurisdiction.

²¹⁹ Art. 6 (1) (a) and (b) Rome I.

²²⁰ Art. 6 (2) Rome I.

Here again similarities are found between the jurisdiction rules on individual employment contracts and the rules regarding the law applicable to these. As for consumer contracts, a choice of law by the parties must meet some additional criteria in order to be valid.²²¹

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 in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.²²²

Where the law applicable cannot be determined pursuant to the previous paragraph, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.²²³

Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in the previous paragraphs, the law of that other country shall apply.²²⁴

Although these rules are special rules for contracts of employment, it must be noted that the last paragraph is almost identical to the first exception to the general, fixed rules determining the applicable law in article 4.²²⁵

3.7 Insurance Contracts

The basic principle governing applicable law for insurance contracts is a choice by the parties. If they have not made a choice, the contract is governed by the law of the country where the insurer has his habitual residence. However, where it is clear from

²²¹ Art. 8 (1) Rome I.

²²² Art. 8 (2) Rome I. Cf. the concept of “habitually carries out his work” supra under jurisdiction.

²²³ Art. 8 (3) Rome I.

²²⁴ Art. 8 (4) Rome I.

²²⁵ Cf. supra.

all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that country shall apply.²²⁶

Although the parties can choose the law applicable to their insurance contract, this freedom is limited because they can only choose certain laws. In particular they can choose the law of any Member State where the risk is situated at the time of conclusion of the contract,²²⁷ the law of the country where the policyholder has his habitual residence²²⁸ or, where the policy holder pursues a commercial or industrial activity or a liberal profession and the contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.²²⁹ If the Member States grant the parties greater freedom to choose the applicable law, they can take advantage of that freedom.²³⁰

Furthermore the parties may choose, in the case of life assurance, the law of the Member State of which the policy holder is a national²³¹ or, for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State.²³²

3.8 Overriding Mandatory Provisions

Mandatory provisions are provisions which cannot be derogated from by contract²³³ and therefore they limit party autonomy to a certain extent. The reasons for this limitation, or, for the mandatory rules in question, vary as will seem from the discussion of those rules contained in the Regulation.²³⁴

When the parties have made a choice but where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose

²²⁶ Art. 7 (2) Brussels I.

²²⁷ Art. 7 (3) (a) Brussels I.

²²⁸ Art. 7 (3) (b) Brussels I.

²²⁹ Art. 7 (3) (e) Brussels I.

²³⁰ Art. 7 (3) Brussels I.

²³¹ Art. 7 (3) (c) Brussels I.

²³² Art. 7 (3) (d) Brussels I.

²³³ Art. 3 (3) Rome I.

²³⁴ See also art. 9 (1) Rome I.

law has been chosen, the choice of the parties shall not prejudice the application of mandatory provisions of that law.²³⁵ Similarly, 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 provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by contract.²³⁶ This last provision was not contained in the Rome Convention but it was inserted in the Regulation in order to prevent fraudulent evasion of Community law.²³⁷

Article 9 provides that nothing shall restrict the application of the overriding mandatory provisions of the law of the forum.²³⁸ Furthermore effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.²³⁹

It has already been mentioned above²⁴⁰ that a choice of law agreement in a consumer or an individual employment contract has to meet some additional criteria in order to be valid. More specifically such a choice of law may not have the result of depriving the consumer or the employee of the protection afforded to them by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice.²⁴¹

3.9 Public Policy

²³⁵ Art. 3 (3) Rome I.

²³⁶ Art. 3 (4) Rome I.

²³⁷ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, final.

²³⁸ Art. 9 (2) Rome I.

²³⁹ Art. 9 (3) Rome I.

²⁴⁰ See *supra*.

²⁴¹ Arts. 6 (2) and 8 (1) Rome I.

Article 21 provides that the application of provisions of the law of any country specified by the Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum. Where other provisions operate in a positive way, in the sense that they provide the possibility to apply certain rules instead of the applicable law, article 21 is negative in the sense that the court can refuse the application of a certain rule of the applicable law.²⁴² This rule expresses an exception to normal conflict of laws rules which can be found in the traditions of both civil and common law systems.²⁴³

4. Conclusion

This chapter has given an overview of relevant EU law for the purposes of the research. It also touched on some issues that could be identified regarding its potential failure to achieve its underlying policy objectives. In particular, the issues identified in need of further investigation were related to the scope of application of the Brussels I Regulation and external defendants, the *lis alibi pendens* rule, the possibility of an implied choice of applicable law, a choice of non-state law, the rules on applicable law in absence of a choice by the parties, and the rules protecting consumers. These issues will be the subject of an in-depth investigation in chapters 4 to 8.

Specific attention will be paid to the recent revision of the Brussels I Regulation as it is provisionally submitted by the researcher that several problems identified have not been addressed yet, or have been addressed inappropriately.

²⁴² HILL, J., 2005. *International Commercial Disputes in English Courts*. 3rd ed. Oxford: Hart. p. 511.

²⁴³ NORTH, P.M. and FAWCETT, J.J., 1999. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths. p. 584.

Chapter 3. English Private International Law and Policy

1. Introduction

The traditional English private international law rules have now been largely replaced by European instruments in the areas of jurisdiction and applicable law in contractual disputes. They do however still apply in cases which do not fall within the scope of these European instruments. This chapter seeks to discuss these traditional rules as well as the policy objectives underlying them.

2. Policy Objectives

2.1 Access to Justice

Historically every person in England, regardless of his nationality or residence, enjoyed the protection of the Crown when on the Crown's territory because they also had the feudal duty of allegiance when on this territory.²⁴⁴ It has been held that "the right of access to the King's court must not be lightly refused"²⁴⁵ and that "whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the courts have jurisdiction".²⁴⁶ The traditional English common law rules are therefore based on the principle that a person present on the territory has access to justice through the adjudication of the English courts.²⁴⁷

Because of this history of feudal duty and corresponding protection of the Crown, certain grounds for jurisdiction of the English courts were developed which are now sometimes regarded as exorbitant and certainly very different from grounds for jurisdiction in other EU countries, particularly civil law countries such as for example

²⁴⁴ GRAVESON, R.H., 1977. *Comparative Conflict of Laws. Selected Essays, Volume I*. Oxford: North-Holland Publishing. p. 8-9.

²⁴⁵ *St Pierre v South American Stores (Garth & Chaves) Ltd* [1936] 1 K.B. 382 at 398.

²⁴⁶ *John Russell and Co Ltd v Cayzer, Irvine and Co Ltd* [1916] 2 A.C. 298 at 302.

²⁴⁷ ROGERSON, P., 2013. *Collier's Conflict of Laws*. 4th ed. Cambridge: Cambridge University Press. p. 139.

Belgium. It has been argued that the English courts should be open to anyone for several reasons.²⁴⁸ On the other hand, however, forum shopping is a phenomenon which must be avoided as it would allow parties to seek the assistance of courts which are not appropriate to hear the case. In particular forum shopping exists when a party files the case with a court because they believe they will gain an advantage through this forum²⁴⁹ rather than because there is “a real and substantial connection” with the forum.²⁵⁰ This will become clear further under the discussion of the different rules in English private international law.

2.2 Deal with Cases Justly

Although the traditional rules on jurisdiction of the English courts have been historically developed, they are now enshrined in the Civil Procedure Rules.²⁵¹ The CPR expressly state in their first part what the overriding objective of their rules is and evidently this should be borne in mind when reading and discussing the rules in force. It is said that the overriding objective of the rules is to enable the court to deal with cases justly and at proportionate cost.²⁵² It is then specified that this includes, so far as is practicable, ensuring that the parties are on equal footing, saving expense, dealing with the case in ways which are appropriate to several factors, ensuring that the case is dealt with expeditiously and fairly and allotting to the case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.²⁵³

It is specified that the courts should deal with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.²⁵⁴

²⁴⁸ CLARKSON, C.M.V. and HILL, J., 2011. *The Conflict of Laws*. 4th ed. Oxford: Oxford University Press. p. 7.

²⁴⁹ ROGERSON, P. , 2013. *Collier’s Conflict of Laws*. 4th ed. Cambridge: Cambridge University Press. p. 140.

²⁵⁰ *Amchem Products Inc. v British Columbia (Workers’ Compensation Board)* [1993] 102 DLR (4th) 96 at 110-111.

²⁵¹ Civil Procedure Rules 1998, No. 3132 (L. 17).

²⁵² CPR 1.1 (1).

²⁵³ CPR 1.1 (2).

²⁵⁴ CPR 1.2 (c).

This overriding objective in the Civil Procedure Rules contains several elements. Noteworthy is the explicit reference to economic efficiency. It is submitted that certainty and predictability contributes to economic efficiency because clear rules which are predictable in their application minimise the cost of litigation²⁵⁵ as there will be limited disagreement as to which court has jurisdiction and which law applies to the dispute, in turn limiting the length and complexity of litigation.

The reference to ensuring the parties are on equal footing can be read, in the context of contractual obligations, as a protection of weaker parties to contracts. Reference must be made to chapter 1 here, where protection of weaker parties was identified as a key policy objective underlying EU private international law rules.

The objective that the case is dealt with expeditiously and fairly refers to what is called a central concern in English law: justice in the individual case. In order to achieve this, English law is characterised by a high degree of judicial discretion and flexibility, which are concepts quite alien to civil law, where uniformity and legal certainty and predictability are always at the centre of attention.²⁵⁶ It is submitted that the emphasis on flexibility and judicial discretion in order to deal with cases fairly results, at times, in a lack of uniformity and legal certainty and predictability.²⁵⁷

2.3 Party Autonomy

As mentioned in chapter 1, party autonomy is recognised in the vast majority of legal systems throughout the world. It can be seen as the private international law aspect of the freedom of contract which exists in contract law in general.²⁵⁸ Similar to EU law, it is also recognised in English private international law as will seem from the discussion of the rules later on in this chapter.

²⁵⁵ Keyes, M., 2008. Statutes, Choice of Law and the Role of Forum Choice. *Journal of Private International Law*, vol. 4, n° 1, 15.

²⁵⁶ McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris: The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 344.

²⁵⁷ Keyes, M., 2008. Statutes, Choice of Law and the Role of Forum Choice. *Journal of Private International Law*, vol. 4, n° 1, 15.

²⁵⁸ McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris: The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 344.

2.4 Modernisation and International Openness

Because society changes, private international law must be adapted to these changes. Society changes in several ways and, regarding contracts, the internationalisation of legal relationships as well as other tendencies, such as the increased need of consumer protection, are particularly relevant. Regularly inspiration for change is found in solutions applied by other legal systems, which could be viewed as an aspect of international openness. It is obvious that the EU can impact domestic rules and this impact is researched and assessed in this thesis.

Long before the EU came into existence however, it was already pointed out by the House of Lords that “some fixed common principles should guide the courts in every country on international questions”.²⁵⁹ This is seen as a clear direction in favour of an international outlook in the judicial development of the conflict of laws.²⁶⁰ In this respect international openness does not refer to a country’s readiness to find inspiration in other legal systems or its willingness to accept that other legal systems, such as EU law, impact its national legislation. It rather refers to the fact that the English court should be prepared to adjudicate matters involving foreign elements, which, as highlighted above, does not seem to cause too much of a problem.²⁶¹ Similarly, however, it refers to the fact that the English courts should accept that cases involving English elements may be better adjudicated elsewhere. As illustrated by the Lord Chancellor in *Udny v Udny*: “A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot [...] put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicile.”

²⁵⁹ *Udny v Udny* [1869] L.R. 1 H.L. (Sc. & D.) 441.

²⁶⁰ Graveson, R.H., 1977. *Comparative Conflict of Laws. Selected Essays, Volume I*. Oxford: North-Holland Publishing. p. 44.

²⁶¹ See subtitle 1 of this chapter on access to justice.

3. The Rules

3.1 Jurisdiction

3.1.1 Introduction

As mentioned the historically developed English private international law rules are now enshrined in the Civil Procedure Rules (CPR). Under these rules there are three grounds on which the English courts can have jurisdiction: 1) presence of the defendant in England, 2) submission of the defendant to the jurisdiction of the English courts and 3) service of process to the defendant abroad.

3.1.2 Presence

It has been long established at common law that the mere presence of the defendant on English territory is sufficient to give the English courts jurisdiction. Furthermore English private international law has a strong procedural character whereby the emphasis lies on the service of the claim form to the defendant. Service of this form in England gives the English courts jurisdiction.

Other connecting factors such as the defendant's nationality, domicile or residence are irrelevant as the Court of Appeal has confirmed that the English courts have jurisdiction when the defendant is served on English territory even though he is only there for a few days²⁶² or to visit the Ascot races.²⁶³ The only exception to the rule that service of the claim form on English territory is enough to constitute jurisdiction of the English courts is that of abuse of process. This means that when the defendant is fraudulently induced to come to England with a view to serve him, the service of the claim form will be ignored by the court in determining their jurisdiction.²⁶⁴

²⁶² *Colt Industries Inc. v Sarlie* [1966] 1 W.L.R. 440.

²⁶³ *H.R.H. Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* [1972] 2 Q.B. 283.

²⁶⁴ *Watkins v North American Land and Timber Co Ltd* [1904] 20 T.L.R. 534.

From a procedural point of view it is clear that the service of the claim form is extremely important because without this there is of course the likelihood that a defendant would not be aware of any proceedings being brought against them. That would severely undermine the policy object of placing the parties on equal footing.²⁶⁵ It has however been said that the service of the claim form as a ground for jurisdiction is exorbitant.²⁶⁶ For a civil lawyer it is easy to agree with this upon first sight. It must therefore be applauded that there is at least an exception for fraudulently inducing the defendant to come to England, because it is definitely unjust to lure somebody into litigation in England, especially when this would mean he is put on completely unequal footing. That could be the case because he will have to travel a lot, he might not be familiar with the English legal system, he might not speak the language etc.

There are more scenarios however, in which it seems that this ground for jurisdiction could lead to unjust results such as in the case where an English court has jurisdiction based on service of the claim form in England but where none of the other elements of the case have any connection with England. It is therefore equally important to investigate how other private international law rules regarding jurisdiction possibly rectify this situation.

3.1.3 Submission and Party Autonomy

There are several ways in which the English courts can have jurisdiction by submission. Part 11 of the CPR contains the rules for disputing the court's jurisdiction and states that failing to abide by these the defendant is to be treated as having accepted that the court has jurisdiction to try the claim.²⁶⁷ This means that the defendant who does not object to the court's jurisdiction submits himself to this court, thus giving it jurisdiction. If the defendant contests the case on its merits it is therefore held that he submits to the court.²⁶⁸ Furthermore the claimant [plaintiff], who has chosen to bring his case before an English court, thereby gives it jurisdiction to rule on a counterclaim from the

²⁶⁵ See supra policy objectives.

²⁶⁶ E.g. Graveson, R.H., 1977. *Comparative Conflict of Laws. Selected Essays, Volume I*. Oxford: North-Holland Publishing. p. 9; McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris: The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 112.

²⁶⁷ CPR 11.5.

²⁶⁸ *Boyle v Sacker* [1888] L.R. 39 Ch. D. 249.

defendant.²⁶⁹ A very similar rule also exists in EU law²⁷⁰ and Belgian law²⁷¹ and this is not surprising as it closely relates to party autonomy. After all, if the defendant appears and does not contest the court's jurisdiction, he in effect agrees to bring the case before that court.

A different way of submitting to the English courts is to exercise party autonomy and hence contract expressly or impliedly that these courts will have jurisdiction in disputes relating to the contract.²⁷² In international commerce it is in fact common practice to provide such a clause in the contract in which the parties agree between them where possible future disputes will be tried.²⁷³ The CPR clearly envisage this option as they permit the parties to a contract to agree on the method to be used to serve the claim form in the case of a dispute between them.²⁷⁴

3.1.4 Service Abroad

Common law, which only gave the English courts jurisdiction in case of service of the claim form in England or submission to the court, changed in 1852 when the Common Law Procedure Act introduced the possibility to serve a claim abroad. Since then, common law continued to develop this possibility, and other rules were introduced as well.²⁷⁵ The Civil Procedure Rules, introduced in 1998, provided a new code of civil procedure for the courts and hence replaced certain existing rules.²⁷⁶ The possibility to serve a claim abroad, however, remained subject to the rules laid down by common law.

Since 2008 the CPR have been amended, introducing detailed grounds for permission of service abroad by the courts. This permission however, is limited in general by the discretionary power of the court to allow such service. This means that the claimant has

²⁶⁹ *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch. 487; *Lesley June Al-Bassam v Abdullah Saleh Al-Bassam* [2004] W.T.L.R. 157.

²⁷⁰ Art. 24 Brussels I.

²⁷¹ Art. 6 §1 Code of PIL.

²⁷² *Copin v Adamson* [1875-76] L.R. 1 Ex. D. 17.

²⁷³ Cf. Cheshire, North and Fawcett, 2008. *Private International Law*. 14th ed. Oxford: Oxford University Press. p. 371.

²⁷⁴ CPR 6.15.

²⁷⁵ E.g. Rules of the Supreme Court 1965 and County Court Rules 1981.

²⁷⁶ See explanatory note to the Civil Procedure Rules 1998.

to convince the court of several things. Firstly, he must prove that his claim falls within the scope of paragraph 3.1 of Practice Direction 6B.²⁷⁷ Secondly, he must show that his claim has a reasonable prospect of success,²⁷⁸ and finally he must satisfy the court that England and Wales is the proper place in which to bring the claim.²⁷⁹ These requirements will now be discussed further.

3.1.4.1 A claim within the scope of paragraph 3.1 of Practice Direction 6B

General grounds

- A claim is made for a remedy against a person domiciled within the jurisdiction²⁸⁰

This ground seems fairly straightforward and corresponds to the basic EU rule on jurisdiction²⁸¹ although it is important to note that the definition of domicile is of crucial importance here in order to determine whether the English courts have jurisdiction. Clearly EU law has influenced English law here because the CPR expressly refer to the Brussels I Regulation and the Civil Jurisdiction and Judgments Order 2001 for the determination of domicile.²⁸² That means that, regardless whether English private international rules apply or EU private international rules, the definition of domicile will be the same.

- A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction²⁸³

For this ground to be fulfilled the injunction against an act in England or Wales must be the main part of the claim, being the substantial and genuine relief sought by the claimant²⁸⁴ and not just incidental to a different remedy sought by him.²⁸⁵ Furthermore

²⁷⁷ CPR 6.37 (1) (a).

²⁷⁸ CPR 6.37 (1) (b).

²⁷⁹ CPR 6.37 (3).

²⁸⁰ PD 3.1 (1).

²⁸¹ Art. 2 (1) Brussels I.

²⁸² CPR 6.31 (i) (ii).

²⁸³ PD 3.1 (2).

²⁸⁴ *Amoco (U.K.) Exploration Co v British American Offshore Ltd* [1999] 2 Lloyd's Rep 772.

²⁸⁵ *Rosler v Hilbery* [1925] Ch. 250.

the English court will not accept jurisdiction if a foreign court can deal with the question more conveniently²⁸⁶ or if the injunction sought cannot be made effective in England.²⁸⁷

- A claim is made against a person on whom the claim form has been or will be served and: a) there is between the claimant and the defendant a real issue which is reasonable for the court to try and b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.²⁸⁸

This ground covers cases in which there is a claim based on a certain cause of action against two persons only one of whom can be served in England and Wales.²⁸⁹ It can also be used however, for cases in which there are claims against two defendants based on different causes of action, such as a claim against a principal based on breach of contract and a claim against an agent for breach of warranty of authority.²⁹⁰ A different example is a case in which a claimant brings an action for breach of contract against a defendant in England and an action in tort against a defendant abroad.²⁹¹

Brussels I also contains a rule to determine jurisdiction in cases where there are several defendants. Criticisms have been given to that rule because it seems quite difficult to apply.²⁹² The English rule seems more straightforward and easy to apply because the judge does not have to assess whether hearing the claims in different courts could lead to irreconcilable judgments. It must only be reasonable for the court to hear the claim and the other party has to be a necessary or *proper* party. This rule therefore gives the court some leeway in its application and it could be argued that such an approach should be used on an EU level as well. The risk then of course exists that courts will all too easily draw claims towards them as it were. Further research and assessment seeks to find solutions here.

²⁸⁶ *Société Générale de Paris v Dreyfus Brothers* [1888] L.R. 37 Ch. D. 215.

²⁸⁷ *Marshall v Marshall* [1888] L.R. 38 Ch. D. 330.

²⁸⁸ PD 3.1 (3).

²⁸⁹ *Williams v Cartwright* [1895] 1 Q.B. 142.

²⁹⁰ *Massey and Another v Heynes and Co and Schenker and Co* [1888] L.R. 21 Q.B.D. 330.

²⁹¹ *The Manchester Courage* [1973] 1 Lloyd's Rep 386.

²⁹² Chapter 2.

- A claim is an additional claim under part 20 and the person is a necessary or proper party to the claim or additional claim.²⁹³

Part 20 of the CPR is titled “counterclaims and other additional claims” and this ground must be read together with the previous ground as the main criterion for jurisdiction lies in the fact that the party to be served abroad is either a necessary or a proper party to the claim or additional claim.

Claims for interim remedies

- A claim is made for an interim remedy under section 25 (1) of the Civil Jurisdiction and Judgments Act 1982²⁹⁴

In the past it was very difficult, or even impossible, to obtain a freezing injunction in respect of the defendant’s assets in support of litigation abroad. The Civil Jurisdiction and Judgments Act 1982 however, contained provisions which gave the English courts the power to grant interim relief much more easily under those circumstances, provided that the proceedings were held in one of the Brussels or Lugano Contracting States.²⁹⁵ Later this power was extended to interim remedies in respect of proceedings in any country,²⁹⁶ which was a definite step forward in these modern times where international trade and litigation has become very common, as had been also emphasised by the House of Lords: “Given the international character of much contemporary litigation and the need to promote the mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside of England.”²⁹⁷

²⁹³ PD 3.1 (4).

²⁹⁴ PD 3.1 (5).

²⁹⁵ Section 25 (1).

²⁹⁶ Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997/302; amended Civil Jurisdiction and Judgments Act 1982 section 25 (3).

²⁹⁷ *Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd. and Others* [1993] A.C. 334 at 341 per Lord Browne-Wilkinson.

Claims in relation to contract

- The contract was made within the jurisdiction²⁹⁸

The place where a contract is made is a connecting factor and therefore English law will determine where that place was. Contracts made by postal correspondence are made in the jurisdiction where the acceptance is posted.²⁹⁹ The rule is different however for contracts concluded through instantaneous means of communication such as telephone, fax or email, which occurs regularly nowadays. In those cases the contract is made in the country where the acceptance is received.³⁰⁰

In order for this rule to be met it is sufficient that the contract was *substantially* made within the jurisdiction.³⁰¹ It is also possible that a contract is made in different jurisdictions because, for example, there has been a long period of negotiations and several copies were signed in different countries.³⁰² In that case the rule is met if one of these jurisdictions is England.

- The contract was made by or through an agent trading or residing within the jurisdiction³⁰³

This provision covers two different scenarios. The first scenario is that in which the agent in England actually makes the contract on behalf of a foreign principal. In addition to that however, the provision also covers the situation in which the agent does not have the authority to contract on behalf of the foreign principal but merely obtains orders which have to be transmitted to the foreign principal for his acceptance.³⁰⁴

²⁹⁸ PD 3.1 (6) (a).

²⁹⁹ *Benaim and Co. v Debono* [1924] A.C. 514.

³⁰⁰ *Entores Ltd. v Miles Far East Corp.* [1955] 2 Q.B. 327; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandels-gesellschaft M.B.H.* [1983] 2 A.C. 34.

³⁰¹ *BP Exploration Co. (Lybia) Ltd. v Hunt* [1976] 1 W.L.R. 788.

³⁰² *Apple Corps. Ltd. v Apple Computer Inc.* [2004] I.L.Pr. 34.

³⁰³ PD 3.1 (6) (b).

³⁰⁴ *National Mortgage and Agency Co. of New Zealand Ltd. v Gosselin* [1922] 38 T.L.R. 832.

- The contract is governed by English law³⁰⁵

As explained in chapter I the rules in the Rome I Regulation determine which law governs a contract. If the application of these rules determines that English law governs the contract, the English courts have jurisdiction but this is subject to their discretion which should be exercised “with circumspection” in order to avoid “exorbitant” jurisdiction of the English courts.³⁰⁶ It has indeed been held by the House of Lords that the discretion to grant jurisdiction based on the law governing the contract depends on the individual circumstances of the case.³⁰⁷

- The contract contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract³⁰⁸

As already explained supra³⁰⁹ English law recognises party autonomy in the sense that parties can choose where to litigate by inserting provisions to that effect into their contract. CPR 6.15 recognises submission to the English courts when parties have agreed to a method to serve the claim form in the jurisdiction, the case in which no permission of the court needed. The rule discussed here however, envisages choice of jurisdiction situations which do not fall under the submission rule such as the situation in which no method of service was specified or the situation in which the contract contains a non-exclusive jurisdiction clause.³¹⁰

- A claim is made in respect of a breach of contract committed within the jurisdiction³¹¹

Although a contract can of course be breached by either express³¹² or implied repudiation,³¹³ the most common form of breach is the failure by one of the parties to perform his obligations under the contract. If there are different obligations under the

³⁰⁵ PD 3.1 (6) (c).

³⁰⁶ *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* [1984] A.C. 50 at 65 per Lord Diplock.

³⁰⁷ *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] A.C. 460.

³⁰⁸ PD 3.1 (6) (d).

³⁰⁹ See supra.

³¹⁰ *Gulf Bank KSC v Mitsubishi Heavy Industries Ltd.* [1994] 1 Lloyd's Rep 315.

³¹¹ PD 3.1 (7).

³¹² F.e. *Mutzenbecher v La Aseguradora Espanola* [1906] 1 K.B. 254.

³¹³ On this see: McClean, D. and Beevers, K., 2009. *Morris: The Conflict of Laws*. 7th ed. London: Sweet & Maxwell. p. 127.

contract, some of which are to be performed in England and others abroad, the breach has to occur with regards to the obligations with England as their place of performance in order for the English courts to have jurisdiction.³¹⁴

- A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in the first four bullet points³¹⁵

3.1.4.2 A reasonable prospect of success

The claimant must express his belief that his claim has a reasonable prospect of success.³¹⁶ A reasonable prospect of success is a real prospect that is not imaginary or fanciful,³¹⁷ which must be established by the claimant although the court does not rule on the merits of the case at this stage so that the standard of proof is lower. The House of Lords has ruled that the claimant must show that there is “a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff [claimant] bona fide desires to try”.³¹⁸

3.1.4.3 Forum conveniens

The courts may allow service of the claim form out of the jurisdiction but this is not an obligation. The court must therefore be convinced that England is the proper place in which to hear the claim, or, in other words, England must be the most appropriate forum for the interests of all the parties and for the ends of justice.³¹⁹

³¹⁴ *Rein v Stein* [1892] 1 Q.B. 753.

³¹⁵ PD 3.1 (8).

³¹⁶ PD 6.37 (1) (b).

³¹⁷ *Swiss Reinsurance Co. Ltd. v United India Insurance Co.* [2004] I.L.Pr. 4; *Carvill America Inc. and Another v Camperdown Uk Ltd. and Others* [2005] EWCA Civ 645.

³¹⁸ *Seaconsar Far East Ltd. v Bank Markazi Jomhuri Islami Iran* [1994] 1 A.C. 438 at 452.

³¹⁹ *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.

3.2 Applicable Law

3.2.1 *The Proper Law of the Contract*

The doctrine of the proper law of the contract was developed by the English courts during the nineteenth and twentieth century and is characterised by a high degree of flexibility. It has been held that criteria such as the *lex loci contractus* or the *lex loci solutionis* are rigid and arbitrary and therefore the applicable law should be determined by ascertaining the intention of the parties to the contract.³²⁰ The doctrine of the proper law of the contract therefore comprises several rules to achieve this goal of ascertaining the parties' intention.

3.2.2 *Party Autonomy*

As mentioned in chapter 1 all Member States of the EU recognise the principle of party autonomy in private international law. It is therefore indeed also expressly recognised in English law and it is clear that the intention of the parties is most easily ascertained when they have in fact made an express choice of law by inserting such a clause in their contract. The recognition of party autonomy therefore enhances legal certainty because the parties are at all times aware of the law governing their contract.³²¹ It must be noted however, that an express choice of law will only have effect in an English court when it is bona fide, legal and not contrary to public policy.³²²

Apart from an express choice of law by the parties, common law also recognises an implied choice of law whereby the proper law of the contract is the system of law by reference to which the contract was made.³²³ Such an implied choice of law can be

³²⁰ *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Ltd* [1938] A.C. 224, at 240.

³²¹ Clarkson, C.M.V. and Hill, J., 2002. *Jaffey on the Conflict of Laws*. 2nd ed. London: Butterworths. p. 198; CLlarkson, C.M.V. and Hill, J., 2006. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 170; McClean, D. and Beevers, K., 2009. *Morris: The Conflict of Laws*. 7th ed. London: Sweet & Maxwell. p. 353.

³²² *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277.

³²³ *Bonython v Commonwealth of Australia* [1951] A.C. 201 at 219.

found from an arbitration clause,³²⁴ a choice of jurisdiction by the parties³²⁵ or the form of the contract, such as the use of a certain standard form.³²⁶

3.2.3 Absence of Choice by the Parties

When the parties to the contract have not made an either express or implied choice of law the court has to determine the proper law of the contract by identifying the law with which the transaction has its closest and most real connection.³²⁷ In doing this, the court has to take many matters into consideration such as the place of contracting, the place of performance, the places of residence or business of the parties and the nature and subject matter of the contract.³²⁸

It is said that the objective of this rule is to give effect to the reasonable expectations of the parties but also to the interests of the country which is likely to have the greatest interest in the outcome of the dispute between these parties.³²⁹ It must be said however that this flexible approach, whereby many factors have to be taken into account, could also backfire because some cases will have factors connecting them equally strong to more than one country. It seems hard to achieve the named policy objectives in those cases.

4. Conclusion

EU law has greatly influenced English private international law in the area of contractual obligations, as English common law has now largely been replaced by the Brussels I and the Rome I Regulation. When those Regulations do not apply, however, English courts will still apply domestic private international law.

³²⁴ *Compagnie Tunisienne de Navigation S.A. v Compagnie d'Armement Maritime S.A.* [1971] A.C. 572.

³²⁵ *Hellenic Steel Co. v Svolamar Shipping Co. Ltd (the Komminos)* [1991] Lloyd's Rep 370.

³²⁶ *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* [1984] A.C. 50.

³²⁷ *Bonython v Commonwealth of Australia* [1951] A.C. 201 at 219.

³²⁸ *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch. 52 at 91.

³²⁹ Clarkson, C.M.V. and Hill, J., 2006. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 171.

It appears that English private international law generally focuses on procedural issues and jurisdiction more than on applicable law. Furthermore English private international law is characterised by flexibility and achieving the just outcome in the concrete case rather than an urge to have rules set in stone. Many rules are formulated in a way giving the courts a large degree of discretion. As such, English private international law seems quite distinct from EU private international law, which is generally much more focused on legal certainty and predictability, and therefore more rule-based.

It will be researched in chapters 4 to 8 whether the English approach could be of assistance or provide inspiration at EU level when problems with current EU law provisions are identified.

Chapter 4. Belgian Law and Policies

1. Introduction

Until 2004 Belgian law had very few provisions regarding private international law, which were scattered among the Civil Code (*Burgerlijk Wetboek*), the Procedural Code (*Gerechtelijk Wetboek*), the Commercial Law Code (*Wetboek van Koophandel*) and several pieces of legislation regulating specific matters such as divorce between couples of different nationalities,³³⁰ adoption³³¹ and supervision of the financial sector.³³² Furthermore some private international law provisions could be found in legislation implementing international conventions such as the Act Liability Motor Vehicles implementing the Benelux Convention regarding Motor Vehicles.³³³ The main provisions on which the conflict of laws was based, however, dated back to 1804, when they were introduced in France. They were adopted by Belgian law makers after Belgian independence in 1830. Since then they had never been adapted to changed social circumstances or new needs of a changing society and therefore the courts were left with no option but to try and be creative in applying these few and insufficient rules to the broad range of cases brought before them.³³⁴

Among academics there had been a desire to codify private international law for quite some time³³⁵ but action was only taken in 1996 when legislators asked all professors in the conflict of laws in of the country to research codification of this area of law. Six professors from different universities agreed to participate in the preparation of a code of private international law. After different interest groups, such as public civil servants of the Ministry of Justice and the registrar's office, judges and lawyers, were consulted, this research resulted in a proposal of law.³³⁶ This proposal was extensively discussed and amended several times in both the Chamber of Representatives (*Kamer van*

³³⁰ Wet van 27 juni 1960 op de toelaatbaarheid van de echtscheiding wanneer ten minste één van de echtgenoten een vreemdeling is.

³³¹ Wet van 24 april 2003 tot hervorming van de adoptie.

³³² Wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten.

³³³ Wet aansprakelijkheid motorrijtuigen van 19 februari 1968 ter implementering van de Beneluxovereenkomst van 24 mei 1966 met betrekking tot motorrijtuigen, *B.S.* 21 mei 1976.

³³⁴ This will be explained further under General Policy Objectives.

³³⁵ Carlier, J.-Y., *Le Code belge de droit international privé*, *R.C.D.I.P.* 2005, 13.

³³⁶ For an extensive discussion of the genesis of the proposal for the code of private international law see Erauw, J., *De codificatie van het Belgisch international privaatrecht met het ontwerp van Wetboek ipr*, *R.W.* 2002, 1564-1566.

Volksvertegenwoordigers) and the Senate (*Senaat*).³³⁷ From these parliamentary preparatory works the main objectives of Belgian private international law can be ascertained to some extent. It is also important, however, to conduct a detailed textual analysis and to research relevant academic writing as this sometimes identifies or clarifies some underlying issues which can only be read between the lines. The policy objectives underlying Belgian private international law will now be discussed in general, after which the actual private international law rules will be explained with reference to the policy objectives underlying them.

2. Policy Objectives

2.1 Transparency

As already touched upon in the introduction, the existing private international law provisions were scattered among several entirely different legal instruments and the rules stemmed not only from these outdated provisions but were also largely based on case law from courts which tried to adapt them to the cases before them.³³⁸ It is fair to say that this situation, where an important area of law was based mainly on jurisprudence, was regarded as problematic and undermining legal certainty.³³⁹ Not only did the few old fashioned provisions available lead to rigidity in jurisprudence, it was also difficult to assess the scope of decisions which had tried to interpret and apply them to specific situations.³⁴⁰ In this complex field of law the practitioner often found

³³⁷ As evidenced by the parliamentary preparatory documents: Verslag namens de Commissie voor de Justitie van de Kamer uitgebracht door de dames Déom en Van der Auwera, Parl. St. (I) Kamer 2003-04, nr. 51-1078/5; Verslag namens de Commissie voor de Justitie van de Senaat uitgebracht door mevrouw Nyssens en de heer Willems, Parl. St. (I) Senaat 2003-04, nr. 3-27/7; Tweede Verslag namens de Commissie voor de Justitie van de Senaat uitgebracht door mevrouw Nyssens en de heer Willems, Parl. St. (I) Senaat 2003-04, nr. 3-27/11; Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1; Amendementen bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/3.

³³⁸ Verslag namens de Commissie voor de Justitie van de Kamer uitgebracht door de dames Déom en Van der Auwera, Parl. St. (I) Kamer 2003-04, nr. 51-1078/5 at p. 7; ERAUW, J., 2005. Krachtlijnen van het nieuwe Wetboek van Internationaal Privaatrecht, in *Internationale aspecten in de verschillende takken van het recht*, Permanente vorming Order van Advocaten Kortrijk, Larcier, at p. 160.

³³⁹ Verslag namens de Commissie voor de Justitie van de Senaat uitgebracht door mevrouw Nyssens en de heer Willems, Parl. St. (I) Senaat 2003-04, nr. 3-27/7 at p. 9; BARNICH, L., 2005. Présentation du nouveau code belge de droit international privé, *Rev. not.*, at p. 7.

³⁴⁰ Rommelaere, C., 2004. De codificatie van het internationaal privaatrecht. *TVW*, at p. 341.

himself lost in a chaos of provisions, case law and doctrine aiming to bring order in this chaos.³⁴¹ The fear of this so called “gouvernement des juges”, or government by judges, is of course inevitably linked with the Belgian civil law system as this system is in some respects fundamentally different from the common law system. Apart from a few very limited exceptions,³⁴² the only binding law is law made by the legislative power which is primarily in the hands of the parliament, consisting of the Chamber and the Senate, and to a limited degree in the hands of government. The judiciary merely applies the law made by the legislature but does not produce decisions which are regarded as a primary source of law.³⁴³ Furthermore courts or judges are not bound by precedent and precedent is even expressly prohibited by a provision in the Procedural Code.³⁴⁴

It was therefore decided that this situation in the area of private international law had to change. The scattered provisions had to be brought together in one instrument which would first of all clarify the existing rules,³⁴⁵ making them accessible and comprehensible for not only practitioners but also civilians.³⁴⁶ Following the analysis just made this definitely makes sense and in order to provide sufficient transparency and clarity the rules in the instrument had to be sufficiently detailed because a large part of the problems encountered in the area of private international law were indeed the result of a lack of relevant, let alone detailed, provisions. Despite the need for detail however, it was also stressed that there was a need for flexibility of the provisions which would allow to adapt them to the diversity of international legal relationships.³⁴⁷ Whether this need was met or not will be discussed further but it is interesting to already point out here that inspiration in this respect was sought in common law for some of the new provisions which were regarded as most revolutionary in terms of changes to the existing private international law.

³⁴¹ Carlier, J.-Y., 2005. *Le Code belge de droit international privé. R.C.D.I.P.*, at p. 17.

³⁴² Such as two identical rulings by the Constitutional Court on a provision of law violating the Constitution for certain reasons such as discrimination. LOOK UP ARTICLES IN Laws re. constitutional court.

³⁴³ Art. 36 of the Constitution specifies that legislative power is in the hands of the King and Parliament.

³⁴⁴ Art. 6 Ger. W.

³⁴⁵ *Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht*, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 3.

³⁴⁶ *Verslag namens de Commissie voor de Justitie van de Senaat uitgebracht door mevrouw Nyssens en de heer Willems*, Parl. St. (I) Senaat 2003-04, nr. 3-27/7 at p. 18.

³⁴⁷ *Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht*, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 3.

To ensure transparency in a complex area of law with very detailed provisions it is important to use direct and clear language³⁴⁸ but also, and perhaps even more crucially, to provide structure in a logical and accessible fashion. It seems generally accepted that the legislator has succeeded in providing this³⁴⁹ and the discussion of the rules relevant to this chapter will therefore follow the structure of the Code. The first chapter of the Code contains general provisions regarding jurisdiction, applicable law and recognition and enforcement. Chapters II to XII contain provisions regarding jurisdiction and applicable law specific to certain subject matters, which are either supplementary or deviant from the general provisions. Chapter XIII contains provisions regarding entry into force, changes to other laws etc.

2.2 Adaptation to Evolution /Modernisation

The Code aims for modernisation in the sense that it takes four developments into account which have arisen since the entry into force of the old private international law rules. The first development is that of the interpretation of the old provisions by the Belgian courts in order to adapt them as far as possible to modern cases before them as well as the codification of private international law in other European countries, namely Switzerland, Italy, Liechtenstein and the Netherlands, which have obviously also tried to provide rules which meet the needs of modern society.³⁵⁰

The second development is the fundamental change of social relationships in a time where the international movement of goods and persons are part of everyday life. Nationality as a connecting factor is therefore considered as far less relevant than

³⁴⁸ Erauw, J., 2003. Het voorstel van Belgisch wetboek van internationaal privaatrecht en zijn algemene bepalingen, *W.P.N.R.*, n° 6537, at p. 482; Van Houtte, H. en Verlinden, J., 2005. De nieuwe ipr-codex voor de notaris: Inleiding tot de codex ipr, in *Notariële nieuwigheden*, Weyts, L., ed., Leuvense Notariële Geschriften, n° 7, Universitaire Pers Leuven, at p. 51.

³⁴⁹ E.g. Carlier, J.-Y., 2005. Le Code belge de droit international privé. *R.C.D.I.P.*, at p. 18; Van Houtte, H. en Verlinden, J., 2005. De nieuwe ipr-codex voor de notaris: Inleiding tot de codex ipr, in *Notariële nieuwigheden*, Weyts, L., ed., Leuvense Notariële Geschriften, n° 7, Universitaire Pers Leuven, at p. 51; Erauw, J., 2005. Krachtlijnen van het nieuwe Wetboek van Internationaal Privaatrecht, in *Internationale aspecten in de verschillende takken van het recht*, Permanente vorming Order van Advocaten Kortrijk, Larcier, at p. 159;

³⁵⁰ Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 4-5.

habitual residence or the principle of the closest connection.³⁵¹ This development is even more poignant in the EU where the free movement of goods and persons leads to a virtual disappearance of barriers. The Code however, does not focus on rules aimed at international conflicts within the EU, as will become clear under heading 3. It rather aims to provide rules which acknowledge the internationalization of today's society in general.

Thirdly, since the early nineteenth century the way in which nationality is acquired has changed drastically. Nationality has become less permanent and is far less connected to the family unit than it used to be.³⁵² This development, pointed out by the legislator, is of course correct although it closely relates to the second development identified and therefore becomes less relevant. Because of the second development nationality becomes less relevant as a connecting factor altogether, regardless whether it has become less permanent or not.

Lastly, the Code aims to adapt the law to the evolution of the fundamental social values, providing rules which meet current needs.³⁵³ Despite the fact that this development is interesting to note, it is not necessarily very important in the area of contract law as it seems that contract law is less often touched by social values than other parts of the law. This development will therefore be of concern mainly in the area of family law, which becomes clear when reading the preparatory documents to the Code. The main issues debated on and subject to amendments in this context were repudiation, polygamy etc. This development in terms of adaptation of rules to evolution will therefore only be of marginal importance in this chapter.

³⁵¹ Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 5.

³⁵² Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 6.

³⁵³ Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 6.

2.3 International Openness

Although many were looking forward to a Code of private international law,³⁵⁴ there were also some objections to be noted.³⁵⁵ Belgium is after all a tiny country so “would it not be presumptuous [...] to try and establish a law intended to regulate international relations all by ourselves?”³⁵⁶ This question received a “yes” from the Council of State (*Raad van State*), who were invited by the Minister of Justice to provide advice on the draft code of private international law. They motivated this answer by both a practical and a more fundamental concern. The practical concern was that Belgian authorities, which already had a very bad track record regarding timely implementation of international conventions, would now be even less inclined to speed up the process in this area because they would have their own new code to regulate matters.³⁵⁷ The fundamental concern was that Belgium would distance itself from harmonisation processes going on between its neighbours³⁵⁸ and, besides that, that EU legislation in the area, which was already underway, would be far better than a national code.³⁵⁹

The legislator has apparently taken these concerns, as well as other related considerations, into account. A first indication of that lies in the text of article 2 of the code, which is in fact the first real provision since the first article merely refers to the constitutional basis for the code. Article 2 reads: “This law regulates in international situations the jurisdiction of Belgian courts, the designation of the applicable law and the conditions for the effect in Belgium of foreign judgments and authentic instruments in civil and commercial matters *without prejudice to the application of international treaties, the law of the European Union or provisions of special statutes.*”

Furthermore the Code of private international law is intended to be characterised by an internationalist spirit in the sense that, although private international law is part of the national law of a country, the interests of the international movement of goods and

³⁵⁴ Erauw, J., 2003. Het voorstel van Belgisch wetboek van internationaal privaatrecht en zijn algemene bepalingen, *W.P.N.R.*, n° 6537, at p. 481.

³⁵⁵ E.g. Rigaux, F., 2000. Codification of Private International Law: Pros and Cons, *Louisiana Law Review*, 4, p. 1321-1330.

³⁵⁶ Barnich, L., 2005. Présentation du nouveau code belge de droit international privé, *Rev. not.*, at p. 7.

³⁵⁷ Advies van Raad van State, Bijlage bij voorontwerp van wet houdende het Wetboek van internationaal privaatrecht, Parl. St. (I) Senaat 2001-02, nr. 2-1225/1, at p. 243-244.

³⁵⁸ Advies van Raad van State, Bijlage bij voorontwerp van wet houdende het Wetboek van internationaal privaatrecht, Parl. St. (I) Senaat 2001-02, nr. 2-1225/1, at p. 244.

³⁵⁹ Advies van Raad van State, Bijlage bij voorontwerp van wet houdende het Wetboek van internationaal privaatrecht, Parl. St. (I) Senaat 2001-02, nr. 2-1225/1, at p. 247-248.

persons have been taken into account.³⁶⁰ Thereto an effort has been made to abandon terminology typical of Belgian law in order to ensure the application of rules regarding similar foreign legal concepts. In addition the use of certain connecting factors in certain situations has been inspired by the tendencies in international instruments and other recent national codifications.³⁶¹

The importance of international codification, especially in the European Union is clearly recognised by the Belgian legislator but it is also rightly considered that, for the purpose of legal certainty, residuary rules are necessary. The reason for this is that international projects, even under the umbrella of the EU, only cover specific matters and usually have a limited scope of application.³⁶² Brussels I is a good example of this as its rules do not apply when the defendant is not domiciled in a Member State.³⁶³ The national private international law rules of the Member States then have to fill in the gaps.

3. The Rules

As mentioned under heading 1), the Code of Private International Law consists of several parts. The first chapter contains general provisions and the other chapters contain provisions specific to certain areas or subject matters. The first chapter starts by defining certain concepts relevant to the conflict of laws such as nationality, domicile etc. After that it formulates the general rules regarding jurisdiction which apply regardless of the subject matter, unless the specific rules, contained in the other chapters of the code, state otherwise. The rules regarding applicable law are contained in the chapters on specific subject matters although the first chapter of the code also contains a few overriding rules which will always apply when seeking the applicable law.

³⁶⁰ Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 6.

³⁶¹ Memorie van Toelichting bij het Wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht, Parl. St. (I) Senaat 2003-04, nr. 3-27/1 at p. 7.

³⁶² Verslag namens de Commissie voor de Justitie van de Senaat uitgebracht door mevrouw Nyssens en de heer Willems, Parl. St. (I) Senaat 2003-04, nr. 3-27/7 at p. 15.

³⁶³ Art. 4 §1 Brussels I.

3.1 Jurisdiction

The first chapter of the Code of Private International Law contains the general rules on jurisdiction which means that these are the basic rules which apply to all subject matters. In addition to these basic rules however, there are rules specific to a certain subject matter which either formulate additional grounds for jurisdiction or which formulate other grounds for jurisdiction, excluding the application of the basic rules. For contractual obligations the specific rules contain additional grounds for jurisdiction, as will seem from the discussion of the law.

This chapter will contain the actual text of the rules in italics after which they will be discussed with a view to extract the basic rules and principles underlying them in order to allow a first comparison with both EU and English rules in the field. A more detailed analysis will be conducted at a later stage in order to identify smaller nuances and differences between the laws, principles and approach of these legal systems.

Firstly the general rules on jurisdiction will be discussed, structured around the central idea underlying them. Secondly the specific, additional, rules on jurisdiction regarding contractual obligations will be discussed.

3.1.1 General rules on jurisdiction

A first rule to be mentioned briefly here does not contain a ground for jurisdiction but is of a rather procedural nature, which is why it is mentioned first under this heading, although it appears after other rules in the Code. After that the general grounds for jurisdiction are discussed.

“Verification of international jurisdiction”

Art. 12. The court seized verifies its international jurisdiction of its own motion.

Brussels I contains a rule which says that the court shall verify its international jurisdiction in article 26 §1. The difference with article 12 however, is that under Brussels I the court only has to do this when the defendant does not enter an appearance whereas under this provision the court always has to do this.

3.1.1.1 Domicile or residence of defendant

“International jurisdiction based on the domicile or residence of the defendant”

Art. 5. §1. Except when otherwise provided for by this law, the Belgian courts have jurisdiction if the defendant has his domicile or habitual residence in Belgium at the time the claim is filed.

If there are multiple defendants, the Belgian courts have jurisdiction if one of them has his domicile or habitual residence in Belgium, unless the claim has been filed solely to remove a defendant from the jurisdiction of his domicile or habitual residence abroad.

§2. The Belgian courts also have jurisdiction to hear claims regarding the exploitation of a secondary establishment of a legal person which has neither its domicile nor its residence in Belgium, if this establishment is located in Belgium when the claim is filed.

This rule clearly responds to the policy objective to adapt private international law to evolution in the sense that nationality was abandoned as a basic connecting factor, in the sense that before the Code of Private International Law persons of Belgian nationality could be sued before the Belgian courts, regardless of where they were domiciled or habitually resident.³⁶⁴ This is a welcome change because of the arguments made in the introduction to this chapter.³⁶⁵ The rule goes further than Brussels I because habitual residence is sufficient as a connecting factor, where Brussels I requires domicile.³⁶⁶ It does not go as far as the English rule however, which focuses on the service of the claim form, and therefore attaches jurisdiction to mere presence of the

³⁶⁴ Art. 15 B.W. (oud/old).

³⁶⁵ See supra.

³⁶⁶ Art. 2 §1 Brussels I.

defendant on English territory.³⁶⁷ One could therefore conclude that the Brussels I rule is a compromise between the rather broad common law approach and the more stringent civil law approach, which still applied in Belgium at the time the Regulation was made and came into force.

3.1.1.2 Party Autonomy

“Widening of international jurisdiction by choice”

Art. 6. §1. When the parties, in a matter in which they can freely dispose of their rights under Belgian law, have lawfully agreed to confer jurisdiction on the Belgian courts or a Belgian court to hear existing or future disputes arising in connection with a legal relationship, the latter courts or court shall have exclusive jurisdiction.

Except when otherwise provided for by this law, a Belgian court before which the defendant appears has jurisdiction to hear the claim filed against him, unless the main aim of the appearance is to dispute jurisdiction.

§2. In the cases described in §1, the court may however decline its jurisdiction when it appears from the circumstances as a whole that the dispute has no meaningful connection with Belgium at all.

“Exclusion of international jurisdiction by choice”

Art. 7. When the parties, in a matter in which they can freely dispose of their rights under Belgian law, have lawfully agreed to confer jurisdiction on foreign courts or on a foreign court to hear existing or future disputes arising in connection with a legal relationship and when the case has been brought before a Belgian court, the latter must stay its proceedings, unless it is anticipated that the foreign decision will not be amenable to recognition and enforcement in Belgium or unless the Belgian courts have jurisdiction under article 11. The Belgian courts decline jurisdiction when the foreign decision can be recognised under this law.

³⁶⁷ See chapter 3 on English law and policy.

Although not expressly mentioned in this chapter as a policy objective underlying Belgian private international law rules, party autonomy was already recognised in Belgium prior to the Code of Private International Law although no express provision to that effect existed. As explained in chapter 1, party autonomy has been recognised in most countries throughout the world³⁶⁸ and it is therefore logical that the Code of Private International Law recognises this principle in its main basic provisions. Hence the provisions not only fill a void which prior had to be filled by jurisprudence, it can also be viewed as a reinforcement of this principle.

Although the Code distinguishes between a choice of a Belgian court and a choice of a foreign court, these choices are both the expression of the same autonomy. If party autonomy is recognised in favour of Belgian courts it is only logical and testament to international openness that a choice of jurisdiction in favour of a foreign court is equally recognised. The reason why they are treated in two separate provisions is of course because of the fact that exceptions are made to the recognition of a choice for a foreign court under certain circumstances. These seem reasonable and aimed at ensuring access to justice and legal certainty,³⁶⁹ although it must be further researched how they are applied.

3.1.1.3 Related Actions

The following rules envisage situations in which several claims and/or actions or measures relate to one case or situation. It is in the interest of legal certainty, access to justice and of course process economy to treat these before the same judge. Each article contains rules for different types of situations and will therefore be commented on separately.

“Claim on a warranty or intervention claim and counterclaim”

Art. 8. A Belgian court which has jurisdiction to hear a claim also has jurisdiction to hear:

³⁶⁸ See Chapter 1 on EU law.

³⁶⁹ Which are also two main aims of EU private international law: see chapter 1 on EU law.

1° a claim on a warranty or an intervention claim, unless it is filed solely to remove the defendant from the jurisdiction of the court which would normally have jurisdiction;

2° a counterclaim arising from the fact or act on which the original claim is based.

This provision does not need much explanation as it seems very logical. Comparison to English law could be difficult here however, as the Belgian provision contains terms which could not be correctly translated into English because English law does not know these concepts. This could raise concerns regarding the policy objective of international openness, under which the legislator wanted to avoid terminology typical of Belgian law.³⁷⁰

“International coherence”

Art. 9. When the Belgian courts have jurisdiction to hear a claim, they also have jurisdiction to hear a claim which is so closely connected with it that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments if the claims were determined separately.

This provision seems similar to article 28 Brussels I but it goes further than the latter. This article treats the risk of irreconcilable judgments as a ground for jurisdiction where article 28 treats this risk as a possible ground for an *exception* to jurisdiction. It must be further researched how this notion of “irreconcilable judgments” is interpreted and applied because it seems difficult to predict what the result of a separate determination of claims would be. Furthermore it will be researched in how far this rule envisages the same situations as its English equivalent,³⁷¹ which uses the words “additional claim” and “necessary or proper party” to it, notions also open to different interpretations and applications.³⁷²

³⁷⁰ Cf. *supra*.

³⁷¹ PD 3.1 (4).

³⁷² See chapter 3 on English law.

“Provisional, protective and executory measures”

Art. 10. In urgent cases the Belgian courts have jurisdiction to grant provisional, protective and executory measures regarding persons present or property located on Belgian territory at the time the claim was filed, even if the Belgian courts do not have jurisdiction to hear the substance of the case.

This provision is completely in line with article 31 Brussels I. Furthermore English law also contains a similar rule although it has been explained that this possibility for the English courts to grant interim remedies was only fairly recently developed for cases in which litigation took place abroad.³⁷³

3.1.1.4 Necessity / access to justice

“Exceptional attribution of international jurisdiction”

Art. 11. Notwithstanding the other provisions of this law, the Belgian courts will exceptionally have jurisdiction when the case has close connections with Belgium and proceedings abroad seem impossible or when it would be unreasonable to demand that the claim be filed abroad.

This provision has historical roots in the sense that nationality used to be the main connecting factor for jurisdiction so that a Belgian citizen could always turn to a Belgian court (although the provision on which that right was based has not been in force since 1948). Similarly, although based on presence on the territory rather than nationality, English law has historically given its courts jurisdiction because it was said that the defendant deserved the protection of the Crown when on the Crown’s territory.³⁷⁴

³⁷³ See chapter 3 on English law.

³⁷⁴ See chapter 3 on English law.

Article 11 is now said to be based on article 6 §1 ECHR, which has, although controversially, been implied to contain a right of access to court.³⁷⁵ This rule could of course very well be based on a genuine concern of the legislator to provide people with a forum but it has to be said that, if applied too easily and interpreted too broadly, it could also lead Belgian courts to assume jurisdiction all too quickly.

3.1.1.5 Lis Pendens

“International lis pendens”

Art. 14. When a claim has been brought before a foreign court and it is anticipated that the foreign decision will be amenable to recognition and enforcement in Belgium, the Belgian court before which, at a later time, a claim is brought between the same parties with the same object and cause of action, may stay its proceedings until the foreign decision has been rendered. The court takes into consideration the requirements of due process. It declines jurisdiction when the foreign decision can be recognised under this law.

This provision is a novelty compared to the old Belgian private international law since the courts would in general refuse to stay proceedings when another court had already been seized. It seems that the legislator has been inspired by EU law in this respect, although it must also be said that the provision is formulated in such a way that proceedings will not necessarily be stayed.

3.1.2 Specific rules on jurisdiction: Contracts

“CHAPTER IX. OBLIGATIONS

³⁷⁵ *Airey v Ireland* [1979] No. 6289/73, 2 E.H.R.R. 305.

Section 1. International jurisdiction

“International jurisdiction regarding contractual and non-contractual obligations”

Art. 96. In addition to the cases provided for in the general provision of this law, the Belgian courts have jurisdiction to hear claims in respect of obligations regarding:

1° a contractual obligation,

- a) if it came into existence in Belgium; or*
- b) if it is or has to be executed in Belgium [...]*

This rule is quite similar to the English rule in the sense that English law recognises as a connecting factor the place where the contract was made³⁷⁶ as well as the place where the breach occurred.³⁷⁷ Belgian law refers to the place of execution rather than the place of breach, which seems to have been inspired to some extent by the Brussels I Regulation, which attaches jurisdiction to the place of performance of the contract.³⁷⁸

“International jurisdiction regarding consumer and individual employment contracts”

Art. 97. §1. In addition to the cases provided for in article 96, the Belgian courts have jurisdiction to hear claims regarding an obligation referred to in article 96, filed by a natural person who acted with a purpose outside his professional activity, namely the consumer, against a party who supplied or should have supplied a good or service within the framework of his professional activities, if:

1° the consumer completed the actions necessary to conclude the contract in Belgium and had his habitual residence in Belgium at that time; or

2° the good or service was supplied or should have been supplied to a consumer who, at the time of the order, had his habitual residence in Belgium, if the order was preceded by an offer or by publicity in Belgium.

³⁷⁶ PD 3.1 (6) (a).

³⁷⁷ PD 3.1 (7).

³⁷⁸ Art. 5 (1).

§2. Regarding individual labour relationships the contractual obligation is performed in Belgium within the meaning of article 96 if the employee habitually carries out his work in Belgium at the time of the dispute.

§3. An agreement to attribute international jurisdiction only has effect with regard to the employee or consumer if entered into after the dispute has arisen.

This provision is clearly inspired by the aim of the legislator to protect weaker parties to a contract. It is comparable to the provisions regarding consumers and employees in the Brussels I Regulation, one of the main aims of which is to ensure protection of such weaker parties. Such protection is provided for in this rule by giving weaker parties an additional forum which in many cases is far more convenient and thus lowers the barrier for them to go to court.

3.2 Applicable law

For the sake of clarity the Belgian rules on applicable law will be discussed somewhat differently than those on jurisdiction. The first chapter of the Code contains a set of general rules, a few of which do not contain rules determining the applicable law but rather procedural issues related to applicable law. These will be discussed first. Other rules in this first chapter are exceptions to the specific rules in the other chapter of the Code and they will therefore be discussed after these specific rules have been discussed.

3.2.1 General rules on applicable law: preliminary issues

3.2.1.1 Role of the court

“Application of foreign law”

Art. 15. §1. The content of the law designate by this law is established by the court. Foreign law is applied in accordance with the interpretation given to it in the foreign country.

§2. When the court cannot establish this content, it can require the parties to assist. When it is clearly impossible to establish the content of the foreign law in a timely fashion, Belgian law is applied.

This rule seems to be quite different from the English rule in the sense that in England the parties are required to prove the content of the foreign law as a matter of fact. The argument can be made that this is indeed far more efficient than leaving everything up to the judge, especially because Belgian courts are coping with so many arrears in work as it is. It must be said however that the second paragraph provides a sensible solution to this problem. Practitioners know that some courts are very well aware of for example Moroccan family law because they apply it on an everyday basis in areas with a large concentration of Moroccan immigrants. In these cases the court will not need assistance from the parties, nor will it be necessary to resort to the application of Belgian law. In other scenarios however, the parties can assist in order to ensure the progress of the proceedings in a timely fashion.

It must however be noted that the last possibility, the application of Belgian law, could lead to unwanted consequences if applied too easily.

3.2.1.2 Renvoi

“Renvoi”

Art. 16. Within the meaning of this law and notwithstanding special provisions, the meaning of the law of a State is the legal rules of that State with the exclusion of its rules of private international law.

3.2.1.3 States with several legal systems

“States with more than one legal system”

Art. 17. §1. When this law refers to the law of a State with two or more legal systems, each system is considered the law of a State for the purpose of determining the applicable law.

§2. A reference to the law of the State of which a natural person has the nationality refers, within the meaning of §1, to the legal system which is designated by the rules in force in that State or, in the absence of such rules, to the legal system with which the natural person has the closest connections.

A reference to the law of a State with two or more legal systems, which are applicable to different categories of persons, relates, within the meaning of §1, to the legal system which is designated by the rules in force of that State or, in the absence of such rules, to the legal system which it has the closest connections with the legal relationship.

3.2.2 Specific rules on applicable law: Contracts

“CHAPTER IX. OBLIGATIONS

Section 2. Applicable law

“The law applicable to contractual obligations”

Art. 98. §1. The law applicable to contractual obligations is determined by the Convention on the law applicable to contractual obligations concluded in Rome on 19 June 1980.

Except in the cases otherwise provided for by law, contractual obligations excluded from the scope of application of that convention, are governed by the law which is applicable by virtue of the articles 3 to 14 thereof. [...]”

This provision is a perfect example of a rule implementing the policy objective of international openness. Not only does it expressly state that the Rome Convention will be applied by the Belgian courts, it also provides that it will apply to contractual obligations which fall outside its scope. This of course enhances legal certainty and predictability because the same rules will apply to all contractual obligations. On the other hand it must be noted that the entry into force of the Rome I Regulation has given rise to the existence of two legal instruments beside each other, namely Rome I on the one hand and the Rome Convention on the other hand for those contractual obligations falling outside the scope of the Regulation. Although the consequences of this are not dramatic, it would be good to change the provision in order to avoid this as that was the legislator’s intention from the outset.

3.2.3 General rules: exceptions

3.2.3.1 Evasion of the law

“Evasion of the law”

Art. 18. For the determination of the applicable law in a matter in which the parties cannot freely dispose of their rights, facts and acts committed with the sole purpose of evading the application of the law designated by this law are not taken into account.

3.2.3.2 Weak connection

“Exception clause”

Art. 19. §1. By way of exception, the law designated by this law does not apply if it manifestly appears from the circumstances as a whole that the matter had only a very weak connection with the State of which the law was designated, but is very closely connected with another State. In that case the law of this other State is applied.

When applying §1 special consideration is given to:

- the need of predictability of the applicable law, and*
- the circumstance that the relevant legal relationship was validly established according to the rules of private international law of the States with which it was connected at the time of its creation.*

§2. Paragraph 1 does not apply in case of a choice of law by the parties in accordance with the provisions of this law, or in case the designation of the applicable law is based on its content.

3.2.3.3 Mandatory rules

“Mandatory rules”

Art. 20. The provisions of this law do not prejudice the application of the Belgian mandatory or public policy provisions which, by virtue of the law or because of their apparent purpose, are aimed to govern an international situation irrespective of the law designated by the conflict rules.

When applying the law of a State, by virtue of this law, effect may be given to the mandatory or public policy provisions of the law of another State with which the situation has a close connection, if and in so far as, according to the law of that other State, those provisions apply irrespective of the law designated by the conflict rules. In determining whether those provisions should be applied, regard shall be given to their nature and purpose as well as the consequences of their application or non-application.

3.2.3.4 Public policy

“Public policy exception”

Art. 21. The application of a provision of the foreign law designated by this law is refused in so far it would lead to a result which is manifestly incompatible with public policy.

In assessing this incompatibility special consideration is given to the degree in which the situation is connected with the Belgian legal order and to the significance of the consequences which would result from the application of the foreign law.

If a provision of foreign law is not applied because of this incompatibility, a different relevant provision of that law or, if required, of Belgian law applies.

4. Conclusion

It is clear that Belgian private international law is very rule-based. This entails that there is limited discretion for the courts in applying the rules. In that respect, EU law seems more inspired by civil law systems than by English common law. It must be noted, however, that the Belgian rules explicitly provide for a certain amount of discretion in certain circumstances. This will also become clear later on in this thesis, when different options are examined.

Generally speaking Belgian law has been heavily influenced by EU law in the area of private international law. Not merely because Belgian law is largely replaced by the Brussels I Regulation and the Rome I Regulation, but also because the Code of Private International law in places specifically provides that a certain situation will be resolved in accordance with the EU rules. In other words, even where EU rules do not apply, Belgian law provides that they must apply.

Chapter 5. Access to Justice

1. Introduction

It is said by the EU that its citizens have a right to expect it to simplify and facilitate the judicial environment in which they live.³⁷⁹ The overriding aim sought to be achieved by the transfer of competences in the area of private international law by the Treaty of Amsterdam 1997 from the Member States to the EU was to create a European judicial area in civil matters, where citizens have a common sense of justice throughout the European Union and where justice facilitates their day-to-day life.³⁸⁰ Thus the notion of European citizenship, first introduced by the Treaty of Maastricht 1992,³⁸¹ is strongly emphasised in the area of private international law because, in order to facilitate the everyday life of EU citizens, this area of law was considered particularly important, as can be seen from the vast amount of initiatives in the area of private international law since the Treaty of Amsterdam 1997.

Since access to justice relates to jurisdiction rather than applicable law, the issues discussed in this chapter are all related to jurisdiction and Brussels I.

2. Scope of Application of Brussels I: External Defendants

The Brussels I Regulation covers jurisdiction in civil and commercial matters. Particularly relevant for the purposes of this thesis in the context of the scope of application of Brussels I is article 4.

It provides that, if a defendant is domiciled outside the EU, Brussels I does not apply, which means that domestic private international law rules will determine jurisdiction. The text of Article 4 is as follows:

³⁷⁹ Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, *O.J.* C19, 23.01.1999, 4.

³⁸⁰ Explanatory Memorandum Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a European Judicial Area in Civil Matters, COM (2001), 221 final, 15.05.2001, 1.2.; See chapter 1.

³⁸¹ Article 20.

“1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.”

Although the notion of European citizenship was strongly introduced in the area of private international law, Article 4 seems to fail to deliver in terms of access to justice for EU citizens. An EU citizen wanting to sue a third country defendant in the EU cannot do this based on EU law. On the contrary, EU law provides that he has to rely on his domestic private international law rules in order to find a ground for jurisdiction. This seems unsatisfactory in terms of EU policy objectives. It is therefore not surprising that this issue was raised by the Commission in its Green Paper on the revision of Brussels I.

It was pointed out by the Commission that equal access to justice on the basis of clear and precise rules on international jurisdiction is crucial for defendants but also for plaintiffs domiciled in the EU because it is a requirement for the good functioning of the internal market. The jurisdictional needs of persons domiciled in the Union in their relations with third countries' persons are similar to those required in their relations with persons domiciled in the EU from the perspective of a business or consumer. The Commission therefore proposed an extension of the personal scope of the rules to defendants domiciled in third countries, so that the Regulation would apply equally to them, and domestic rules would have no role.³⁸²

It seems that the primary concern in contemplating such an extension of the personal scope of Brussels I was a concern of international courtesy. The Commission emphasised that “a balance should be found between ensuring access to justice on the

³⁸² Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final, 3.

one hand and international courtesy on the other hand”.³⁸³ Similarly, the Belgian government noted that in all discussions regarding this issue the notion of international courtesy should be borne in mind.³⁸⁴

The UK government went even further in its response and did not support extending the scope of the grounds of jurisdiction because they did not see problems significant enough in scale and frequency to justify such a measure. They did highlight an interesting problem in relation to the current state of affairs regarding third country defendants though. It was said that, for want of uniform jurisdiction rules in such cases, such defendants could be sued in any Member State, possibly on an exorbitant basis of jurisdiction if national law made such provisions. Judgments resulting from such proceedings would then however, be amenable to free recognition and enforcement throughout the Union.³⁸⁵

In its Impact Assessment the Commission explained that national rules on jurisdiction for third country defendants vary widely between Member States. This divergence led to a situation in which EU citizens had unequal access to justice in cases where the defendant was domiciled outside the EU.³⁸⁶ Furthermore some issues in relation to protection of weaker parties were identified. These will be discussed in the chapter on weaker party protection.³⁸⁷

However, the Commission’s proposal was not adopted. The Brussels I Recast now contains a provision dealing with such situations in which the defendant is domiciled in a third country which is similar to Article 4 of the Brussels Regulation. Article 6 of the Recast provides:

³⁸³ Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final, 3.

³⁸⁴ Response of Belgium to the Commission’s Green Paper, p. 4.

³⁸⁵ Response of UK to the Commission’s Green Paper, p. 2.

³⁸⁶ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.2.1.1. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

³⁸⁷ See chapter 8.

“1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.”

The Articles referred to in Article 6 are those relating to consumer and employment contracts, on the one hand, and exclusive jurisdiction and jurisdiction agreements on the other hand. The question must be asked if it is enough, where the D is a non EU domiciliary, to subject only those contracts to the Brussels I Regulation. In terms of access to justice this question must be answered in the negative. Only some parties will be allowed to “sue at home”³⁸⁸ based on the Regulation, while all other parties will still have to rely on the Member State laws on jurisdiction.

Although, as mentioned, the notion of international courtesy is an important one, equal access to justice for all parties can only be achieved if the Regulation contained a rule extending its personal scope to all external defendants. It is suggested that further research should be done to assess the feasibility of such option.

3. Lis Alibi Pendens

3.1 Introduction

This Latin term, which literally means “pending action elsewhere”, relates to the problem of the same or similar claims being brought before more than one court. It is often referred to shortly as *lis pendens*, which literally means “pending action”. It is this term which will be used in this thesis.

This part of the thesis focuses on the provision relating to similar actions (*lis pendens*), which involve the same cause of action and between the same parties,³⁸⁹ as distinguished from related actions but which are so closely connected that it is expedient

³⁸⁸ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.2.3. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

³⁸⁹ Art. 29 (1) Brussels I.

to hear and determine them together.³⁹⁰ The reason for this is twofold. Firstly, it is submitted that it is the former rather than the latter that has proven particularly problematic in terms of achieving policy objectives underlying EU private international law. Secondly, the provision regulating such situations where the parties bring the same case, or very similar cases, before different courts has been revised in the context of the Brussels I recast whereas the provisions for closely connected cases has not. The amended provision in the recast Brussels I is therefore discussed and critically evaluated in this thesis.

The relevant provision in the original Brussels I Regulation is, however, discussed and evaluated first because the instrument currently in force is still the original Brussels I Regulation,³⁹¹ as the recast Regulation only applies to legal proceedings instituted on or after 10 January 2015.³⁹² Moreover, it is impossible to assess the current provision without researching its predecessor and the reasons for its amendment as well as the extent to which it was amended and whether the changes made are a substantial improvement, a status quo or a deterioration.

3.2 The relevant provision and its underlying objectives

Article 27 of the original Brussels I reads:

“1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.”

³⁹⁰ Art. 30 (3) Brussels I.

³⁹¹ Art. 66 (1) Brussels I.

³⁹² Art. 66 (2) Brussels I.

This rule was inspired by the aim to minimise the possibility of concurrent proceedings in different courts and to ensure that irreconcilable, or “mutually unenforceable”,³⁹³ judgments, which could of course be the result of such proceedings, would not be given in courts of different Member States. This can be seen in Recital 15 to the Brussels I Regulation which formulates the aim underlying article 27 as follows:

“In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as being pending. For the purposes of this Regulation that time should be defined autonomously.”

It must also be mentioned that the preferred solution in Article 27, where the court second seized must stay its proceedings, was inspired by a will to ensure the parties would not have to institute new proceedings if the court first seized were to decline jurisdiction. As such “unnecessary disclaimers” were avoided.³⁹⁴ This would not have been the case had the drafters of the Convention, and later the Regulation, opted for a rule whereby the court second seized would have to decline jurisdiction, rather than staying its proceedings. Under such a solution it would have been easy for a party to delay proceedings as a simple claim that the second court has no jurisdiction would lead to that court declining jurisdiction, meaning the claim would have to be reinstated at another court if the court first seized subsequently declined its jurisdiction.

It seems that Article 27 has proven effective in avoiding parallel proceedings since the ECJ has interpreted and applied it very strictly so that virtually no exceptions can be made.³⁹⁵ Case law has revealed however, that problems relating to several policy objectives, including access to justice, can arise.

³⁹³ Term used by: Harris, J., 2000. Contractual Freedom in the Conflict of Laws. *Oxford Journal of Legal Studies*, vol. 20, 2, 247, at p. 249.

³⁹⁴ Council Report by Mr. P. Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *OJ C59*, 05.03.1979, 1, at p. 42.

³⁹⁵ E.g. Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693; Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004], ECR I-03565.

A discussion and critical analysis of the relevant case law will illustrate the application of Article 27 as well as the problems encountered in the context of Article 27 and the policy objectives underlying EU private international law rules. It must be noted that this case law involved issues regarding *lis pendens* under the Brussels Convention, and its Article 21 in particular, as there is no case law available on *lis pendens* under the Regulation. The decisions on the Convention however, are equally relevant to the Regulation as the *lis pendens* rule was maintained unchanged in this instrument. Article 29 of Brussels I recast will then be discussed, as compared to Article 27 of Brussels I. An evaluation of the recast provision will conclude this section.

3.3 The Overseas Union case³⁹⁶

In *Overseas Union* the European Court of Justice was asked for a preliminary ruling on the interpretation of Article 21 of the Brussels Convention³⁹⁷ in a case regarding a dispute on an insurance contract. New Hampshire Insurance Company (“New Hampshire”) was a company incorporated in New Hampshire, USA, and registered in England as an overseas company and in France as a foreign company. It issued an insurance policy covering the costs relating to a warranty provided by a company incorporated in France with its registered office in Paris. Later on New Hampshire reinsured a proportion of its risk under that policy inter alia with Overseas Union Insurance Limited (“OUI”), a company incorporated in Singapore and registered in England as an overseas company, and with Deutsche Ruck UK Reinsurance Limited (“Deutsche Ruck”) and Pine Top Insurance Company Limited (“Pine Top”), both incorporated in England with their registered offices in London.

OUI, Deutsche Ruck and Pine Top ceased all payment of claims and purported to avoid their respective insurance commitments, following which New Hampshire issued proceedings against OUI, Deutsche Ruck and Pine Top in Paris, claiming monies due under the reinsurance policies. Deutsche Ruck and Pine Top challenged the jurisdiction of the French court and OUI made it clear they intended to do likewise.

³⁹⁶ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317.

³⁹⁷ Now Art. 27 Brussels I; Article 29 of the Recast.

OUI, Deutsche Ruck and Pine Top then brought an action against New Hampshire in London, seeking a declaration that they had lawfully avoided their obligations under the reinsurance policies. The English court stayed its proceedings pursuant to Article 21 of the Brussels Convention until the French court gave a decision on the question of its jurisdiction. This order granting a stay of proceedings was appealed by OUI, Deutsche Ruck and Pine Top.

The Court of Appeal submitted several questions to the European Court of Justice for a preliminary ruling, the relevant ones for the purposes of this discussion being the second and third questions, which were as follows:

“(2) Under Article 21, paragraph 2, of the Convention, where the jurisdiction of the court first seized is contested, is the court second seized obliged in all circumstances to stay its proceedings as an alternative to declining jurisdiction?”

“(3) (a) If the court second seized is not so obliged, is it (i) required or (ii) permitted for the purpose of deciding whether to stay its proceedings to examine whether the court first seized has jurisdiction?

(b) If so, under what circumstances and to what extent may the second-seized court examine the jurisdiction of the first-seized court?”³⁹⁸

As eloquently summarised by the Court of Justice, the Court of Appeal therefore sought to find out whether Article 21³⁹⁹ meant that, if the court second seized did not decline jurisdiction, its power was limited to staying its proceedings or whether it was also either required or permitted to examine the jurisdiction of the court first seized and, if so, to what extent.⁴⁰⁰

The Court of Justice first noted that its ruling did not have to cover cases in which the court second seized has jurisdiction because this was not the situation in the case at hand.⁴⁰¹ It held that in cases where it is not claimed that the court second seized has exclusive jurisdiction, the only exception to that court’s obligation to decline

³⁹⁸ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para. 8.

³⁹⁹ Later Art. 27 Brussels I.

⁴⁰⁰ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 19.

⁴⁰¹ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 20.

jurisdiction, as imposed by Article 21,⁴⁰² was its obligation to stay proceedings.⁴⁰³ The Court emphasises that the court second seized is in no case in a better position than the court first seized to determine whether the court first seized has jurisdiction. Either that first court has to determine its jurisdiction by virtue of the rules of the Convention – now the Regulation – which it applies with authority equal to the court second seized, or it has to determine its jurisdiction by virtue of its national law, which is undeniably knows better than the court second seized.⁴⁰⁴ The Court of Justice concluded that:

*“without prejudice to the case where the court second seized has exclusive jurisdiction under the Convention [...] Article 21 must be interpreted as meaning that, where the jurisdiction of the court first seized is contested, the court second seized may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seized”.*⁴⁰⁵

As to cases where it is claimed that the court second seized has exclusive jurisdiction, by saying that its ruling was *“without prejudice to the case where the court second seized has exclusive jurisdiction [...]”*, which was not so in the case before it, the ECJ created the impression by some that the court second seized did not have to stay proceedings when it had exclusive jurisdiction pursuant to a jurisdiction agreement⁴⁰⁶ or by virtue of subject-matter.⁴⁰⁷ It seems that this was indeed what the English courts read in *Overseas Union*, as it was subsequently decided in *Continental Bank NA v Aekos SA*⁴⁰⁸ that the English court was not required to stay proceedings in favour of the first seized Greek court since there was a jurisdiction agreement conferring jurisdiction on the English courts. In particular, the English court was asked to grant an anti-suit injunction preventing the defendants from continuing the proceedings in Greece, which were allegedly in breach of the jurisdiction agreement.

The English court emphasised that it was important, in construing the Brussels Convention, to put aside pre-conceptions based on traditional English rules as the Convention was a new regime following the civilian rather than the common law

⁴⁰² Later Art. 27 Brussels I.

⁴⁰³ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 21.

⁴⁰⁴ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 23.

⁴⁰⁵ Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 26.

⁴⁰⁶ E.g. Nurmela, I., 2005. Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System. *Journal of Private International Law* [online], 1(1), 115. Available via: HeinOnline.

⁴⁰⁷ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 198.

⁴⁰⁸ *Continental Bank SA v Aekos Compania Naviera SA* [1994] 1 WLR 588.

approach. In particular the court referred to the fact that English courts traditionally exercise a discretion when asked to grant an anti-suit injunction, while such discretion did not generally exist in civilian legal systems.

The court continued that, when Article 17 of the Convention applied, the jurisdiction agreement conferred jurisdiction on the state chosen by the parties, depriving any other courts of contracting states seized of the case of jurisdiction, regardless of which court was first seized. These other courts must of their own motion consider whether Article 17 applied, and decline jurisdiction if it did. The court concluded there was no discretionary power in the Convention itself to override the conclusive effect of an exclusive jurisdiction agreement which conformed with the requirements of Article 17, meaning that Article 17 took precedence over Articles 21 and 22. Based on this reasoning the court assessed that it did not have to stay proceedings until the Greek court had ruled on its jurisdiction.⁴⁰⁹ Furthermore, on the facts, the grant of an anti-suit injunction was deemed the only effective remedy for the defendants' breach of contract, that breach having taken the form of them suing in Greece while they in fact had to sue in England pursuant to the jurisdiction agreement.⁴¹⁰

However, through the much criticised decision in *Gasser v MISAT*⁴¹¹ it became clear that the interpretation of *Overseas Union* by the English Court of Appeal was incorrect.

3.4 The Gasser case

Erich Gasser GmbH ("Gasser"), a company incorporated under Austrian law, sold children's clothing to MISAT Sri ("MISAT"), a company incorporated under Italian law. All invoices contained a jurisdiction clause in favour of the Austrian courts. After a breakdown in business relationships between the two companies MISAT brought proceedings against Gasser in Italy. Gasser, on the other hand, brought an action against MISAT in Austria, honouring the jurisdiction agreement. The Austrian court, as the court second seized, stayed its proceedings pursuant to Article 21 of the Brussels

⁴⁰⁹ *Continental Bank SA v Aekos Compania Naviera SA* [1994] 1 WLR 588, at 596.

⁴¹⁰ *Continental Bank SA v Aekos Compania Naviera SA* [1994] 1 WLR 588, at 598.

⁴¹¹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693.

Convention, a decision appealed by Gasser. The higher court then asked the ECJ for a preliminary ruling.

The questions particularly relevant in the context of *lis pendens* and the application of the relevant provisions of the Convention were as follows:

“2. May a court other than the court first seized, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters [“the Brussels Convention”], review the jurisdiction of the court first seized if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?”

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seized, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?”

Gasser and the UK government were of the opinion that the second question must be answered with a ‘yes’, based on the decision in *Overseas Union* which, as mentioned above, specifically said the obligation of the court second seized to stay its proceedings was “without prejudice to the case where the court second seized has exclusive jurisdiction under the Convention and in particular under Article 16 thereof”⁴¹². Referring to the needs of international trade and legal certainty in commercial relationships,⁴¹³ the UK Government added that the court designated by a jurisdiction agreement is generally in a better position to rule on the effect of such agreement so that the normal *lis pendens* rule must not apply in such cases.⁴¹⁴

⁴¹² Case C-351/89, *Overseas Union Ins. v New Hampshire Ins. Co.* [1991], ECR I-3317, at para 26, cited in Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 29.

⁴¹³ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 31.

⁴¹⁴ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 32.

MISAT, the Italian Government and the Commission, on the other hand, were of the opinion that the rule in Article 21, requiring the court second seized to stay its proceedings until the court first seized has ruled on its jurisdiction, applied even if there was a jurisdiction agreement in favour of the court second seized.⁴¹⁵

The Court of Justice agreed with the latter. It held that Article 21 did not draw a distinction between the various heads of jurisdiction provided for in the Brussels Convention.⁴¹⁶ The fact that the Court, in *Overseas Union*, said that its decision was without prejudice to the case where the court second seized had exclusive jurisdiction following Article 16 merely meant that the Court of Justice declined to prejudge the interpretation of Article 21 in a hypothetical situation not before it.⁴¹⁷

The Court emphasised that Articles 21 and 22 were intended to prevent parallel proceedings in the interests of the proper administration of justice within the (then) Community. Therefore Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States, irrespective of parties' domicile.⁴¹⁸ The fact that it was claimed in this case that the court second seized had jurisdiction under Article 17 of the Convention is not such as to call in question the application of the procedural rule contained in Article 21. This rule was based clearly and solely on the chronological order in which the courts involved were seized.⁴¹⁹

It was further held that it was conducive to legal certainty that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts was to establish whether it had jurisdiction under the rules of the Convention. It appeared from the clear wording of Article 21 that this was the court first seized.⁴²⁰

Finally, in relation to the second preliminary question, the Court observed that the potential of delaying tactics by parties who wanted to delay a ruling on the substance

⁴¹⁵ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 34 and 35.

⁴¹⁶ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 43.

⁴¹⁷ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 45.

⁴¹⁸ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 41.

⁴¹⁹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 47 *juncto* para. 46.

⁴²⁰ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 51.

of the dispute should not be allowed to call in question the interpretation of a provision of the Convention as deduced from its wording and purpose.⁴²¹

In regards to the third question, Gasser and the UK Government referred to Article 6 of the European Convention on Human Rights (ECHR)⁴²² which provides, inter alia, for the right to a fair trial in civil proceedings, and the UK pointed out, in particular, that a party fearing a judgment against them could run to a court where they expect that proceedings will go on for a very long time with the aim to delay a judgment against them. The automatic application of Article 21 under such circumstances would grant them a substantial and unfair advantage and may, in fact, dissuade the other party from enforcing his rights by legal proceedings.⁴²³ The UK Government suggested therefore that, under such circumstances, an exception to Article 21 should be recognised. Such exception should allow the court second seized to examine the jurisdiction of the court first seized.⁴²⁴

MISAT, the Italian Government and the Commission, however, advocated the full applicability of Article 21, notwithstanding the excessive duration of court proceedings in one of the states concerned.⁴²⁵ MISAT based this point of view on considerations of legal certainty and the prevention of an increase in financial burden for the parties, while also referring to a potential contribution to paralysis of the legal system.⁴²⁶ The Commission equally referred to legal certainty but added that the Convention was based on mutual trust between, and the equivalence of, the courts of the Contracting States. It established a binding system of jurisdiction which all courts concerned were required to observe.⁴²⁷ It would therefore be incompatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on *lis pendens* only if they consider that the court first seized would give judgment within a reasonable period.⁴²⁸ Finally the Commission contended that the determination as to from which point proceedings become excessively long so as to seriously affect a

⁴²¹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 53.

⁴²² Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 59 and 61.

⁴²³ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 62.

⁴²⁴ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 63.

⁴²⁵ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 65.

⁴²⁶ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 66.

⁴²⁷ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 67.

⁴²⁸ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 68.

party's interests, was an issue not to be settled in the context of the Brussels Convention but rather by the European Court of Human Rights.⁴²⁹

The Court of Justice stated that it would be manifestly contrary to the letter and the spirit and to the aim of the Convention to interpret Article 21 of the Brussels Convention so that the application of that article should be set aside where the court first seized belongs to a Contracting State in whose courts there are, generally, excessive delays in dealing with cases.⁴³⁰ The reason for this was twofold according to the Court. Firstly, there was no provision in the Convention under which its articles ceased to apply because of the length of proceedings before the courts of the Contracting State concerned.⁴³¹ Secondly, the Court referred to the trust of the Contracting States in each other's legal systems and judicial institutions, based on which a compulsory system of jurisdiction was established. Thereby the Convention sought to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court would have jurisdiction.⁴³²

In summary the judgment of the Court of Justice in *Gasser* was therefore that even if there is a jurisdiction agreement, the court second seized must stay its proceedings until the court first seized has ruled on its jurisdiction. The fact that it takes an unjustifiably long time for the court first seized to rule on its jurisdiction, does not change that, nor the fact that parties could use the so called "torpedo tactic" discussed below.⁴³³

3.5 The repercussions of the current rule as interpreted and applied by the Court of Justice

As mentioned above,⁴³⁴ the decision in *Gasser* was subject to substantial and wide criticism. This criticism was voiced in academic literature⁴³⁵ and became apparent in

⁴²⁹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 69.

⁴³⁰ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 70.

⁴³¹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 71.

⁴³² Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 72.

⁴³³ This term is explained further below in this section.

⁴³⁴ See *infra*.

⁴³⁵ E.g. Merrett, L., 2006. The Enforcement of Jurisdiction Agreements within the Brussels Regime. *International and Comparative Law Quarterly* [online], 55, 315. Available via: HeinOnline; Pertegás, M., 2005. De EEX-Verordening in de praktijk: enkele knelpunten, in *Internationale aspecten van de verschillende taken van het recht, Permanente Vorming Orde van Advocaten*, 157. Kortrijk:Larcier; Steinle, J. And Vasiliades, E., 2010. The Enforcement of Jurisdiction agreements under the Brussels I

several responses to the Commission's Green Paper on the Brussels I Recast as well.⁴³⁶ From the case law discussed it is clear that article 27 is applied very strictly, mainly because the Commission as well as the ECJ want a very clear rule with very limited exceptions to it in order to safeguard legal certainty.⁴³⁷ It was submitted that the *lis pendens* rule, as applied by the Court of Justice, could be misused, or abused, by parties to delay proceedings⁴³⁸ or the even try and prevent the court with jurisdiction to be seized.⁴³⁹ This is done by applying the "torpedo" tactic.

This term was used by Italian lawyer Mario Franzosi.⁴⁴⁰ He focused on international patent litigation and referred to the well-known principle of sea warfare that an escorted convoy should travel at the speed of the slowest ship because, if the ships all travel at their own speed, there would be no convoy and no unity.⁴⁴¹ He compared the EU nations and their judicial systems with these ships and concluded that the *lis pendens* rule resulted in all "ships" slowing down until the slowest "ship" had progressed.⁴⁴² In particular he observed that a party could start an action for declaration of non-infringement of a patent before a slow-moving Italian court and, until the Italian court had made a decision, all other EU courts had to decline jurisdiction as to actions alleging

Regulation: Reconsidering the Principle of Party Autonomy. *Journal of Private International Law* [online], 6(3), 565. Available via: EBSCOHost;

⁴³⁶ E.g. Response of the Bar Council of England and Wales to the Commission's Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/bar_council_of_england_and_wales_en.pdf; at 3.3 (b); Response of the Intellectual Property Lawyers' Association to the Commission's Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,

http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/intellectual_property_lawyers_association_en.pdf, p. 1-2.

⁴³⁷ See the discussion of *Gasser* in particular.

⁴³⁸ Mance, J., 2004. Exclusive Jurisdiction Agreements and European Ideals. *Law Quarterly Review* [online], 120, 357. Available via: Westlaw.

⁴³⁹ Bříza, P., 2009. Choice-of –Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way Out of the *Gasser-Owusu* Disillusion? *Journal of Private International Law* [online], 5(3), 541. Available via: EBSCOHost.

⁴⁴⁰ Franzosi, M., 1997. Worldwide Patent Litigation and the Italian Torpedo. *European Intellectual Property Review* [online], 19(7), 382. Available via: Westlaw.

⁴⁴¹ Franzosi, M., 1997. Worldwide Patent Litigation and the Italian Torpedo. *European Intellectual Property Review* [online], 19(7), 382. Available via: Westlaw.

⁴⁴² Franzosi, M., 1997. Worldwide Patent Litigation and the Italian Torpedo. *European Intellectual Property Review* [online], 19(7), 384. Available via: Westlaw.

infringement of the patent. As the Italian procedure could take an “outrageous length of time”, the enforcement of the intellectual property right would be paralysed.⁴⁴³

The term “torpedo”, which is often linked to proceedings commenced in Italy or Belgium and therefore also called the “Italian torpedo” or “Belgian torpedo”, therefore refers to the situation where a party senses imminent litigation but want to delay proceedings. They do this by rushing to an, often incompetent, court, preferably in a “slow-moving”⁴⁴⁴ jurisdiction because then the court second seized has to stay its proceedings until the court first seized has ruled on its jurisdiction.⁴⁴⁵ This possibility to maliciously delay proceedings was pointed out by the UK Government in *Gasser*, as discussed above. Furthermore, it was one of the reasons the court in *Continental Bank* concluded the way it did by stating that applying the *lis pendens* rule so that the court chosen in the jurisdiction agreement must stay proceedings awaiting a decision of the court first seized, would mean that:

*“a party who is in breach of the contract will be able to set at naught an exclusive jurisdiction agreement which is the product of the free will of the parties. The principle of the autonomy of the parties, enshrined in article 17, cannot countenance such a conclusion.”*⁴⁴⁶

Several responses to the Commission’s Green Paper on the Brussels I Recast pointed out that courts in the EU regularly encounter such abusive litigation tactics⁴⁴⁷ and a Commission Staff Working Paper discussed this risk, although it admitted that it was difficult to obtain reliable figures to quantify the risk of abuse of the existing rule.⁴⁴⁸

⁴⁴³ Franzosi, M., 1997. Worldwide Patent Litigation and the Italian Torpedo. *European Intellectual Property Review* [online], 19(7), 384. Available via: Westlaw.

⁴⁴⁴ Břıza, P., 2009. Choice-of –Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way Out of the *Gasser-Owusu* Disillusion? *Journal of Private International Law* [online], 5(3), 541. Available via: EBSCOHost.

⁴⁴⁵ See e.g. House of Lords Report with Evidence on the Green Paper on the Brussels I Regulation; <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/148/148.pdf>; p. 17-20.

⁴⁴⁶ *Continental Bank SA v Aekos Compania Naviera SA* [1994] 1 WLR 588, at 597.

⁴⁴⁷ Response of COMBAR (the Commercial Bar Association of the Bar of England and Wales) to Commission’s Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_of_hers/commercial_bar_association_en.pdf.

⁴⁴⁸ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.1.3. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

Referring to a study launched by the European Business Test Panel, the Commission observed that 7.7% of companies reported that in the five years prior their contractual counterpart took a dispute before a court not designated in their jurisdiction agreement. As 5.7% of companies reported that their jurisdiction agreement was held invalid, the Commission concluded that the percentage of these companies affected by abusive litigation tactics was between 2 and 7.7%.⁴⁴⁹

This possibility to maliciously delay proceedings by a “pre-emptive strike”⁴⁵⁰ is problematic in several respects, including legal certainty and predictability, party autonomy and access to justice. The focus in this chapter is on access to justice but the issue will be picked up in the chapters on legal certainty and predictability, on the one hand, and party autonomy, on the other hand, with particular reference to those policy objectives and referring back to the general discussion of the problem and its background in this chapter.

As mentioned in chapter 1, one of the aspects of access to justice as one of the main policy objectives underlying EU private international law is that individuals and businesses must be able to approach courts and authorities in any Member State as easily as in their own. Furthermore they should not be prevented or discouraged from exercising their rights by the complexity of the legal and administrative systems in the Member States.⁴⁵¹ Arguably the current *lis pendens* rule undermines this objective. It is true that the rule, as interpreted and applied by the Court of Justice, provides a clear solution for cases in which the same action is pending before the courts of more than one Member State but the advantage of certainty is outweighed by the considerable harm done by the rule in terms of hampering access to justice.

The estimated 2% to 7.7% of companies affected by abusive litigation tactics, however, are, at least to an extent, denied access to justice as they will not have an opportunity to have their claim heard in the appropriate court until the court pre-emptively struck has ruled on its jurisdiction. One party, acting in bad faith, may deny the other party access

⁴⁴⁹ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.1.3 juncto 1.4. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

⁴⁵⁰ *Continental Bank SA v Aekos Compania Naviera SA* [1994] 1 WLR 588, at 597.

⁴⁵¹ See chapter 1.

to justice in a timely fashion. This is all the more problematic if stalling tactics are worsened by selecting a court in a slow-moving jurisdiction. Furthermore these percentages refer only to those affected by abusive litigation tactics who had a jurisdiction agreement. They do not take into account those cases where there was no jurisdiction agreement but where parties employ similar abusive forum shopping tactics. Our attention will turn to each of these possible scenarios in turn, starting with the situation where there is a jurisdiction agreement.

3.6 Cases in which there is a jurisdiction agreement

The Commission apparently realised that action against the torpedo claims explained above was needed and therefore sought to address this problem in cases where there was a choice of court agreement to “strengthen the effect”⁴⁵² of choice of court agreements. Having detected the problem, for example through research such as the survey referred to above,⁴⁵³ it proposed several solutions to remedy the problem. The solution which made it into the Brussels I Recast will be outlined first. After that it will be critically evaluated with reference to the alternative solutions which were suggested by the Commission in its Green Paper, with reference, where appropriate, to the relevant rules in English and Belgian law.

Article 29 Brussels I Recast provides:

“1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such a time as the jurisdiction of the court first seized is established.”

Article 31 Brussels I Recast provides:

“2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court

⁴⁵² Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175 final, at p. 5.

⁴⁵³ See supra.

of another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.”

This rule reflects one of the solutions which was suggested by the Commission in its Green Paper. It, in effect, alters the priority in the *lis pendens* rule. Hence, the courts chosen by the agreement will have priority to determine its jurisdiction and the other court seized would stay its proceedings until the chosen court has ruled on its jurisdiction.

In order to assess this new rule in terms of improving access to justice, as compared to the current rule, it must be compared, first, to the alternative solutions proposed by the Commission in its Green Paper.⁴⁵⁴

One alternative was to release the court designated in a choice of court agreement from its obligation to stay proceedings where it was the court second seized. Such a solution would have been in line with relevant English and Belgian rules, according to which their courts are not required to stay their proceedings if there is a choice of the English⁴⁵⁵ or Belgian⁴⁵⁶ courts respectively, despite the fact that proceedings may be pending elsewhere already. The Commission rightly pointed out that this solution would mean that parallel proceedings leading to irreconcilable judgments were

⁴⁵⁴ Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final, at p. 5-6.

⁴⁵⁵ PD 3.1 (6) (d).

⁴⁵⁶ Art. 14 juncto art. 25, §1, 7° and art. 6 §1 Code of PIL.

possible.⁴⁵⁷ Since the main idea behind the *lis pendens* rule was to avoid that,⁴⁵⁸ it is submitted that it was undesirable to amend it in such a way that this objective was undermined. Therefore this solution was not more desirable than the solution ultimately chosen.

Another alternative proposed by the Commission was to maintain the *lis pendens* rule as it is, but with the organisation of direct communication and cooperation between the two courts seized. This communication and cooperation could be combined with a deadline for the court first seized to rule on its jurisdiction as well as an obligation to regularly report on the progress of proceedings to the court second seized. This solution seems complicated and rather impractical. It seems that such a system of regular communication and cooperation would increase the workload of courts and, as between the courts of most Member States, translations would be required. Since the torpedo tactic leads parties to seek courts in slow-moving jurisdictions, it seems undesirable to cause still further delays before these courts. Lastly this solution would also increase the cost of litigation because of the extra work, translation services and correspondence needed.⁴⁵⁹ Because of the lack of sufficient support for this option, expressed by stakeholders following the consultation of the public on the Commission's Green Paper, it was discarded.⁴⁶⁰ The author agrees with these criticisms, particularly because both increased delays and increased costs would further hamper access to justice, and therefore concludes that it was not the most desirable solution proposed.

For the same reason, another proposed solution was discarded. This was to exclude the application of the *lis pendens* rule in situations where parallel proceedings consist of

⁴⁵⁷ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.6.2. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

⁴⁵⁸ See *supra*.

⁴⁵⁹ See also Comments from the United Kingdom on the Review of the Brussels I Regulation (EC) 44/2001; http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/united_kingdom_en.pdf at 23.

⁴⁶⁰ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.5. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

one set of proceedings on the merits and another for declaratory relief. That would mean that the court second seized does not have to stay proceedings when the court first seized has been asked to provide a declaration as to the liability of the applicant. This solution did not seem desirable either because it would not effectively address the problem of torpedo tactics. After all, other than a declaration as to liability, a party wishing to employ such tactics could also bring an action seeking performance of the contract for example.⁴⁶¹

The Green Paper also proposed as a solution the introduction of a standard choice of court clause in order to remedy the uncertainty surrounding the validity of the agreement, which could also lead to a quicker decision regarding jurisdiction by the courts. In itself such a standard clause would of course not prevent the application of the torpedo tactic by parties and could therefore not be a sufficient solution to the problem of undermining access to justice. Moreover, even when combined with one of the other solutions, as suggested by the Commission, the question should be asked whether a standard clause is desirable in order to enhance party autonomy.⁴⁶² It could also be asked whether such an initiative to unify certain clauses, and the detail of how to do this, should come from the trading industry itself rather than from the legislator. The answer should be yes when bearing in mind that it can be very expensive to change standard form contracts and that certain industries or sectors have certain needs and customs which they would like to respect.

The Commission also proposed as a solution to enhance the efficiency of jurisdiction agreements by the granting of damages for breach of such agreements. At first glance this may seem a good idea. After all the party wanting to honour the jurisdiction agreement is, in reality, forced to defend himself before the court first seized, even though his defence may be limited to a defence of inadmissibility of the claim for lack of jurisdiction. Any such defence could lead to additional expenses for legal counsel, travel, translations etc. Furthermore the delay created by the party ignoring the jurisdiction agreement could also result in costs or other disadvantages for the other

⁴⁶¹ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.5. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

⁴⁶² See chapter 8.

party, compensation for which may be appropriate.⁴⁶³ It seems however that a substantive right to damages does not belong in a Regulation solely concerned with private international law.⁴⁶⁴ Private international law is concerned with certain preliminary issues in a case, namely which court has jurisdiction and which law will be applied. It is not concerned with the trial of the case on the merits. A substantive right to damages for breach of jurisdiction agreements therefore belongs in the area of contract law or tort law rather than private international law.⁴⁶⁵ Furthermore the granting of damages after the fact does not remedy the initial problem causing the damages.⁴⁶⁶ In addition, it could conflict with the principle of national procedural autonomy recognised by the ECJ in *Rewe* 158/80. This does not mean, however, that the national courts could not award damages for the breach of a choice of court agreement. It would not be based on the Brussels I Regulation, but remains a possibility under, for example, domestic English law, which does provide such a remedy at common law.⁴⁶⁷

To be complete, it must be noted that a status quo, whereby the unamended *lis pendens* rule would be maintained, was of course an option as well, although not mentioned in the Commission's Green Paper.⁴⁶⁸ As the author submitted above, the unamended provision, as interpreted and applied by the Court of Justice, is unsatisfactory in terms of the results it produces, undermining access to justice. Therefore this is definitely not considered a desirable option.

⁴⁶³ Steinle, J. and Vasiliades, E., 2010. The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy. *Journal of Private International Law*, Vol. 6, No. 3, p. 573 and 578-579.

⁴⁶⁴ Comments from the UK; at 25.

⁴⁶⁵ See also: Cuniberti, G., 2010. Mari and Pretelli on Choice-of-Courts Agreements, Lis Pendens and Torpedo Actions. *Conflict of Laws .net* [online]. Available via: <http://conflictoflaws.net/2010/mari-and-pretelli-on-choice-of-court-agreements-lis-pendens-and-torpedo-actions/>; Merrett, L., 2006. The Enforcement of Jurisdiction Agreements within the Brussels Regime. *International and Comparative Law Quarterly* [online], 55(2), 332. Available via: Westlaw.

⁴⁶⁶ Similarly: Response to the Green Paper of the Financial Markets Law Committee; http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/financial_markets_law_committee_en.pdf; p. 4.

⁴⁶⁷ E.g. *National Westminster Bank v Rabobank Nederland* [2008] 1 Lloyd's Rep 16.

⁴⁶⁸ See however: Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.5. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

The solution adopted in the recast must therefore be preferred as the best option. The Commission also points out a disadvantage however; if the choice of court agreement is invalid, this must be established before the chosen court first, i.e. before the competent court can be seized. This may lead to delays in judicial proceedings.⁴⁶⁹ This has led some to argue that the new provision may very well lead to more elaborate torpedo tactics, whereby a party can maliciously and incorrectly claim there is a choice of court agreement in favour of the court second seized, while the court first seized actually had jurisdiction and was thus rightly seized.⁴⁷⁰ Upon such a claim the decision in the court with jurisdiction will be delayed until the court allegedly designated by a choice of court agreement declines jurisdiction.

Although this possibility is a drawback in terms of access to justice, the solution adopted in the recast must still be preferred. The solution must be preferred because the invalidity of jurisdiction clauses should be regarded as the exception to the rule so that giving way to the chosen court, whereby excluding the possibility of the traditional torpedo tactic, should prevail over the fear for the occasional invalid choice of court clause.⁴⁷¹

However, in those cases where a new type of torpedo action could be employed in bad faith, and the impediment to access to justice is still a risk, it is suggested that the rule is amended. *Turner v Grovit*⁴⁷² made it clear that the English solution in the form of anti-suit injunctions was not an option under the Brussels regime. The ECJ stressed that the Convention, and now, therefore, the Regulation, is necessarily based on the trust which the Contracting States have in one another's legal systems and judicial

⁴⁶⁹ Commission Staff Working Paper. Impact Assessment. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), SEC (2010) 1548 final, 14.12.2010, at 2.3.6.2. Available via: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52010SC1547.

⁴⁷⁰ Cuniberti, G., 2010. Mari and Pretelli on Choice-of-Courts Agreements, Lis Pendens and Torpedo Actions. *Conflict of Laws .net* [online]. Available via: <http://conflictoflaws.net/2010/mari-and-pretelli-on-choice-of-court-agreements-lis-pendens-and-torpedo-actions/>; Horn, F., 2011. The Proposal for a Regulation of the European Parliament and the council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast). Note. European Parliament Directorate-General for Internal Policies. Policy Department. Citizens' Rights and Constitutional Affairs. Available via: [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453202/IPOL-JURI_NT\(2011\)453202_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453202/IPOL-JURI_NT(2011)453202_EN.pdf).

⁴⁷¹ STEINLE, J. and VASILIADES, E., 2010. The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy. *Journal of Private International Law*, Vol. 6, No. 3, p. 581-582.

⁴⁷² Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004], ECR I-03565.

institutions.⁴⁷³ It is therefore interpreted and applied by all European courts with the same authority.⁴⁷⁴ Therefore an anti-suit injunction, or, prohibition imposed by a court to restrain a party from commencing or continuing proceedings before a foreign court is incompatible with the Convention/Regulation because it interferes with and undermines the foreign court's jurisdiction.⁴⁷⁵ It is submitted that the Belgian solution, whereby the court is granted a certain discretion as to whether or not to stay proceedings,⁴⁷⁶ is incompatible with the Regulation for the same reason.

It is suggested, therefore that the relevant provisions should be amended to the extent that the competent court will determine whether damages can be awarded.⁴⁷⁷ As such, the Brussels I Regulation, a private international law instrument, does not itself provide for the grant of damages under certain circumstances but leaves it up to (the law of) the (valid) forum to decide on this issue. This suggestion will be further assessed below, after the issue of *lis pendens* has also been discussed in relation to the policy objectives of legal certainty and predictability and party autonomy.

3.7 Cases in which there is no jurisdiction agreement

As mentioned it must also be assessed whether change is needed in regards to cases where the parties have not made a choice of court agreement. In terms of access to justice, abusive litigation tactics such as the torpedo tactic, which has been the focus of this section, are equally problematic in cases where there is no jurisdiction agreement. In the recast of the Brussels I Regulation the EU has decided to change the *lis pendens* rule in relation to cases in which there is a jurisdiction agreement but not in relation to

⁴⁷³ Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004], ECR I-03565, at para. 24.

⁴⁷⁴ Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004], ECR I-03565, at para. 25.

⁴⁷⁵ Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004], ECR I-03565, at para. 27.

⁴⁷⁶ Art. 14 juncto art. 22 and 25 Code PIL.

⁴⁷⁷ An issue briefly mentioned by: Cuniberti, G., 2010. Mari and Pretelli on Choice-of-Courts Agreements, Lis Pendens and Torpedo Actions. *Conflict of Laws .net* [online]. Available via: <http://conflictoflaws.net/2010/mari-and-pretelli-on-choice-of-court-agreements-lis-pendens-and-torpedo-actions/>.

those in which there is no such agreement. It could be argued in the light of access to justice however, that the need to establish a mechanism for resolving conflicts of jurisdiction is just as great in cases involving an alleged jurisdiction agreement as in cases in which there is none.⁴⁷⁸

Inspired by English and Belgian law, it should be assessed whether some discretion should be allowed in those cases where there is a clear abuse of the *lis pendens* rule. In English law, the fact that there are parallel proceedings pending is a factor which will be taken into account when deciding to stay proceedings, although it is not enough in itself though.⁴⁷⁹ Hence bad faith on the side of the party who initiated the first proceedings could be decisive in determining whether to stay proceedings as the court second seized. As a matter of Belgian law, the court must take into account the requirements of due process generally, which includes parallel proceedings in deciding whether to stay proceedings. Important to note here is that the court must not stay proceedings if it seems that the foreign decision will not be amenable to recognition or enforcement in Belgium.⁴⁸⁰ Looking at the grounds for refusal of recognition and enforcement in Belgian law, any exclusive jurisdiction given to the Belgian courts to hear the claim is relevant here.⁴⁸¹ If a party uses the torpedo and the Belgian court, as the court second seized, finds that it has exclusive jurisdiction, a judgment by the foreign court would not be amenable to recognition and enforcement in Belgium. As a result the Belgian court will not stay proceedings in favour of the foreign court.

As explained in the previous paragraph relating to cases in which there is a jurisdiction agreement, the Brussels regime was built on the notion that the Member States trust one another's judicial systems. Discretion on the part of Member State courts as to whether or not to stay proceedings because of abusive litigation tactics by one of the parties could not only undermine legal certainty and predictability,⁴⁸² but would also interfere with the authority of the courts in other Member States. Such a solution would therefore be undesirable, as also concluded in relation to the previous paragraph.

⁴⁷⁸ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 198.

⁴⁷⁹ *De Dampierre v De Dampierre* [1988] AC 92, 108.

⁴⁸⁰ Art. 14 Code PIL.

⁴⁸¹ Art. 25, §1, 7^o Code PIL.

⁴⁸² See chapter 6.

4. Conclusion

To conclude it must be noted that it is obvious that the abusive use of the so called torpedo tactic causes very serious concerns regarding access to justice. If the parties have made a choice of court agreement, which is undermined by one party rushing to an incompetent court, this party, in bad faith, denies the other party access to justice in a timely fashion. This may be all the more problematic in regards to other policy objectives if stalling tactics are worsened by selecting a court in a slow-moving jurisdiction.

It must therefore be concluded that the Regulation is a significant improvement in terms of access to justice in those cases where the parties have made an exclusive choice of court agreement and one of them rushes to an incompetent court.

It was discussed, however, that the same tactic can be used when there is no jurisdiction agreement, and the Brussels I recast did not amend the *lis pendens* rule applicable in those cases. Furthermore a drawback of the new rule in the recast for cases in which there is an agreement, is that more advanced torpedo tactics could be used. After an analysis of potential solutions to these problems, it seems that the options available are undesirable for several reasons, the most important one being that it seems they could undermine legal certainty and predictability. This will be further assessed in the next chapter.

As a result, it appears as though a perfect solution cannot be achieved within the Brussels I Regulation so that parties' access to justice may, in a small number of cases, still be affected by abusive tactics of the other parties. In such cases, it seems that the domestic substantive law of the Member States will have to provide them with a remedy, in the form of, for example, damages to compensate them for the costs incurred or punitive damages. Such remedies do not belong in a private international law instrument.

Chapter 6. Legal Certainty and Predictability

1. Introduction

Legal certainty and predictability regarding private international law consists of the possibility, for the plaintiff, to easily identify the court before which he can bring his claim and, for the defendant, to easily foresee the court before which he can be sued.⁴⁸³ Furthermore it entails that both parties can easily foresee which law the competent court will apply to their dispute.⁴⁸⁴

The adoption of both the Brussels I and Rome I Regulations happened in order to progressively establish an area of freedom, security and justice in the European Union.⁴⁸⁵ Such an area cannot exist without a reasonable degree of legal certainty and predictability.⁴⁸⁶ The highest degree of legal certainty and predictability in international trade within the Union would of course be achieved through the unification of substantive law concerned with international commerce, such as contract law. Although efforts are being made in order to unify, or at least harmonise, certain areas of substantive law, we are not there yet. Therefore the unification of private international law remains highly important in the Union in order to achieve legal certainty and predictability.

⁴⁸³ Merrett, L., 2009. Article 23 of the Brussels I Regulation: a Comprehensive Code for Jurisdiction Agreements? *International and Comparative Law Quarterly* [online], p. 555. Available via: Westlaw.

⁴⁸⁴ Keyes, M., 2008. Statutes, Choice of Law, and the Role of Forum Choice. *Journal of Private International Law*, vol. 4, n°1, p. 14.

⁴⁸⁵ (1) Preamble Brussels I; (1) preamble Rome I.

⁴⁸⁶ Cf. Chapter 1.

Brussels I states in its preamble that “the rules of jurisdiction must be highly predictable”⁴⁸⁷ and Rome I’s preamble contains terms to the same effect. It states that “the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation [and] certainty as to the law applicable [...], for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country or the court in which the action is brought.”⁴⁸⁸ Therefore, “to contribute to the general objective of this Regulation, certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable.”⁴⁸⁹

Several aspects of the Regulations will be discussed in-depth in this chapter, while two will be discussed fairly briefly as they are the subject of the next chapter on party autonomy.

2. Jurisdiction

2.1 Lis Alibi Pendens

2.1.1 Introduction

The issue of *lis alibi pendens*, or *lis pendens*, was introduced in the previous chapter, Chapter 5, and discussed in relation to the policy objective of access to justice. Its meaning, the provisions relevant to it and the key cases will not be repeated in detail here, although, in brief, it should be recalled that the *lis pendens* rule attempts to avoid parallel proceedings in situations where more than one court is seized of the same proceedings. Instead reference will be made to the relevant sections in chapter 5.⁴⁹⁰ In this chapter the relevant rules will be assessed with particular reference to the underlying policy objective of legal certainty and predictability.

⁴⁹⁰ Section 3.1.: meaning of *lis pendens*; section 3.2.: relevant provisions; 3.3.: case law.

⁴⁹⁰ Section 3.1.: meaning of *lis pendens*; section 3.2.: relevant provisions; 3.3.: case law.

⁴⁹⁰ Section 3.1.: meaning of *lis pendens*; section 3.2.: relevant provisions; 3.3.: case law.

⁴⁹⁰ Section 3.1.: meaning of *lis pendens*; section 3.2.: relevant provisions; 3.3.: case law.

The preamble of the Brussels I Regulation, the relevant section of which was quoted in chapter 5,⁴⁹¹ specifically refers to legal certainty and predictability in relation to the *lis pendens* rule. It states that “*there must be a clear and effective mechanism for resolving cases of lis pendens and related actions [...]*”.⁴⁹² This phrase remained unchanged in the preamble of the Brussels I Recast.⁴⁹³

The current rule, which provides that the court second seized in relation to similar actions must stay its proceedings until the jurisdiction of the court first seized is established,⁴⁹⁴ has been the subject of several cases before the Court of Justice, which were discussed in detail in chapter 5.⁴⁹⁵ Those aspects particularly relevant to the policy objective of legal certainty and predictability will, however, form part of the discussion and evaluation of the relevant rules in this chapter. Reference will be made, in particular, to those elements which specifically refer to legal certainty and predictability.

Reference must be made, first, to the decision in *Gasser*⁴⁹⁶, which has been called a “shocking”⁴⁹⁷ case in terms of choice of party autonomy and which was discussed in depth in the previous chapter. Against the background of legal certainty and predictability as a policy objective underlying EU private international law, the case is, however, not necessarily shocking. Why will be clarified with reference to the decision.

The facts of the case as well as the preliminary questions submitted to the CJEU are summarised here again for the purpose of clarity. *Gasser*, an Austrian company, sold clothing to *MISAT*, an Italian company. All invoices contained a jurisdiction clause in favour of the Austrian courts. *MISAT*, however, brought proceedings against *Gasser* in Italy, after which *Gasser* initiated proceedings in Austria. The Austrian court sought to find out from the Court of Justice whether the court second seized could review the jurisdiction of the court first seized if there was a jurisdiction agreement favouring the court second seized. Furthermore it asked whether the *lis pendens* rule in the Brussels Convention could be derogated from where the duration of proceedings before the

⁴⁹¹ See section 3.2.

⁴⁹² (15) Preamble Brussels I.

⁴⁹³ (21) Preamble Brussels I Recast.

⁴⁹⁴ Art. 27(1) Brussels I.

⁴⁹⁵ See *supra*.

⁴⁹⁶ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693.

⁴⁹⁷ Briggs, A., 2008. *Agreements on Jurisdiction and Choice of Law*. Oxford: Oxford University Press. p. 276.

courts of the Contracting State in which the court first seized was established was excessively long.⁴⁹⁸

In its submission to the Court as an intervener the UK Government emphasised, in relation to the first issue, that the commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged because such choice-of-court clauses contribute to legal certainty in commercial relationships. This is because they enable the parties, in case of a dispute, to determine easily which courts will have jurisdiction to deal with it.⁴⁹⁹ The UK Government continued that, in cases where there is an exclusive jurisdiction agreement, the court second seized, which is favoured in the agreement, is in a better position to rule on its jurisdiction than the court first seized.⁵⁰⁰ To avoid the risk of irreconcilable judgments, the court first seized, not favoured by the jurisdiction agreement, must stay its proceedings until the court second seized, designated by the agreement has ruled on its jurisdiction.⁵⁰¹

The Commission disagreed with this position and highlighted that Article 21 of the Brussels Convention sought not only to obviate irreconcilable decisions, but also to uphold economy of procedure. This is achieved because the court second seized is initially required to stay proceedings, and to decline jurisdiction as soon as the jurisdiction of the court first seized is established. The Commission concluded that such a clear rule is conducive to legal certainty.⁵⁰² It was not of the opinion that the *lis pendens* rule should be applied any differently in cases where there was a jurisdiction agreement between the parties.⁵⁰³

The Court of Justice agreed with the Commission. It held that, in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, it was conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts was to establish whether it had jurisdiction.⁵⁰⁴ It further held that the potential difficulties, stemming from delaying tactics employed by parties who, aiming to delay

⁴⁹⁸ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 20.

⁴⁹⁹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 31.

⁵⁰⁰ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 32.

⁵⁰¹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 33.

⁵⁰² Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 38.

⁵⁰³ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 35.

⁵⁰⁴ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 51.

settlement of the substantive dispute, commence proceedings before a court which they know lacks jurisdiction, are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.⁵⁰⁵

In relation to the second issue raised by the Austrian court in its preliminary questions, MISAT submitted that a derogation from the *lis pendens* rule should be allowed where the proceedings in the country of the court first seized were excessively long. If not, MISAT contended, legal uncertainty would be created and the financial burden would be increased for litigants, who would be required to pursue proceedings at the same time in two different states and to appear before the two courts seized, without being in a position to foresee which court would give judgment before the other.⁵⁰⁶

The Commission, on the other hand, emphasised that the Brussels Convention was based on mutual trust and on the equivalence of the courts of the states. It established a binding system of jurisdiction which all the courts within the purview of the Convention were required to observe. The compulsory system of jurisdiction established by the Convention was, according to the Commission, conducive to legal certainty because the parties and the courts could properly and easily determine international jurisdiction.⁵⁰⁷

The Court of Justice equally emphasised the mutual trust in each other's legal systems between the [Contracting] Member States as well as legal certainty. It said that:

“[...] It must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by

⁵⁰⁵ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 53.

⁵⁰⁶ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 66.

⁵⁰⁷ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 67.

*allowing individuals to foresee with sufficient certainty which court will have jurisdiction.”*⁵⁰⁸

2.1.2 Current issues regarding legal certainty and predictability

It is clear from chapter 1 and the introduction to this chapter that legal certainty and predictability is, of all the policy objectives underlying EU private international law rules, one of the key objectives. The extracts from the case of *Gasser* discussed in the previous section also illustrate the importance attached to this objective when interpreting and applying EU private international law provisions. Against the background of this central policy objective it must be assessed whether the *lis pendens* rule achieves its desired result. It is clear from both the discussion in chapter 5 and the discussion of the relevant parts of case law in this chapter that the current rule, and how it is applied, establishes a clear priority rule in cases of *lis pendens*. The *lis pendens* rule is applied very broadly so that it covers all situations in which similar actions are brought before the courts of more than one Member State. The decisions in *Overseas Union* and, even more so, *Gasser* made it clear that the rule is invariable so that under no circumstances the court second seized can examine the jurisdiction of the court first seized.⁵⁰⁹ As such the Brussels I Regulation provides a clear and effective mechanism for resolving cases of *lis pendens*, which is what it aimed to do according to its preamble.⁵¹⁰

The *lis pendens* rule, and the way in which it is applied, therefore achieves legal certainty. Parties know that the court second seized must stay its proceedings until the court first seized has ruled on its jurisdiction without exception. Because of that clear priority rule there is very little scope for concurrent proceedings arising out of the same

⁵⁰⁸ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 72.

⁵⁰⁹ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 198.

⁵¹⁰ (15) Preamble Brussels I.

events⁵¹¹ and cases of *lis pendens* are dealt with consistently, ensuring legal certainty. Problems have arisen however.

Reference must be made to the previous chapter, in which the problem of “torpedo tactics” or the malicious delay of proceedings by parties was explained. This problem does not only affect access to justice but legal certainty and predictability as well. The current *lis pendens* rule does provide legal certainty as to what will be done if similar actions are brought before more than one court. Unfortunately it also provides the certainty that it will in fact permit delaying tactics by parties rushing to an incompetent court in a slow-moving jurisdiction. A system which allows its rules to be abused by parties acting in bad faith does not safeguard the legal certainty it aims for very well. If the forum is highly foreseeable because there is a clear rule determining jurisdiction, for example the rule that a choice of forum by the parties will be respected, a party rushing to an incompetent court without consequence could totally undermine the clear rule because his actions are of course not foreseeable. Therefore, although the *lis pendens* rule itself safeguards legal certainty and predictability, its potential abuse undermines this policy objective.

Furthermore, without addressing the extent to which party autonomy is undermined by such tactics, as that will be the subject of chapter 7, a choice-of-court agreement greatly contributes to legal certainty in contractual relationships, as was highlighted by the UK Government in *Gasser*.⁵¹² The possibility for parties acting in bad faith to delay judgment by rushing to a court which clearly does not have jurisdiction pursuant to the jurisdiction agreement, obviously undermines that legal certainty.

Some authors argue that the need for a clear mechanism resolving cases of *lis pendens* is as great in cases where there is an alleged jurisdiction agreement as in any other case. The consistent application of Article 27 Brussels I, honoured by the *Gasser* ruling, is therefore preferred by them.⁵¹³ This argument must be put in perspective. When parties make a jurisdiction agreement they, in effect, choose to have absolute certainty as to which court is competent to hear the claims arising out of their contractual relationship. Assuming that this foreseeability of the forum is not affected, in the end, by an

⁵¹¹ Bell, A., 1995. The Negative Declaration in Transnational Litigation. *Law Quarterly Review* [online], 678. Available via: Westlaw.

⁵¹² See *supra*.

⁵¹³ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 199.

incompetent court examining its jurisdiction first, it is exactly that. *Eventually* legal certainty and predictability as to the competent court is not affected. During the, potentially substantial, period of delay legal certainty may very well be affected.

It can therefore be argued that abuse of the current rule is even more problematic in cases where there is a choice of court agreement. First, one party is confronted with unforeseeable behaviour by the other party who seizes an incompetent court. As such legal certainty and predictability is undermined just as much, if not more, in cases where there is no choice of court agreement as in cases where there is one. It can be argued that in cases where there is an agreement, however, the competent court is even more clearly identified than in cases where there is no agreement. If the parties to a contract insert a choice-of-court clause in their agreement, which fulfils the requirements set by the Brussels I Regulation, they unequivocally know, often in advance of any conflict between them, which court will hear the dispute. As such, legal certainty existed to a larger extent and is therefore undermined more severely by abusive litigation tactics. Assuming that the incompetent court will decline jurisdiction because it was not favoured in the jurisdiction agreement and assuming that the court second seized is in no better position than the court first seized to rule on its jurisdiction, there is still a delay in proceedings during which there is a certain degree of uncertainty for the party wanting to honour the jurisdiction agreement.

As discussed in chapter 5, the problem of “torpedo tactics” attracted the EU’s attention and was addressed on the road to the Brussels I recast although only in relation to cases in which there was a jurisdiction agreement. These will therefore be discussed first.

2.1.3 Analysis and proposed solutions

As the research has identified that problems regarding legal certainty and predictability existed under the original *lis pendens* rule discussed above, it must be assessed whether the new rule in the recast appropriately addresses this problem or whether another solution would have been better. The new rule in Article 31 Brussels I Recast reverses the priority in the *lis pendens* rule in cases where there is a jurisdiction agreement. As such, the court chosen by the agreement has priority to determine its jurisdiction and

the other court seized has to stay its proceedings until the chosen court has ruled on its competence.

As mentioned in chapter 5 there are certain drawbacks to this solution in relation to access to justice.⁵¹⁴ It will now be evaluated whether these are also present in relation to legal certainty and predictability.

As pointed out by Professor Stone there is no reason to presume that the alleged jurisdiction agreement exists or is valid.⁵¹⁵ If the agreement is non-existent or invalid, following the new rule, this must be established at the allegedly chosen forum before the competent court can be seized. As a result there is scope for more advanced torpedo tactics, whereby a party claims there is a choice-of-court agreement, even though there is none or one that is invalid, resulting in the court first seized to stay its proceedings while the court allegedly chosen examines its jurisdiction. As such the legal certainty aimed for by the Regulation by way of clear jurisdiction rules can be undermined, at least temporarily, in a fashion similar to that experienced under the original Brussels I Regulation.⁵¹⁶

A possible solution was suggested by Horn, who said that giving more flexibility to the courts seized could prevent, or discourage, the use of “improved” torpedo actions. The courts involved could then decide which proceedings should continue, even in parallel to another proceeding, based on considerations of cost and effort.⁵¹⁷ This suggestion is in line with the Belgian and the English solution, discussed in the previous chapter, which both entail a certain amount of discretion for the court.⁵¹⁸

It cannot be denied that judicial discretion could lead to different interpretations and applications of the same rules, depending on the forum. This should be prevented as much as possible because it would undermine legal certainty as, depending on where

⁵¹⁴ See chapter 5.

⁵¹⁵ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 199.

⁵¹⁶ Cuniberti, G., 2010. Mari and Pretelli on Choice-of-Courts Agreements, Lis Pendens and Torpedo Actions. *Conflict of Laws .net* [online]. Available via: <http://conflictoflaws.net/2010/mari-and-pretelli-on-choice-of-court-agreements-lis-pendens-and-torpedo-actions/>.

⁵¹⁷ Horn, F., 2011. The Proposal for a Regulation of the European Parliament and the council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast). Note. European Parliament Directorate-General for Internal Policies. Policy Department. Citizens' Rights and Constitutional Affairs. p. 24. Available via: [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453202/IPOL-JURI_NT\(2011\)453202_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453202/IPOL-JURI_NT(2011)453202_EN.pdf).

⁵¹⁸ See chapter 5.

litigation takes place, the outcome of the jurisdiction dispute could be very different. Some national courts could decide to stay their proceedings while some may decide under the same circumstances not to stay their proceedings. Flexibility could therefore lead to less legal certainty and predictability than under the clear priority mechanism established by the Brussels regime. The emphasis put on legal certainty, as opposed to flexibility, has also been pointed out by literature⁵¹⁹ and EU official documents such as action plans⁵²⁰ and research reports.⁵²¹ Furthermore it appears from, for example, the preamble of the Rome I Regulation that discretion of the courts in applying EU private international law rules is viewed as undermining legal certainty because it is formulated in terms which formulate discretion as the opposite of legal certainty and foreseeability of rules.⁵²²

It is true that this approach, whereby legal certainty has priority over flexibility, has been described as traditionally Continental-European⁵²³ and the CJEU's case law in this area as compromising the very foundations of common law principles of civil jurisdiction.⁵²⁴ Even if that is true, it is the EU's approach and the rules it produces must therefore be assessed against the background of that approach. More discretion for the courts is therefore not desirable because it does not safeguard legal certainty and predictability.

It is submitted that the solution opted for in the Brussels I Recast is to be preferred because it does safeguard legal certainty and predictability in terms of providing a clear priority rule in cases of *lis pendens*. Furthermore it ensures that the legal certainty, sought by parties by way of a choice-of-court agreement, is upheld as the court favoured in the agreement is to establish its jurisdiction while the other court seized stays its proceedings. As a result, there will be no period of time in which parties are waiting for

⁵¹⁹ E.g. Santomauro, P., 2010. Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001. *Journal of Private International Law*, 6(2), p. 282 and 293.

⁵²⁰ Action Plan of the Council and the Commission on How to Best Implement the Provisions of the treaty of Amsterdam on an area of Freedom, Security and Justice, *OJ C19*, 23.01.1999, p. 4 at para. 16.

⁵²¹ Report on the Application of the Brussels I Regulation Presented by Hess, B., Pfeiffer, T. and Schlosser, P., 2007. Study JLS/C4/2005/03 ("The Heidelberg Report"). Available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. p. 196 at para. 447.

⁵²² (16) Preamble Rome I.

⁵²³ Nurmela, I., 2005. Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System. *Journal of Private International Law* [online], 1(1), p. 143. Available via: HeinOnline.

⁵²⁴ Bříza, P., 2009. Choice-of –Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way Out of the *Gasser-Owusu* Disillusion? *Journal of Private International Law* [online], 5(3), 539. Available via: EBSCOHost.

an incompetent court to assess the existence and validity of a choice-of-court agreement not favouring them.

What, then, of the possibility of so-called “improved” torpedo tactics? It cannot be denied that this is a drawback indeed, because it could, again, affect legal certainty as a party acting in bad faith can allege there is a choice-of-court agreement, delaying proceedings and avoiding the trial of the substantive dispute before the competent court. Furthermore, the priority rule has been reversed only in relation to cases in which it is said there is an exclusive jurisdiction agreement. What, then, with torpedo actions in those cases in which there is no exclusive jurisdiction agreement? The *lis pendens* rule will still lead to delay, and associated uncertainty, under those circumstances as well.

In chapter 5 it was suggested that the solution contained in the Brussels I Recast must be retained, despite the fact that it does not appropriately address the new possibilities to abuse it and despite the fact that it does not come to the aid of parties who are victimised by abusive tactics in cases where there is no jurisdiction agreement.⁵²⁵ It must be assessed whether this conclusion holds true in view of legal certainty and predictability.

First, the new rule in the Brussels I recast ensures that the legal certainty aimed for by jurisdiction agreements is restored. In those cases where there is a valid exclusive choice-of-court agreement torpedo tactics in the sense of rushing to a court not favoured in the agreement will be to no avail, as the court indicated in the agreement will rule on its jurisdiction while the other court stays its proceedings. As a result there will be more certainty of enforcement of jurisdiction agreements, compared to the situation under the Brussels I Regulation as originally drafted.⁵²⁶

Second, although the invalidity of choice-of-court agreements must be regarded as exceptional rather than the rule,⁵²⁷ parties acting in bad faith still have the opportunity to apply stalling tactics, which is highly undesirable not only because it clashes with access to justice but also because it may impact legal certainty. The solutions identified

⁵²⁵ See chapter 5.

⁵²⁶ For a critique on the situation under the Brussels I Regulation see: Steinle, J. and Vasiliades, E., 2010. The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy. *Journal of Private International Law* [online], 6(3), p. 574. Available via: EBSCOHost.

⁵²⁷ See chapter 5.

in the previous chapter were anti-suit injunctions on the one hand, and more discretion for the courts on the other hand. For the reasons discussed in that chapter, these solutions seem undesirable.

Third, the solution identified to solve the problem of torpedo tactics in cases in which there is no jurisdiction agreement was to give the courts more discretion in deciding whether to stay their proceedings until the court first seized had ruled on its jurisdiction. It was concluded that this solution was not desirable. In relation to legal certainty and predictability this conclusion must be upheld as it was explained higher in this section that discretion for the national courts could undermine this policy objective.

3. Applicable Law

3.1 Choice of applicable law

3.1.1 Introduction

The issues in relation to a choice of law made by the parties will be discussed in-depth in chapter 7 on party autonomy. It is necessary, however, to provide a general overview in this chapter as this will allow for a provisional conclusion in relation to legal certainty and predictability. This, albeit provisional, conclusion will then inform the assessment carried out in the next chapter, so that a definitive conclusion can be reached there.

The Rome I Regulation honours party autonomy as one of the fundamental principles in private international law by allowing the parties to a contract to choose which law will apply to their contractual relationship.⁵²⁸ As such, Article 3(1) provides:

“A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the

⁵²⁸ (11) Preamble Rome I.

circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.”

When the parties to a contract expressly choose which law will apply to their contractual relationship, one of the consequences is that a high degree of legal certainty and predictability is achieved. The parties make an agreement so that they can clearly foresee which law will apply.

3.1.2 Implied choice of applicable law

An express choice is relatively straightforward in most cases because it is a clause literally stating that the contract shall be governed by e.g. English law or a reference to standard terms and conditions containing such a clause.⁵²⁹ The concept of express choice by the parties is therefore quite easy to apply and unlikely to cause a lot of dispute⁵³⁰. A so called implied choice is less straightforward. As will be discussed in the next chapter, it is submitted that effect should be given to an implied choice of law for reasons of party autonomy.⁵³¹ In the application of this concept however, problems may arise regarding legal certainty and predictability. In this respect it is necessary to address, albeit briefly, the Rome I's predecessor and commentary on it.

The Rome Convention said that a choice had to be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.⁵³² This is because, even though a choice of law will often be express, the Convention recognised the possibility that the court, in the light of all facts, may find that the parties have made a real choice of law.

There were some problems with the application of this provision however. It was formulated in more flexible or more strict terms depending on which language was used.⁵³³ The Commission said that the differences in formulation in the different

⁵²⁹ See e.g. *Ferguson Shipbuilders Ltd. v Voith Hydro GmbH and Co. KG* [2000] S.L.T. 229.

⁵³⁰ Hill, J., 2004. Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts. *The International and Comparative Law Quarterly* [online], 53, 325 at p. 326. Available via: Westlaw.

⁵³¹ See chapter 7.

⁵³² Art. 3 (1) Rome Convention.

⁵³³ 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 (02) 654, final, para. 3.4.2.1 as well as footnote 47.

linguistic versions of the Convention carried the inherent risk of different interpretations in different countries.⁵³⁴ Moreover, case law showed that there were indeed differences in the application of article 3 between the courts of the Contracting States.⁵³⁵ This was clearly undesirable from the perspective of legal certainty and predictability.

There were different opinions especially, on the question in how far a choice of a certain court or a choice of an arbitrator in a certain country constitutes a choice of the law of that court's country or of the country where the arbitration is to be held. At common law a choice for the courts of a country or an arbitration clause is considered to be a very strong indication of the parties' intention to have their contract governed by the law of that country.⁵³⁶ After the entry into force of the Rome Convention it was then necessary to examine whether this rule was still applicable, and it was held that it was. More specifically it was held by the English courts that the test under the Rome Convention and the test under common law were very similar so therefore a choice of jurisdiction was highly likely to imply a choice of law.⁵³⁷

Where some were of the opinion that this approach stemmed from a correct interpretation of the Rome Convention,⁵³⁸ others argued that stronger evidence of the parties' intention was required and that a mere choice of jurisdiction cannot be interpreted as implying a choice of law without further indications of the parties' intention.⁵³⁹

The Rome I Regulation as originally proposed aimed to bring some clarity regarding the impact of a choice of court clause on an implied choice of law. How it attempted to do that and whether it would have been successful will be the subject of chapter 7. For

⁵³⁴ 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 (02) 654, final, at para 3.2.4.1.

⁵³⁵ See chapter 7

⁵³⁶ *Hamlyn and Co. v Talisker Distillery and Others* [1894] A.C. 202; *Compagnie d' Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572; *Compania Naviera Micro SA v Shipley International Inc. (The "Parouth")* [1982] 2 Lloyd's Rep. 351.

⁵³⁷ *Egon Oldendorff v Libera Corp.* [1996] C.L.C. 482. See also: *Hellenic Steel Co. and Others v Solamar Shipping Co. Ltd. and Others (The "Komminos")* [1991] 1 Lloyd's Rep. 370.

⁵³⁸ Plender, R. and Wilderspin, M., 2001. *The European Contracts Convention. The Rome Convention on the Law Applicable to Contractual Obligations*. 2nd ed. London: Sweet & Maxwell. p. 93-96.

⁵³⁹ For example: Morse, C.J.G., 1982. The EEC Convention on the Law Applicable to Contractual Obligations. *Yearbook of European Law*, 2, 107 at p. 117.

the purposes of this section it suffices to say that the proposed provision did not make it into the Regulation.

An addition was made to the preamble of the Rome I Regulation however which did make it in to the Regulation as adopted. The Preamble states that an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated. It is provisionally concluded here that this is insufficient. It is unclear how it could bring a significant improvement to legal certainty as it is quite vague. Based on the initial findings made it seems that additional guidance is needed as to when the national courts can find that parties have made an implied choice of law.

3.1.3 *Choice of non-State Law*

Although this issue will also be discussed in-depth in chapter 7 on party autonomy, it must be touched upon here as well. Under the Rome Convention parties were not allowed to choose as the applicable law a non-state body of law, such as international conventions, divine law, *lex mercatoria* etc. They only had the option to choose the law of a country.⁵⁴⁰

The original Rome I proposal, in order to boost the impact of the parties' will, contained a provision in Article 3 which expressly allowed a choice of a non-state body of law, although some choices were still excluded. This provision was adopted. It would not have added to legal certainty and predictability and it can be argued that it would even have undermined the objective because it may not have been clearly foreseeable whether a particular choice would be allowed under the new rule or not. In the light of this policy objective it is therefore positive that the provision did not make it into the Regulation. As will be discussed in the chapter 7, this evaluation does not necessarily hold true in the light of the objective of party autonomy however.

⁵⁴⁰ Art. 1(1) Rome Convention; Lando, O., 1996-1997. Some Issues relating to the Law Applicable to Contractual Obligations. *King's College Law Journal*, 7, 55 at p. 60; Sambugaro, G., 2008. What "law" to choose for international contracts?. *The European Legal Forum* [online], 3(I), 126, 130. Available via: <http://www.simons-law.com/library/pdf/e/887.pdf>.

It must be mentioned, finally, that the preamble of the Rome I Regulation as adopted provides that the Regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international convention.⁵⁴¹ It is unclear what the preamble adds to the rule. The question must be asked here whether this recital entails that a choice of non-state law as the applicable law is now allowed under the Regulation, as opposed to the Convention and, if so, whether it is clear which types of non-state law can be chosen. As will be explained in detail in the next chapter, the preamble merely confirms that, in principle parties can insert into their contract non-state law. From a private international law view this is not very significant as the incorporation of law does not mean the contract will be governed by that law. As a result it is safe to say that the Rome I Regulation does not cause particular issues in relation to legal certainty and predictability; it is clear that a choice of non-state law as the law applicable to the contract is still not allowed.

3.2 Absence of choice by the parties: Article 4

3.2.1 Introduction

If the parties to a contract do not make an either express or implied choice of law, the Rome I Regulation contains rules on the applicable law in the absence of choice. It can be said that Articles 3 and 4 are the most important provisions in the Regulation.⁵⁴² Article 3 regulates the freedom of choice and was briefly discussed in the previous section. Article 4 is the subject of this section. It states:

“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:

⁵⁴¹ (13) Preamble Rome I.

⁵⁴² Magnus, U., 2009. *Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice*. In Ferrari, F. and Leible, S., 2009. *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: Sellier European Law Publishers. p. 27.

(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;

(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(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;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) 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.

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.”*

This provision could be viewed as incorporating both a rule which is typical of civil law and a rule which is typical of common law. As such, alarm bells immediately ring as to whether the long standing and well developed approaches to interpretation and application of this rule in two very different types of legal system will result in a uniform interpretation and application of Article 4 of the Regulation. It must be evaluated first, if these *prima facie* concerns are justified. To that effect, the predecessor of the Rome I Regulation and the evaluation of its application will be of assistance. Second, it must be assessed whether the current rule in the Regulation is a status quo, an improvement or deterioration to legal certainty and predictability, as compared to its predecessor.

3.2.2 Article 4 of the Rome Convention

As the current rule in the Rome I Regulation is a relatively significant departure from the previous rule under the Rome Convention, the old rule must be recollected. Article 4 Rome Convention stated:

“1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be 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, in the case of a body corporate or unincorporate,

its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions 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.”

Similarly to the current rule in the Rome I Regulation, this provision combines the civilian rule of the law of the characteristic performance and the common law rule of the proper law of the contract.⁵⁴³

Article 4 of the Rome Convention refers in its first paragraph to the law of the country with which the contract is most closely connected. This rule is very similar to the English common law rule, as well as the rules from the other contracting states,⁵⁴⁴

⁵⁴³ Vondráček, O., 2007. Art. 4 of the Rome Convention: a Fruitful or Fruitless Compromise? Common Law Review [online], 8(7), 4893, at 2.2. Available via: http://review.society.cz/index.php?option=com_content&task=view&id=33&Itemid=2.

⁵⁴⁴ Apart from Italy: Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, *OJ* No. C282, 31.10.1980, p.1.

which applied before the entry into force of the Rome Convention. The common law rule stated that in the absence of a choice by the parties, the courts had to find the proper law of the contract by determining with which law system it has its closest and most real connection.⁵⁴⁵ In doing this, the courts applied a flexible test, taking many matters into consideration such as the place of contracting⁵⁴⁶, the place of residence⁵⁴⁷ or business⁵⁴⁸ of the parties, the place of performance,⁵⁴⁹ the nature and subject matter of the contract⁵⁵⁰ or the place where the relationship between the parties was centred.⁵⁵¹

The position under the Rome Convention is similar but the Giuliano-Lagarde Report added that the courts could also take factors into account which supervened after the conclusion of the contract⁵⁵², which was not possible under the common law rule⁵⁵³ and was criticised by some because it would allow a party to one-sidedly change the law applicable to the contract⁵⁵⁴. It was argued, however, that such factors should only be taken into account to strengthen the factors existing at the moment of the conclusion of the contract rather than to be seen as independent factors⁵⁵⁵. This approach would exclude the possibility of a one-sided alteration of the applicable law.

As mentioned, the first paragraph of the rule in article 4 so far came across as very familiar from an English common law point of view, adhering to a high degree of flexibility in determining the country with which the contract has the closest connection. It then moved on, in its second paragraph however, to introduce this concept of “characteristic performance”, a concept alien to English law. It was said to be one of the innovations of the Convention, having gained its ground in in legal

⁵⁴⁵ *John Lavington Bonython and Others v Commonwealth of Australia* [1951] A.C. 201; *James Miller and Partners v Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583; *Amin Rasheed Corp. v Kuwait Insurance Co.* [1984] A.C. 50.

⁵⁴⁶ *Cantieri Navali Riunti S.P.A. v N.V. Omne Justitia and Others (the “Stolt Marmaro”)* [1985] 2 Lloyd’s Rep. 428.

⁵⁴⁷ *Jacobs, Marcus and Co. v the Crédit Lyonnais* [1883-1884] L.R. 12 Q.B.D. 589.

⁵⁴⁸ *Re Anglo-Austrian Bank* [1920] 1 Ch. 69.

⁵⁴⁹ *The Assunzione* [1954] P. 150.

⁵⁵⁰ *British South Africa Co. v De Beers Consolidated Mines Ltd.* [1910] 1 Ch. 354.

⁵⁵¹ *X AG v A Bank (X, Y and Z v B)* [1983] 2 Lloyd’s Rep. 535. See also: Sri Ram, Vinayak, 2005. Choice of Law in Contracts. *University College London Jurisprudence Review* [online], 12, 256-273. Available via: Westlaw.

⁵⁵² Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, *OJ* No. C282, 31.10.1980, p.1.

⁵⁵³ *James Miller and Partners v Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583.

⁵⁵⁴ Bogdan, M., 2006. *Concise Introduction to EU Private International Law*. Groningen: Europe Law Publishing. p. 126.

⁵⁵⁵ Hill, J., 2005. *International Commercial Disputes in English Courts*. 3rd ed. Oxford: Hart. p. 485.

writings and case law in many countries⁵⁵⁶ but quite clearly a concept stemming from Swiss doctrine and case law⁵⁵⁷. It has been called one of the most difficult concepts used in the Convention⁵⁵⁸ and it has, as a result, not been without criticism. As it is a concept alien to common law, much of the criticism came from English commentators.⁵⁵⁹ The question must be asked, therefore, what the characteristic performance of a contract is.

The Giuliano-Lagarde Report explained that the characteristic performance is usually the performance for which the payment is due⁵⁶⁰. However, the payment will sometimes constitute the characteristic performance and therefore this attempted definition by the Report is not always helpful⁵⁶¹. Moreover there are contracts where it is impossible to determine the characteristic performance because parties perform obligations of the same type⁵⁶². It may be clear that the concept is not the easiest concept to apply, although advocates of it can be found as well.⁵⁶³

In addition to this concept of characteristic performance, alien to common law, the provision further departs from common law by significantly limiting the flexibility in determining with which country the contract is most closely connected. Paragraphs 2 to 4 contain a whole list of presumptions to be taken into account by the courts. These presumptions have been heavily criticised, not in the least because, similar to the concept of characteristic performance, they are based around concepts which lack definition in the Regulation such as the concept of “habitual residence”, “central administration” and “principal place of business”. It seems that the courts will therefore

⁵⁵⁶ Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, *OJ* No. C282, 31.10.1980, p.1.

⁵⁵⁷ D’Oliveira, H.U., 1977. “Characteristic Obligation” in the Draft EEC Obligation Convention. *American Journal of Comparative Law* [online], 303 at p. 304. Available via: HeinOnline.

⁵⁵⁸ North, P.M., Fawcett, J.J., 1999. *Cheshire and North’s Private International Law*. 13th ed. London: Butterworths. p. 569.

⁵⁵⁹ By way of example: Atrill, S., 2004. Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw? *International and Comparative Law Quarterly* [online], 53(3), 549. Available via: Westlaw; Vlachos, D., 2006. Characteristics Ain’t Always Proper. *Hertfordshire Law Journal* [online], 6(1), 42. Available via: http://www.herts.ac.uk/__data/assets/pdf_file/0007/38680/HLJ_V6I1_Vlachos.pdf.

⁵⁶⁰ Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, *OJ* No. C282, 31.10.1980, p.1.

⁵⁶¹ Collins, L., 1976. Contractual Obligations. The EEC Preliminary Draft Convention on Private International Law. *International and Comparative Law Quarterly* [online], 35 at p. 48. Available via: HeinOnline.

⁵⁶² *Apple Corps Ltd. v Apple Computer Inc.* [2004] I.L.Pr. 34.

⁵⁶³ Mankowski, P., 2010. *The Principle of Characteristic Performance Revisited Yet Again*. In Boele-Woelki, K. et al. (eds.), 2010. *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr*. The Hague: Eleven International Publishing.

have to rely on their national definitions of these concepts where possible⁵⁶⁴, which is obviously problematic with regards to a uniform interpretation and application of the Convention⁵⁶⁵.

Furthermore the Convention stated in its article 4, paragraph 5 that paragraph 2 shall not apply if the characteristic performance cannot be determined. Since the presumption of characteristic performance appeared to be rather difficult to apply, the more general question arose what exactly the relationship was between the presumptions in paragraph 2, 3 and 4, on the one hand, and paragraph 5, on the other hand. Paragraph 5 contained an escape clause as it stated that these presumptions shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. In other words the question arose was which weight was to be attached to the presumptions in the second, third and fourth paragraph. Opinions varied on this among legal writers⁵⁶⁶ and there were differences in the approach by the national courts of the contracting states as well.

The courts in several contracting states, famously those in the Netherlands, disregarded the presumptions only in very exceptional cases⁵⁶⁷ where it appeared from *all* the circumstances that the contract was more closely connected with another country than the country presumed⁵⁶⁸. Particularly famous in this respect is the Dutch case of *Société Nouvelle des Papeteries de l' Aa SA v BV Machinefabriek BOA*⁵⁶⁹ where the Dutch Supreme Court court refused to discard the presumption in article 4 (2) and decided that Dutch law applied to the contract, even though the contract was clearly more closely connected to France and the only connection with the Netherlands was that the seller's principal place of business was situated there. The court held that the presumption in article 4 (2) "should be disregarded only if, in the special circumstances of the case, the

⁵⁶⁴ North, P.M., Fawcett, J.J., 1999. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths. p. 571.

⁵⁶⁵ Hill, J., 2005. *International Commercial Disputes in English Courts*. 3rd ed. Oxford: Hart. p. 491.

⁵⁶⁶ On the different approaches see: Atrill, S., 2004. Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw? *International and Comparative Law Quarterly* [online], 53(3), 549. Available via: Westlaw.

⁵⁶⁷ McClean, D. and Beevers, K., 2005. *Morris: The Conflict of Laws*. 6th ed. London: Sweet & Maxwell. p. 350.

⁵⁶⁸ Lagarde, P., 1982. The European Convention on the Law Applicable to Contractual Obligations: An Apologia. *Virginia Journal of International Law* [online], 222 (1), 91 at p. 97. Available via: HeinOnline.

⁵⁶⁹ Hoge Raad 25 september 1992. See Struycken, T.H.D., 1996. Some Dutch Judicial Reflections on the Rome Convention, Article 4 (5). *Lloyd's Maritime and Commercial Law Quarterly*, 18.

place of business of the party who is to effect the characteristic performance has no real significance as a connecting factor”.⁵⁷⁰

This so called “strong presumption theory” was criticised for undermining the general principle of the most close connection laid out in the first paragraph of article 4⁵⁷¹ and it was even said that the application of this theory could lead to “dramatic” results when all factors but one point towards a different law.⁵⁷²

UK courts on the other hand applied the “weak presumption theory”, whereby the presumptions in paragraph 2, 3 and 4 were regarded as to provide help and guidance in determining the closest connection, which was regarded as the general aim of article 4. Where the presumptions did not lead to the law which had the closest connection to the contract, the courts fell back on the fifth paragraph of article 4⁵⁷³. More specifically the English courts were in favour of a literal interpretation of paragraph 5,⁵⁷⁴ and emphasised that it stated that the presumptions could be *disregarded* and not *rebutted*, which meant that paragraph 5 should be promoted because the presumptions were very weak⁵⁷⁵.

Thus the presumptions were reduced in the UK to not much more than “tie-breakers” in situations where it was difficult to determine that the contract had a closer connection with one country rather than another⁵⁷⁶. It must be said that this approach clearly reflected the rules which were in force in England before the Convention⁵⁷⁷ since according to common law tradition in the matter a very flexible approach was practised. The problem with this weak presumption theory, however, was that it did not enhance legal certainty and predictability, which was just what the presumptions were intended

⁵⁷⁰ *Société Nouvelle des Papeteries de l' Aa SA v BV Machinefabriek BOA*, 25.09.1992. Number 14.566. Available in Dutch via: <http://www.unilex.info/case.cfm?pid=1&do=case&id=71&step=FullText>.

⁵⁷¹ Clarkson, C.M.V. and Hill, J., 2006. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 191.

⁵⁷² Plender, R. and Wilderspin, M., 2001. *The European Contracts Convention. The Rome Convention on the Law Applicable to Contractual Obligations*. 2nd ed. London: Sweet & Maxwell. p. 122.

⁵⁷³ ATRILL, S., 2004. Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw? *The International and Comparative Law Quarterly* [online], 53 (3), 549 at p. 553. Available via: Westlaw.

⁵⁷⁴ E.g. *Definitely Maybe (Touring) Ltd. v Marek Lieberberg Konzertagentur GmbH* [2001] 1 W.L.R. 1745; *Land Rover Exports Ltd. v Samcrete Egypt Engineers and Contractors SAE* [2001] E.W.C.A. Civ. 2019.

⁵⁷⁵ *Crédit Lyonnais v New Hampshire Insurance Co.* [1997] 9 C.L.C. 909.

⁵⁷⁶ Diamond, A., 1979. Conflict of Laws in the EEC. *Current Legal Problems*, 32, 155 at p. 167.

⁵⁷⁷ McClean, D. and Beevers, K., 2005. *Morris: The Conflict of Laws*. 6th ed. London: Sweet & Maxwell. p. 350.

to provide⁵⁷⁸. It was therefore necessary that the relationship between the presumptions and paragraph 5 of article 4 was clarified in the new Regulation⁵⁷⁹.

It must be noted that the Dutch case cited above led to a judgment by the CJEU, which answered a preliminary question of the Dutch *Hoge Raad* (Supreme Court) as to the application of Article 4. In its preliminary ruling the CJEU, emphasising the need to ensure a high level of legal certainty in contractual relationships, made it clear that the criteria in paragraphs 2 to 4 of the Rome Convention operate like presumptions in the sense that the court must take them into consideration in determining the law applicable to the contract.⁵⁸⁰ Only when it is clear from the circumstances as a whole that the contract is more closely connected with the country other than that identified on the basis of the presumptions, can the court disregard those criteria and apply paragraph 5.⁵⁸¹ As this judgment was made in 2009, after the arrival of the Rome I Regulation, this thesis will not focus on whether the CJEU's judgement added to legal certainty but rather whether the new rule in the Regulation did.

3.2.3 Article 4 of the Rome I Regulation

Article 4, paragraph 1, of the Rome I Regulation, cited above,⁵⁸² contains fixed rules instead of presumptions to determine the applicable law in the absence of choice. Paragraph 2 then states that where the contract is not covered by any of the rules set out in the first paragraph or where it would be covered by more than one rule of the first paragraph, it will be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Paragraph 3, again, contains an exception clause which under the Rome Convention was criticised for undermining legal certainty and predictability. It states that 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

⁵⁷⁸ Hill, J., 2005. *International Commercial Disputes in English Courts*. 3rd ed. Oxford: Hart. p. 503.

⁵⁷⁹ Clarkson, C.M.V. and Hill, J., 2006. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 194.

⁵⁸⁰ Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV* [2009], ECR I-09678. At para. 55.

⁵⁸¹ Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV* [2009], ECR I-09678. At para. 63-64.

⁵⁸² See *supra*.

of that other country shall apply. Moreover paragraph 4 says that the courts also have to apply the law of the country with which the contract has the closest connection in case the applicable law cannot be determined pursuant to paragraphs 1 or 2.

The introduction of fixed rules instead of presumptions can definitely be seen as a step forward for certainty.⁵⁸³ They replace the original rule with characteristic performance as a connecting factor for eight types of contracts. This is conducive to legal certainty and predictability because, rather than presumptions, which can be disregarded, the provision provides clear rules identifying the applicable law.

It must be regretted, however, that the Regulation holds onto the much criticised notion of characteristic performance for those contract not falling in one of the categories in paragraph 1. The fixed rules do not solve the problem of identifying the characteristic performance in relation to complex contracts.⁵⁸⁴ It has been argued that “all that can be said with certainty is that there are certain types of contract in relation to which it is impossible to determine the characteristic performance”.⁵⁸⁵ Since the aim of the revision of the Article 4 rules was to enhance certainty, this could be viewed as somewhat surprising.

Even more problematic in terms of legal certainty and predictability, however, is that the Regulation has not abandoned the exception, or escape, clause which had arguably been over-relied on.⁵⁸⁶ If a contract is manifestly more closely connected with another country, the fixed rules may be set aside.⁵⁸⁷ This exception clause means that the courts retain a certain degree of discretion, and is therefore reflective of recital 16 of the Regulation which states that the conflict-of-law rules should be highly foreseeable but that the courts should retain a degree of discretion to determine the law that is most closely connected to the situation. The wording of the escape clause suggests that its scope is narrower than that under the Rome Convention as there has to be a *manifestly*

⁵⁸³ See also: Editorial Comments, 2006. On the Way to a Rome I Regulation. *Common Market Law Review* [online], 43 (4), 913 at p. 916. Available via: EBSCOHost.

⁵⁸⁴ On the difficulty identifying the characteristic performance for complex contracts see e.g. North, P. and Fawcett, J.J., 1999. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths. p. 564-574.

⁵⁸⁵ Hill, J., 2004. Choice of Law in Contract under the Rome Convention: the Approach of the UK Courts. *International and Comparative Law Quarterly* [online], 53(2), 335. Available via: Westlaw.

⁵⁸⁶ Compare the ruling of the CJEU in *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV* [2009] with some of the English case law discussed in this chapter.

⁵⁸⁷ Art. 4(3) Rome I.

closer connection with another country rather than merely a “closer” connection.⁵⁸⁸ It has been argued, however, that the addition of the word “manifestly” makes no significant difference.⁵⁸⁹ As a result it must be feared that problems, similar to those experienced under the Rome Convention, may rise again. As these related to a lack of uniformity in interpretation and application, that would be detrimental to legal certainty and predictability.

It is therefore suggested by the researcher that the rules proposed in the Rome I Proposal but not adopted would have been better. The proposed provision also contained the fixed rules determining the applicable law for certain types of contracts, followed by a paragraph which still referred to the characteristic performance to determine the applicable law for contracts not specified in the fixed rules. The big improvement in terms of legal certainty, however, lay in the fact that the exception clause was abandoned.⁵⁹⁰ The aim of this approach was to make the rules applicable in the absence of choice by the parties as precise and foreseeable as possible so that parties could be sure at the time of contracting which law would apply to their contract and therefore make a well-considered choice to either exercise or not exercise their party autonomy.⁵⁹¹

This proposed rule however, was amended by the European Parliament,⁵⁹² resulting in an article that reflects a compromise between the different opinions there were on how article 4 should be modified.⁵⁹³ Particularly relevant in this respect was its amendment

⁵⁸⁸ Tang, Z., 2008. The Interrelationship of European Jurisdiction and Choice of Law in Contract. *Journal of Private International Law*, 4(1), 55.

⁵⁸⁹ Briggs, A., 2009. When in Rome, Choose as the Romans Choose. *Law Quarterly Review* [online], 125(Apr), 192. Available via: Westlaw UK.

⁵⁹⁰ Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 312.

⁵⁹¹ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, final. See also: Response of the City of London Law Society, Financial Law Sub-Committee to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/city_london_law_society_financial_sub-committee_1_en.pdf.

⁵⁹² See: Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, - C6-0441/2005 – 2005/0261 (COD), <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0450&language=EN&mode=XML>.

⁵⁹³ See e.g.: Response of the Netherlands to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/netherlands_en.pdf; Response of the Czech Republic to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/czech_republic_en.pdf; Response of the Nordic Group for Private International Law to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/nordic_group_private_international_law_en.pdf; Joint Response of Prof. Ulrich Magnus and Prof. Peter Mankowski to the Commission’s

which added recital 20 stating: “Where the contract is manifestly more closely connected with a country other than that indicated in Article 4 (1) or (2), an escape clause in those provisions provides that the law of that country should apply. In that event, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts”.⁵⁹⁴

As a result, Article 4 of the Rome I Regulation is an improvement to its predecessor to an extent but legal certainty and predictability are not completely safeguarded.

4. Conclusion

This chapter has discussed and evaluated the Brussels I *lis pendens* rule from the perspective of legal certainty and predictability. The problem of parties abusing the current rule, by employing so called torpedo tactics, which had been considered to be particularly problematic in cases where there is a choice of court agreement, has now been addressed in the Brussels I recast so that legal certainty and predictability will improve in this respect. Parties acting in bad faith, however, could now apply a new form of torpedo tactic, alleging there is a valid jurisdiction agreement when there is none. It has been assessed whether a possibility of anti-suit injunctions or the granting of more discretion to the courts could improve this situation without sacrificing legal certainty and concluded that these solutions would undermine legal certainty and predictability. Finally, in cases where there is no jurisdiction agreement and where it is not alleged that there is one, parties could still in bad faith rush to an incompetent court. In such cases granting more discretion to the courts is not desirable either because, as mentioned, it would negatively impact legal certainty. As such, although the Brussels I

Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/university_hamburg_en.pdf;
Response of the United Kingdom to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/united_kingdom_en.pdf;
Response of the Bar Council of England and Wales to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/bar_council_england_wales_en.pdf;
E.g. Response of the Law Society of England and Wales to the Commission’s Rome I Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/law_society_england_wales_en.pdf;
Response of the Max-Planck Institute for Foreign Private and Private International Law, http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/max_planck_institute_foreign_private_international_law_en.pdf.

⁵⁹⁴ Amendment 19 of the European Parliament [or whatever – not sure of provenance of “Amendment 19”] adding recital 8g to the draft Regulation.

recast improves legal certainty and predictability, this policy objective remains, to an extent, undermined.

As to the possibility for parties to a contract to make a tacit choice of law, it has been noted that the differences in linguistic versions that existed under the Rome Convention were removed from the Rome I Regulation, which increased legal certainty and predictability. The uncertainty which also existed under the Rome Convention on the question in how far a choice of a particular court constituted a choice of the law of that court's country has been clarified in part by the amendment of the preamble of the Rome Regulation to the effect that such a choice of court should be one of the factors to be taken into account in determining whether parties had made an implied choice. It is provisionally concluded that this is insufficient to significantly improve legal certainty.

Further, it has been examined above whether the parties to a contract have the possibility under the Rome I Regulation to make a choice of non-state law, which was clearly excluded under its predecessor. Although the Rome I proposal sought to introduce such an option which could have adversely affected legal certainty and predictability, the proposed provision was deleted so that the Rome I Regulation does not raise particular issues in relation to legal certainty here. It is clear that parties must still choose a state law as the applicable law.

Finally, the rules determining the applicable law in the absence of a choice by the parties have been researched. First, it has been identified that the concept of characteristic performance is problematic in terms of legal certainty as it appears very difficult to identify the characteristic performance for complex contracts. Sadly this concept, adopted under the Rome Convention, was retained in the Rome I Regulation. The Regulation made improvements in terms of legal certainty as well however. The much-criticised presumptions in the Rome Convention were replaced by fixed rules for eight types of contracts, improving foreseeability of the applicable law. It is concluded that it must be regretted though, that the exception clause in the Rome Convention, which had caused a lack of uniform application of the rules and which had therefore led to division for as long as it had existed, remained in the Regulation. As such legal certainty may still be undermined.

Chapter 7. Party Autonomy

1. Introduction

As mentioned in chapter 1,⁵⁹⁵ party autonomy is recognised in the vast majority of legal systems throughout the world.⁵⁹⁶ It was in fact the only private international law principle recognised by all the Member States when the European private international law project started.⁵⁹⁷ Party autonomy is the private international law aspect of the freedom of contract which exists in contract law in general.⁵⁹⁸ Often the term is used primarily to refer to the freedom of the parties to choose the law applicable to the disputes arising out of their contractual relationship. It also comprises however, their freedom to choose which court will have jurisdiction to hear claims stemming from such disputes. As such the term is used to refer to both these freedoms or rights of the parties to a contract.⁵⁹⁹

Brussels I and Rome I expressly recognise party autonomy in their preambles⁶⁰⁰ and, more importantly, in their substantive terms⁶⁰¹, as discussed above.⁶⁰² Although there are limitations to party autonomy inspired by the EU's desire to achieve other policy objectives,⁶⁰³ revisions of EU private international law rules have generally focussed on further enhancement of the parties' freedoms.⁶⁰⁴ This is true for revisions relevant to the Brussels regime as well as the Rome regime.

This chapter focuses on one key issue relating to jurisdiction and two key issues in the area of applicable law. In relation to jurisdiction, the issue of *lis alibi pendens*, which was evaluated in the previous two chapters in relation to access to justice and legal

⁵⁹⁵ See *supra*.

⁵⁹⁶ Nygh, P., 1999. *Autonomy in International Contracts*. Oxford: Clarendon Press. p. 8-14.

⁵⁹⁷ Drobnič, U., 1966-67. Conflict of Laws and the European Economic Community. *American Journal of Comparative Law* [online], 15, 212. Available via: HeinOnline.

⁵⁹⁸ McClean, J.D. and Beevers, K., 2009. Morris. *The Conflict of Laws*. 7th ed. London: Sweet & Maxwell. p 335.

⁵⁹⁹ E.g. Harris, J., 2000. Contractual Freedom in the Conflict of Laws. *Oxford Journal of Legal Studies*, vol. 20, 2, p. 247-248; Merrett, L., 2009. Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements? *International and Comparative Law Quarterly*, p. 545.

⁶⁰⁰ (14) Preamble Brussels I; (11) Preamble Rome I.

⁶⁰¹ Art. 23 Brussels I; art. 3 Rome I.

⁶⁰² See Chapter 2

⁶⁰³ See Chapter 4, this chapter below and Chapter 7.

⁶⁰⁴ See chapter 1.

certainty and predictability, is discussed and analysed in the light of the underlying policy objective of party autonomy. In relation to the applicable law, party autonomy is discussed with a particular emphasis, first, on the issue of how the existence and terms of an implied choice of law by the parties is to be determined and, second, the extent of the option of the parties to choose a non-state body of law to apply to their contractual relationship. Each of these key issues regarding party autonomy will be further evaluated in order to see whether and how the EU's policy objective can be better achieved.

2. Jurisdiction

2.1 Lis Alibi Pendens

2.2.1 Current Issues In Relation to Party Autonomy

The issues surrounding cases of *lis pendens* have been discussed in depth in chapter 5 and 6 in relation to access to justice and legal certainty and predictability respectively. In order to avoid repetition the most relevant points will be summarised here in order to give sense to the discussion in relation to party autonomy. Where possible, however, reference will be made to the relevant section in the previous chapters.

It was explained that the current rule provides a clear solution for cases of *lis pendens*. As such, it is conducive to legal certainty, especially because the relevant provisions have been applied without exception.⁶⁰⁵ It has also been argued, however, that this clear rule can be abused by way of so-called torpedo tactics, whereby a party rushes to an incompetent court with a view to delay proceedings.⁶⁰⁶ A strict application of Article 27 Brussels I would mean the court second seized has to stay its proceedings until the court first seized has ruled on its jurisdiction, even if the party bringing proceedings in the first court is acting in bad faith.

⁶⁰⁵ See chapter 6.

⁶⁰⁶ See chapter 5.

The infamous case of *Gasser*⁶⁰⁷ made it clear that even an exclusive jurisdiction agreement does not alter the application of Article 27 Brussels I, despite the fact that the UK Government argued strongly in favour of party autonomy. That is, they contended that the commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. The reason they gave was that jurisdiction agreements contribute to legal certainty in commercial relationships.⁶⁰⁸ The UK Government continued that, in cases where there is an exclusive jurisdiction agreement, the court second seized, which is favoured in the agreement, is in a better position to rule on its jurisdiction than the court first seized.⁶⁰⁹ To avoid the risk of irreconcilable judgments, the court first seized, not favoured by the jurisdiction agreement, must stay its proceedings until the court second seized, designated by the agreement has ruled on its jurisdiction.⁶¹⁰

This position, which did not find favour with the CJEU because it focused primarily on the legal certainty achieved through a clear and consistent priority rule, must be assessed. First, it is true that choice-of-court agreements contribute to legal certainty in commercial relationships. They allow the parties to easily predict which court or courts will have jurisdiction to hear their claims in the case of a dispute.⁶¹¹ Even without reference to legal certainty however, the UK Government had a valid point based purely on the fact that party autonomy is one of the key objectives underlying EU private international law rules. It could therefore be argued that, regardless of whether or not legal certainty is achieved, a choice made by the parties should be respected as a matter of party autonomy. The fact that respect for such a choice also adds to legal certainty is a plus, and of course relevant to this thesis which investigates several provisions in relation to more than one underlying policy objective.

Second, the UK Government argued that the court favoured in the jurisdiction agreement is in a better position than the court first seized to rule on its jurisdiction. Bearing in mind the mutual trust in each other's legal systems upon which the Regulation is based,⁶¹² this argument cannot be upheld. The situation is rather that the

⁶⁰⁷ See chapter 5 and 6.

⁶⁰⁸ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 31.

⁶⁰⁹ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 32.

⁶¹⁰ Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 33.

⁶¹¹ As also discussed in chapter 6.

⁶¹² See chapter 6 and, e.g., Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003], ECR I-14693, at para. 72.

court chosen in the jurisdiction agreement is in no better position than the court first seized to assess the validity of the agreement.⁶¹³ It can be argued, however, that this is irrelevant. If parties have made a jurisdiction agreement the chosen court is the court favoured by them. It is this court therefore, which should have priority to hear the case. If, however, this court is not competent because the choice-of-court clause is invalid for example, the case can be brought before the other court.

The current problem for party autonomy in relation to the *lis pendens* rule will be illustrated here by way of example. Say there are two parties to a contract for the sale of goods. The buyer is domiciled in Germany and the seller is domiciled in the UK. They make a choice of court agreement in favour of the UK courts. The buyer does not pay his invoice and gets several notices from the seller requesting him to pay. He senses that litigation is imminent but he wants to delay the proceedings because he is insolvent. He therefore rushes to a Greek court to file a claim. Following the ruling in *Gasser*, when the seller now goes to the UK court, which clearly has jurisdiction pursuant the choice of court agreement and in accordance with the original Article 23 Brussels I Regulation,⁶¹⁴ this court cannot do anything until the Greek court, as the court first seized, has ruled on its jurisdiction. In the previous two chapters it was explained that in such a scenario both access to justice and legal certainty and predictability are compromised. Furthermore the possibility for one of the parties to delay proceedings in such a way also clearly undermines the effectiveness and practical relevance of a choice of court agreement and therefore party autonomy.

It could be argued that party autonomy is only undermined towards the party who wants to honour the jurisdiction agreement and not towards the other party to the contract because the latter exercises his freedom to choose a court unilaterally by ignoring the previous agreement. That argument is flawed however. As explained in chapter 1 and the introduction to this chapter, party autonomy is the term given to the private international law aspect of freedom of contract. A contract presupposes agreement on its terms by all parties to it as it does not only generate rights but also obligations towards one another. The freedom of contract, and party autonomy, can therefore only

⁶¹³ E.g. Case C-351/89, *Overseas Union Ins. V New Hampshire Ins. Co.* [1991], ECR I-3317, at para 23; Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 199.

⁶¹⁴ See Chapter 2.

be exercised by consent.⁶¹⁵ Party autonomy means that parties can freely choose not just the law applicable to their contractual relationship, but also the court which will have jurisdiction in the disputes relating to this relationship. Their mutually agreed choice of court is a contractual term, which means they must both respect it. If the relevant rules allow for a possibility whereby one party decides not to respect the choice of court agreement by rushing to a different court the principle of party autonomy is severely undermined.

The Brussels I rule, as amended in the Brussels I recast, restores the respect for party autonomy in cases of *lis pendens*. By reversing the priority of the court which has to examine its jurisdiction first, the parties' exclusive jurisdiction agreement will be effectively enforced. The court they have chosen will rule on its jurisdiction, while another court, not favoured in the agreement, stays its proceedings. The other court will only be involved if the choice-of-court agreement is invalid.

The possibility of more advanced torpedo claims, identified in chapters 5 and 6, whereby a party claims there is a jurisdiction agreement although there is none or an invalid one, is less problematic in relation to the policy objective of party autonomy. After all, where there is an agreement, it will be respected as the court chosen in the agreement will rule on its jurisdiction first. Only when there is no agreement a problem may arise. Therefore, if the question is: "Did the Brussels I recast appropriately address the problems experienced under the original *lis pendens* rule?", the answer must be: "When it comes to party autonomy, it did."

3. Applicable Law

3.1 Introduction

In its preamble the Rome I Regulation states that the EU considers the parties' freedom to choose the applicable law one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.⁶¹⁶ The importance of this policy objective,

⁶¹⁵ Knight, CJS, 2008. The Damage of Damages: Agreements on Jurisdiction and Choice of Law. *Journal of Private International Law*, Vol. 4, No. 3, p. 502.

⁶¹⁶ (11) Preamble Rome I.

and the central role it plays in the Rome I Regulation, is further illustrated by the fact that it was consistently mentioned as a key objective in the EU's press releases regarding the Rome I proposal and the adoption of the Regulation.⁶¹⁷ As such, the Regulation contains provisions which honour a very liberal position towards party autonomy, which is hardly "policed".⁶¹⁸ Article 3, entitled "Freedom of choice", provides:

"1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. 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 provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

⁶¹⁷ Press Release, 2005. Adoption of Two Commission Proposals Is a Vital Step in Completing the European Law-Enforcement Area for Individuals and Firms, IP/05/1605, 15.12.2005. Available via: http://europa.eu/rapid/press-release_IP-05-1605_en.htm; Press Release, 2007. 2838th Council Meeting, Justice and Home Affairs, PRES/07/275, 06.12.2007. Available via: http://europa.eu/rapid/press-release_PRES-07-275_en.htm?locale=en; Press Release, 2007. European Citizens and Businesses to Benefit from Greater Legal Certainty and Greater Access to Justice, IP/07/1872, 07.12.2007. Available via: http://europa.eu/rapid/press-release_IP-07-1872_en.htm.

⁶¹⁸ Symeonides, S., 2010. *Party Autonomy in Rome I and II from a Comparative Perspective*. In Boele-Woelki, K., et al., 2010. *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr*. The Hague: Eleven International Publishing. At p. 522 and 527. That does not mean, however, that party autonomy is without limitations, as will seem from this chapter, and the chapter on protection of weaker parties in particular.

5. *The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.*”

As a result of Article 3, parties can make an express choice of law. Often, such an express choice consists of the inclusion of a choice of law clause in the contract between the parties. It can even be argued that few contracts of high value are signed without the insertion of such a clause.⁶¹⁹ Commercial reality is, however, that not every international commercial contract contains a choice of law clause.⁶²⁰ Furthermore, although an express choice can be made by way of oral agreement,⁶²¹ for example in the course of negotiations,⁶²² it is quite possible that no express choice is made between the parties.

For those cases in which there is no express choice by the parties the Regulation provides that the choice must be “clearly demonstrated by the terms of the contract or the circumstances of the case.”⁶²³ The question arises what this means and how this provision is applied by the courts. That will be the subject of the next section.

Secondly, as mentioned in the previous chapter,⁶²⁴ there has been some obscurity as to which legal systems parties can choose, particularly in relation to non-municipal law. That discussion, and the extent to which parties should be allowed to choose as the applicable law a non-state system of law, will be the subject of discussion below.

3.2 Implied Choice of Law

As mentioned in the introduction to this chapter, a choice of law can be very straightforward. Although drafting errors or allegations of misunderstanding or misrepresentation could occur, an express choice is very straightforward in most

⁶¹⁹ Crawford, E., 2006. Choice of Law Clauses in Contracts. *Scots Law Times* [online], 29, 185. Available via: Westlaw.

⁶²⁰ McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris. The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 351.

⁶²¹ *Oakley v Ultra Vehicle Design Ltd* [2006] B.C.C. 57. Para. 61.

⁶²² Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 299.

⁶²³ Art. 3(1) Rome I.

⁶²⁴ See chapter 6.

cases⁶²⁵ because it is in the form of a clause inserted in the substantive agreement literally stating that the contract shall be governed by English law or in the form of a reference to standard terms and conditions containing such a clause.⁶²⁶

It is important to note however, that no effect should be given to an express choice of law unless the parties clearly agreed on that specific term of the contract. The case of *Iran Continental Shelf Oil Company v IRI International Corporation*⁶²⁷ is exemplary of this. The case concerned a dispute between an Iranian and a US corporation. The Iranian corporation sought to rely on the choice of Iranian law, which was included in its standard terms and conditions which were sent to its counterparty early in the negotiations. The US company, on the other hand, sought to rely on the express choice of the law of Texas, as their quotation for the work had been made expressly subject to terms and conditions favouring Texan law. The court decided that, under these circumstances, there was no choice of any applicable law within the meaning of Article 3 of the Convention. As the applied provision in the Regulation has not changed, this decision is relevant in the context of the Regulation as well.

The decision on the absence of a choice of express law was not contested by the parties on appeal,⁶²⁸ and illustrates that the Rome I regime seeks to honour parties' choice of law only if there is a real agreement and clear consensus between them.⁶²⁹ After all, should not party autonomy mean that the parties are free to choose but equally that they are free not to choose? It is submitted that the freedom to choose is a freedom which must be exercised affirmatively so that you lose it if you do not use it.⁶³⁰

In this respect special attention must be drawn to the fact that the Rome I Regulation recognises a so called implied choice of law which is sometimes called a "tacit choice".⁶³¹ The Regulation refers to a choice *clearly demonstrated by the terms of the contract or the circumstances of the case*⁶³². It is submitted that a recognition by the Regulation of an implied choice must be applauded as it gives full effect to party

⁶²⁵ Fentiman, R., 2010. *International Commercial Litigation*. Oxford: Oxford University Press. p. 190.

⁶²⁶ E.g. *Ferguson Shipbuilders Ltd. v Voith Hydro GmbH and Co. KG* [2000] S.L.T. 229.

⁶²⁷ *Iran Continental Shelf Oil Company v IRI International Corporation* [2002] C.L.C. 372, at 376-377.

⁶²⁸ *Iran Continental Shelf Oil Company v IRI International Corporation* [2004] C.L.C. 696, at 700.

⁶²⁹ Hill, J., 2004. Choice of Law in Contract under the Rome Convention: the Approach of the UK Courts. *International and Comparative Law Quarterly* [online], 53(2), 325, at p. 326. Available via: Westlaw.

⁶³⁰ Briggs, A., 2013. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 233.

⁶³¹ Van Calster, G., 2013. *European Private International Law*. Oxford: Hart Publishing. p. 132.

⁶³² Art. 3(1) Rome I Regulation.

autonomy and enhances it as one of the key principles in EU private international law, and the domestic legal systems of all the Member States.⁶³³ It is, however, less straightforward to determine whether such an implied choice has been made, compared to an express choice.

It seems that some caution has to be exercised in concluding that the parties have made an implied choice because, if concluded too easily, the will of the parties will not be respected since then the court will decide there was a choice when the parties would construe that there was not. When, then, must the courts conclude that there has been an implied choice of applicable law?

The Regulation does not provide any particular guidance on the matter. It merely states in its preamble that “an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract *should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated*”.⁶³⁴ This guidance has been called “surprisingly unhelpful”.⁶³⁵ Because of the way in which the recital is phrased it does indeed provide hardly any guidance as to how it should be determined whether parties have made a tacit choice. It must be assessed, therefore, whether the Guiliano-Lagarde Report can be of any assistance. Although this is of course a report on the application on the Rome Convention and the wording has slightly changed in the Regulation, and therefore this report is still relevant.

The Guiliano-Lagarde Report provides:

“The choice of law by the parties will often be express but the Convention recognizes the possibility that the Court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract. For example, the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance. In other cases a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously

⁶³³ See also the introduction to this chapter.

⁶³⁴ (12) Preamble Rome I.

⁶³⁵ Briggs, A., 2013. *The Conflict of Laws*. 3rd ed. Oxford: Oxford University Press. p. 235.

chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties. In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case. Similarly references in a contract to specific Articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French law, although there is no expressly stated choice of law. Other matters that may impel the court to the conclusion that a real choice of law has been made might include an express choice of law in related transactions between the same parties, or the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place.

This Article does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice. Such a situation is governed by Article 4.”

It was argued before that the phrase that a choice must be express “or *demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*”⁶³⁶ was not intended to mean an implied choice of law.⁶³⁷ The examples given in the Giuliano-Lagarde Report, however, contradicted this. At the same time, the Report made it clear here that, whereas the Convention says regards must be had to the terms of the contract *or* the circumstances of the case, the courts must consider both.⁶³⁸

Finally, it is clear from the report that the court can never infer a choice of law where there is none.⁶³⁹ They must not presume that the parties, under those circumstances, would or might have made a particular choice of law.⁶⁴⁰ This guidance, however, did not prove very helpful as problems of uniform application of Article 3 of the Rome Convention arose. As mentioned in the previous chapter,⁶⁴¹ the formulation used in the

⁶³⁶ As was the text of the Rome Convention, art. 3.

⁶³⁷ DIAMOND, A., 1979. Conflict of Laws in the EEC. *Current Legal Problems*, 32, 155, at p. 160.

⁶³⁸ See also: HILL, J., 2004. Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts. *The International and Comparative Law Quarterly* [online], 53, 325 at p. 326. Available via: Westlaw.

⁶³⁹ Giuliano, M. and Lagarde, P., 1980. Report on the Convention on the Law Applicable to Contractual Obligations, *OJ C282*, 31.10.1980, p. 17.

⁶⁴⁰ Fentiman, R., 2010. *International Commercial Litigation*. Oxford: Oxford University Press. p. 195.

⁶⁴¹ See chapter 6.

Convention caused problems in regards to uniform application throughout the EU because, depending on the language version, the requirements for an implied choice were phrased more or less flexibly.⁶⁴² In the English version the term was “with reasonable certainty”, in the Dutch version the term was “voldoende duidelijk”, which is to be translated as ‘with reasonable certainty’ and the German version specified that a choice had to be demonstrated “mit heinreichender Sicherheit”, which is also translated as “with reasonable certainty”. The French version, on the other hand, used the term “de façon certaine”, the literal translation of which results in “with certainty”.⁶⁴³ The Commission said in its Green Paper on the Conversion of the Convention into the Regulation that these differences in formulation in the different linguistic versions of the Convention carried the inherent risk of different interpretations in different countries.⁶⁴⁴ Moreover, case law showed that there were indeed differences in the application of article 3 (2) between the courts of the different Member States. Where many continental courts would quite often conclude that there had not been a tacit choice, this was the opposite of for example English or German courts.⁶⁴⁵ To some extent this could of course have been a result of the differences in wording between the different linguistic versions since it can be argued that it is easier to conclude to an implied choice of law “with reasonable certainty” than to conclude to it “with (absolute) certainty”

It is argued by some that the change in wording was not intended in any way to amend Article 3 and that it was just intended to bring the different language versions in line with each other.⁶⁴⁶ It is certainly helpful that the discrepancies between the different language versions have been tackled. The English language version of the Regulation

⁶⁴² 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 (02) 654, final, para. 3.4.2.1 as well as footnote 47.

⁶⁴³ 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 (02) 654, final, para. 3.4.2.1 as well as footnote 47.

⁶⁴⁴ 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 (02) 654, final, at para 3.2.4.1.

⁶⁴⁵ 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 (02) 654, final, at para 3.2.4.2.

⁶⁴⁶ Heiss, H., 2009. *Party Autonomy*. In Ferrari, F. and Leible, S., 2009. *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: Sellier European Law Publishers. p. 1; Plender, R. And Wilderspin, M., 2009. *The European Private International Law of Obligations*. 3rd ed. London: Sweet & Maxwell. p. 144.

(as well as the Dutch⁶⁴⁷ and the German⁶⁴⁸ version), and its third article in particular, now mirrors the French, where it says that the choice must be “clearly demonstrated”.

However, others contend that there was a more fundamental problem leading to a lack of uniform application, namely that it was too easy under the Rome Convention, regardless of the language version, to find an implied choice and that the change in language addresses this by making the Rome I Regulation stricter than the Rome Convention in regards to the possibility for the court to find an implied choice, albeit only slightly stricter.⁶⁴⁹ If this argument is correct then is, the fact that the discrepancies between language versions have been resolved becomes, of itself, almost insignificant.

Particular analysis is needed of the question in how far a choice of a certain court or a choice of an arbitrator in a certain country constitutes a choice of the law of that court’s country or of the country where the arbitration is to be held. Amongst English legal authors there does not seem to be a complete consensus on this issue. At common law a choice for the courts of a country or an arbitration clause is considered to be a very strong indication of the parties’ intention to have their contract governed by the law of that country.⁶⁵⁰ After the entry into force of the Rome Convention it was then examined by the courts whether this rule was still applicable and it was held that it was. More specifically it was said by the courts that the test under the Rome Convention and the test under common law were very similar so therefore a choice of jurisdiction was highly likely to imply a choice of law.⁶⁵¹

Where some were of the opinion that this approach stemmed from a correct interpretation of the Rome Convention,⁶⁵² others argued that stronger evidence of the parties’ intention was required and that a mere choice of jurisdiction could not be interpreted as implying a choice of law without further indications of the parties’

⁶⁴⁷ This version now uses the term “duidelijk” (“with certainty/clearly”).

⁶⁴⁸ This version now uses the term “eindeutig” (“with certainty/clearly”).

⁶⁴⁹ E.g. McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris. The Conflict of Laws*. 8th ed. London: Sweet & Maxwell. p. 352; Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 306.

⁶⁵⁰ *Hamlyn and Co. v Talisker Distillery and Others* [1894] A.C. 202; *Compagnie d’ Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572; *Compania Naviera Micro SA v Shipley International Inc. (The “Parouth”)* [1982] 2 Lloyd’s Rep. 351.

⁶⁵¹ *Egon Oldendorff v Libera Corp.* [1996] C.L.C. 482. See also: *Hellenic Steel Co. and Others v Solamar Shipping Co. Ltd. and Others (The “Komminos”)* [1991] 1 Lloyd’s Rep. 370.

⁶⁵² Plender, R. and Wilderspin, M., 2001. *The European Contracts Convention. The Rome Convention on the Law Applicable to Contractual Obligations*. 2nd ed. London: Sweet & Maxwell. p. 93-96.

intention.⁶⁵³ This is in fact the position at common law, as a choice of court is considered a very strong indication but insufficient to conclude to a choice of the law of that forum.⁶⁵⁴

The Rome I proposal, which was not eventually adopted, aimed to bring some clarity regarding the impact of a choice of court clause on an implied choice of law. It said that, “if the parties had 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 would be presumed to have chosen the law of that Member State.”⁶⁵⁵ This provision definitely added to clarity and therefore legal certainty and predictability. The question is, however, whether it was desirable in terms of respecting and enhancing party autonomy.

The proposed amendment was widely criticised for several reasons, although some also supported the incorporation of the principle *qui elegit iudicem elegit jus* (he who chooses the judge chooses the law).

It was said that this principle was rather outdated and expressly rejected by the courts in some jurisdictions.⁶⁵⁶ This is of course true, as even the English courts who attach great weight to a choice of court clause in deciding jurisdiction, do not view such a choice as sufficient.⁶⁵⁷ This criticism must be put into perspective however. EU law, of which EU private international law forms part, is an entirely separate legal system with its own rules, underlying objectives and principles and ‘there are always dangers in attempting to interpret [international conventions] through the prism of domestic law doctrines which may not feature in the laws of other contracting states.’⁶⁵⁸ Furthermore, as has become clear from previous discussions in this thesis, EU private international law contains other provisions which may seem very alien to the legal systems of some

⁶⁵³ For example: MORSE, C.J.G., 1982. The EEC Convention on the Law Applicable to Contractual Obligations. *Yearbook of European Law*, 2, 107 at p. 117.

⁶⁵⁴ *Compagnie d' Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572, at 596.

⁶⁵⁵ Art. 3(1) Rome I Proposal.

⁶⁵⁶ Boele-Woelki, K. And Lazić, V., 2007. *Where Do We Stand on the Rome I Regulation?* In Boele-Woelki, K. And Grosheide, W., eds., 2007. *The Future of European Contract Law*. Alphen aan de Rijn: Kluwer Law International. p. 25.

⁶⁵⁷ E.g. *Compagnie d' Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572, at 596.

⁶⁵⁸ Hill, J., 2004. Choice of Law in Contract under the Rome Convention: the Approach of the UK Courts. *International and Comparative Law Quarterly* [online], 53(2), 325, 328. Available via: Westlaw.

Member States. Similarly it does not contain some rules which are very prominent in the national laws of certain Member States.

Another criticism was that the proposed provision presumes that, in the case of a jurisdiction agreement, the parties have chosen the law of the country in which the chosen court was situated, regardless of a choice of law. Nothing was said, however, on how that presumption could be rebutted but it was assumed by commentators that further evidence or connections would be required to support a choice of law by the parties.⁶⁵⁹ As such it seemed that the proposed provision would interfere with the intention of the parties⁶⁶⁰ and would undermine party expectations,⁶⁶¹ thus undermining legal certainty as well. After all, it is possible that parties will agree on the jurisdiction of the courts of a country which they perceive as neutral, while not wishing that country's law to apply to their contractual relationship.⁶⁶²

Other commentators argued in favour of the proposal, saying that it would improve the quality of the decision because the court can apply its domestic law in which they have expertise, as opposed to a foreign in which they do not.⁶⁶³ It was further argued that the expectations of the parties would not be undermined when they out of forgetfulness or ignorance fail to make an express choice of law and that an agreement on jurisdiction in one state and the application of the law of another state is a very rare occasion anyway.⁶⁶⁴

The proposed amendment eventually did not make it into the Regulation but, as a matter of compromise,⁶⁶⁵ the preamble provides that a jurisdiction agreement should be one

⁶⁵⁹ Financial Markets Law Committee, 2006. *Legal Assessment of the Conversion of the Rome Convention to a Community Instrument and the Provisions of the Proposed Rome I Regulation*. Issue 121, at para. 12.5. To be consulted at: <http://www.fmlc.org/papers/April06Issue121.pdf>.

⁶⁶⁰ 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), *OJ* C318, 23.12.2006, 56, at para. 3.2.2.

⁶⁶¹ Crawford, E., 2006. Choice of Law Clauses in Contracts. *Scots Law Times* [online], 29, 185, 187. Available via: Westlaw.

⁶⁶² Boele-Woelki, K. And Lazić, V., 2007. *Where Do We Stand on the Rome I Regulation?* In Boele-Woelki, K. And Grosheide, W., eds., 2007. *The Future of European Contract Law*. Alphen aan de Rijn: Kluwer Law International. p. 25.

⁶⁶³ Lando, O. and Nielsen, P.A., 2007. The Rome I Proposal. *Journal of Private International Law* [online], 3(1), 29, 35. Available via: HeinOnline.

⁶⁶⁴ Lando, O. and Nielsen, P.A., 2007. The Rome I Proposal. *Journal of Private International Law* [online], 3(1), 29, 35. Available via: HeinOnline.

⁶⁶⁵ Cf. Boele-Woelki, K. And Lazić, V., 2007. *Where Do We Stand on the Rome I Regulation?* In Boele-Woelki, K. And Grosheide, W., eds., 2007. *The Future of European Contract Law*. Alphen aan de Rijn: Kluwer Law International. p. 26 *juncto* p. 20.

of the factors to be taken into account in determining whether the parties had made a tacit choice of law.⁶⁶⁶ As mentioned at the beginning of this discussion, it is unclear what the added value of this recital is. What does it mean when it says that a jurisdiction agreement *should be* taken into account? And, as it is one of the factors to be taken into account, which other factors should be taken into account and are those of less importance as they are not explicitly mentioned in the preamble or is that irrelevant and do they bear equal importance?

At present, there is only national case law to guide us and there will be no certainty in the matter until the CJEU has ruled on it.⁶⁶⁷ In relation to party autonomy it is submitted that an emphasis on a choice of court clause, in determining whether an implied choice of law was made and therefore in the absence of such express choice, must be defended.⁶⁶⁸ The reason for this is one which was mentioned in relation to the discussion on the Rome I proposal, namely that very often parties choose the domestic law of the chosen forum as the law applicable to their contractual relationship. The fact that they sometimes do not, however, means that an implied choice must not be inferred merely from a jurisdiction clause. In that respect it must be mentioned that, although currently there may be a fixation on questions of jurisdiction, it must not be forgotten that choice of law remains the true foundation of the conflict of laws.⁶⁶⁹

Such an approach, with emphasis on the choice of court clause would be in line with the position at common law, but it is unclear whether it is in line with the position under Belgian law as the Belgian Code of Private International law refers to the Rome Convention as determining the law applicable to contractual obligations.⁶⁷⁰ As concluded here, the position as to how much weight should be attached to a choice of jurisdiction and which other factors are relevant and to what extent, is as of yet unclear.

⁶⁶⁶ (12) Preamble Rome I.

⁶⁶⁷ Similarly: Briggs, A., 2008. *Agreements on Jurisdiction and Choice of Law*. Oxford: Oxford University Press. p. 235. See also: De Meyer, J. and Erauw, J., 2009. *Het recht van toepassing op verbintenissen uit overeenkomst volgens de nieuwe Rome I-Verordening*. In Erauw, J. and Taelman, P., eds., 2009. *Nieuw internationaal privaatrecht: meer Europees, meer globaal*. Mechelen: Kluwer. p. 277-278.

⁶⁶⁸ See also: Response by Professor Peter Stone to the Green Paper COM(2002) 654 final of 14th January 2003, http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/university_essex_en.pdf.

⁶⁶⁹ Sim, C., 2013. Choice of Law and Anti-Suit Injunctions Relocating Comity. *International and Comparative Law Quarterly* [online], 62(3), 702, 718. Available via: Westlaw.

⁶⁷⁰ Art. 98 Code PIL.

As stated above, although it must be applauded that the discrepancies between the different language versions have been tackled, so that the English, Dutch and German language versions now mirror the French, it is doubtful whether this will be enough. As things stand, it may be expected that case law will continue to show that the relevant provision is applied in accordance with a different threshold depending on the forum. This is not just a problem in terms of legal certainty and predictability but also in terms of party autonomy, as, depending on the forum in which the question of implied choice arises, the decision of the court as to whether there was a choice or not may be different. Yet parties may rely on the belief that their implied choice would be recognised by the competent court and not see the need to make an express choice. Unless there is absolute certainty as to which court will hear the claim, that is, at least the claim that there is an implied choice of law, this is problematic in terms of party autonomy. The previous chapter came to the conclusion that absolute certainty is not yet achieved⁶⁷¹ and it is questionable whether it ever will be because discretion of the courts will inevitably lead to an increased risk of different interpretations and applications. To ensure that both legal certainty and party autonomy are safeguarded, further guidance on a tacit choice of law is therefore required. In that sense the Conversion of the Rome Convention into the Rome I Regulation is a missed opportunity.

3.3 Choice of non-state law

As mentioned above,⁶⁷² the Rome I Regulation embraces a very liberal attitude towards party autonomy. It has been said that the right to choose the applicable law is a fundamental right⁶⁷³ which comprises the right of the parties to a contract to choose which law will apply to the disputes arising out of their contractual relationship. The question must be asked just how liberal the Rome I Regulation is towards party autonomy, with particular reference to which law the parties can choose as the applicable law.

⁶⁷¹ See conclusion chapter 6.

⁶⁷² Section supra.

⁶⁷³ De Meyer, J. and Erauw, J., 2009. *Het recht van toepassing op verbintenissen uit overeenkomst volgens de nieuwe Rome I-Verordening*. In Erauw, J. and Taelman, P., eds., 2009. *Nieuw internationaal privaatrecht: meer Europees, meer globaal*. Mechelen: Kluwer. p. 294.

First it must be noted that the Regulation provides that a choice by the parties of the law of a non-Member State is respected just as much as choice of the law of a Member-State.⁶⁷⁴ It has been argued that this means that a choice by the parties is absolutely free in the sense that no connection is needed between the law chosen on the one hand, and the parties or the contract on the other hand.⁶⁷⁵ This is, in principle, true although it must be mentioned that Articles 3(3) and 3(4) contain a minor exception to that. Article 3(3) provides that, where all other elements relevant to the situation at the time of choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. This provision aims to prevent that parties to an entirely domestic contract can avoid the application of the mandatory rules of the domestic law concerned by a simple choice of law. It is submitted however, that this provision will apply only very rarely as it does not say that the mandatory rules of the country with which the situation has *most* connections cannot be escaped. Just those of the country with which the situation has *all* connections cannot be escaped.⁶⁷⁶ Article 3(4) contains a similar arrangement in regards to EU law, which is a novelty compared to its predecessor which did not contain such a provision. However, as it is phrased as restrictively as Article 3(3), it will probably be applied just as rarely.

Apart from these minor limitations to party autonomy there are limitations which are far more significant and which are inspired by other policy objectives of EU private international law, notably the objective to protect parties which are regarded as weaker parties to a contract. Those rules, and whether and how they limit party autonomy in favour of protection of weaker parties, will be the subject of chapter 8. This chapter will now focus on another more substantial limitation on party autonomy, namely the fact that parties could not, under the Rome Convention, choose as the applicable law a non-state system of law. Whether this has changed under the Rome I Regulation and to which extent, will be assessed against this background, after which a critical analysis of the current situation will be conducted.

⁶⁷⁴ Art. 2 Rome I.

⁶⁷⁵ Solomon, D., 2008. Private International Law of Contracts in Europe: Advances and Retreats. *Tulane Law Review* [online], 82(5), 1724. Available via: HeinOnline; Van Calster, G., 2013. *European Private International Law*. Oxford: Hart Publishing. p. 132.

⁶⁷⁶ Symeonides, S., 2010. *Party Autonomy in Rome I and II from a Comparative Perspective*. In Boele-Woelki, K., et al., 2010. *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr*. The Hague: Eleven International Publishing. p. 526.

Under the Rome Convention, the parties could only choose a state law, i.e. the law of a country.⁶⁷⁷ This was deduced from the fact that Article 1(1) said that the rules of the Convention applied to contractual obligations in any situation involving *a choice between the laws of different countries*.⁶⁷⁸ Thus, other forms of law such as EU law, international conventions, divine law (e.g; Sharia law), *lex mercatoria* etc. could not be chosen. This was confirmed by, for example, English case law.⁶⁷⁹

The academic discussion as to whether parties should be allowed to choose a non-state body of law as the law governing their contractual relationship has existed for and it does not seem that the matter has been settled. Several arguments pro and contra such a choice will be discussed and analysed here, with reference to the Rome I proposal, as this amended the Convention in order to allow a choice of a non-national legal system. As the provision in question did not make it into the Regulation, the discussion and analysis of the different arguments will inform the assessment of the current rule.

In order to “further boost the impact of the parties’ will”,⁶⁸⁰ the proposal for the Rome I Regulation contained a provision (which was not adopted) which expressly allowed a choice for a non-state body of law. Its Article 3(1) and (2) provided:

“1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties. [...]

2. 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.

However, 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 choice under this Regulation.”

⁶⁷⁷ LANDO, O., 1996-1997. Some Issues relating to the Law Applicable to Contractual Obligations. *King’s College Law Journal*, 7, 55 at p. 60.

⁶⁷⁸ See e.g. Sambugaro, G., 2008. What “law” to choose for international contracts?. *The European Legal Forum* [online], 3(1), 126, 130. Available via: <http://www.simons-law.com/library/pdf/e/887.pdf>.

⁶⁷⁹ *Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ. 19; *Halpern v Halpern* [2007] EWCA Civ. 291.

⁶⁸⁰ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, final. At p. 5.

The proposal therefore explicitly allowed for a choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional EU instrument. A choice of *lex mercatoria*, however, was not an option - according to the Commission because it lacked precision. Private codifications not adequately recognised by the international community were not an option either.⁶⁸¹ As mentioned this provision was deleted and therefore did not make it into the Regulation. The question then arises whether it should have and whether, as a result, the conversion of the Convention into the Regulation missed an opportunity.

Those not in favour of an option to choose a non-state law argue that there is little demand by practitioners for a provision allowing a choice of non-state law. It would therefore be an issue of little importance.⁶⁸² This argument is not convincing. Even if it is true that this is an issue of limited practical importance,⁶⁸³ that does not render it unimportant from an academic point of view. Furthermore, just because a certain phenomenon is rare, does not mean that there must not be any legal provision for it. There is case law in which parties tried to rely on a choice of non-state law in litigation,⁶⁸⁴ which indicates that it cannot be said that the matter is irrelevant.

It has also been argued that non-state rules are seldom as consistent as state law and often lack provisions regarding burden of proof, formal validity, consequences of breach of contract and so on.⁶⁸⁵ A choice of such rules would therefore inevitably create uncertainty and ambiguity.⁶⁸⁶ This must be put into perspective. Firstly, it has been pointed out that it has already become a widespread practice in international trade to refer to international conventions and the customs of international trade (*lex mercatoria*)

⁶⁸¹ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, final. At p. 5.

⁶⁸² Garcimartí, Alférez, F., 2008. The Rome I Regulation: Much Ado about Nothing? *The European Legal Forum* [online], 2(I), 61, 67. Available via: <http://www.simons-law.com/library/pdf/e/884.pdf>.

⁶⁸³ Generally, see: McLachlan, C., 2004. International Litigation and the Reworking of the Conflict of Laws. *Law Quarterly Review* [online], 120, 580-616. Available via: Westlaw.

⁶⁸⁴ E.g. *Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ. 19; *Halpern v Halpern* [2007] EWCA Civ. 291.

⁶⁸⁵ Response of the United Kingdom to the Commission's Rome I Green Paper: http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/united_kingdom_en.pdf.

⁶⁸⁶ Magnus, U. and Mankowski, P., 2003. *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 Modernization*: http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/university_hamburg_en.pdf; Response by Professor Peter Stone to the Green Paper COM(2002) 654 final of 14th January 2003, http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/university_essex_en.pdf.

as these are generally much more focused on international transactions than national law systems.⁶⁸⁷ By providing parties with the opportunity to choose non-state law as the applicable law EU private international law would therefore be adapted to the needs of modern business.⁶⁸⁸

Furthermore, the choice of a non-state law as the law applicable to an international contractual relationship is already widely accepted in cases before arbitration.⁶⁸⁹ If arbitrators can apply non-state law, while they are very often not judges by profession, why would courts not be able to do so? Most states have courts specialised in commercial disputes, so that the judges faced with such a choice of non-state law will probably have sufficient specialist knowledge and experience to deal with those.⁶⁹⁰ Furthermore, although this depends on the forum, there may be rules in the domestic legal systems whereby the parties can render some assistance to the court in establishing what the chosen foreign law is. Under Belgian law, for example, the judge may require the cooperation of the parties if he cannot establish the content of the applicable law.⁶⁹¹ Under English law, expert witnesses will inform the judge of the content of foreign law, relevant authority and assistance in making findings.⁶⁹²

Finally, purely in terms of respecting and enhancing party autonomy, it must be regretted that the provision was deleted from the proposal. In relation to party autonomy, if anything, it can be argued that the proposal did not go far enough because parties could still not rely on a choice of *lex mercatoria* for example.

The amendment to Article 3 was deleted by the European Parliament because it was of the opinion that it was only appropriate to refer to the use of such bodies of non-state

⁶⁸⁷ Boele-Woelki, K., 1996. Principles and Private International Law. The UNIDROIT Principles of International Commercial Arbitration and the Principles of European Contract Law: How to Apply them to International Contracts. *Uniform Law Review*, 1, 652.

⁶⁸⁸ Boele-Woelki, K. And Lazić, V., 2007. *Where Do We Stand on the Rome I Regulation?* In Boele-Woelki, K. And Grosheide, W., eds., 2007. *The Future of European Contract Law*. Alphen aan de Rijn: Kluwer Law International. p. 28.

⁶⁸⁹ 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 (02) 654, final; Lando, O. and Nielsen, P.A., 2007. The Rome I Proposal. *Journal of Private International Law* [online], 3(1), 29, 31. Available via: HeinOnline.

⁶⁹⁰ Lando, O. and Nielsen, P.A., 2007. The Rome I Proposal. *Journal of Private International Law* [online], 3(1), 29, 33. Available via: HeinOnline.

⁶⁹¹ Art. 15(2) Code PIL.

⁶⁹² *MCC Proceeds Inc v Bishopsgate Investment plc* [1999], C.L.C. 417.

law as UNIDROIT in a recital rather than in the enacting terms.⁶⁹³ As a result recital 13 of the Regulation now provides:

“This Regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international convention.”

What, then, is the effect of this recital on party autonomy? It is seemingly still prohibited to choose non-state law because because rules incorporated by reference are contractual terms rather than a choice of law *stricto sensu* and so, unfortunately, the meaningfulness of such incorporation by reference is, from a private international law perspective, very limited. When parties incorporate non-state law *by reference* into their contract, this means that the chosen non-national rules receive the status of contract clauses. As a result the effect of the rules will be limited to assisting in the interpretation of the contract. Matters affecting the contract as a whole, on the other hand, are dealt with by the applicable national law. An example of this can be found in *Halpern v Halpern*,⁶⁹⁴ regarding Jewish law, where it can be argued that the parties’ choice of Jewish law was not respected since a national law applied to several issues.

Furthermore, because rules incorporated by reference are contractual terms rather than a choice of law they are subject to the mandatory domestic rules of the applicable national law. More importantly, even non-mandatory rules of the applicable national law may cause the non-application of non-state rules incorporated by reference, such as was the case in *Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd*,⁶⁹⁵ where it was held that a reference to the principles of Sharia’a was too vague. As a result, the court granted the claim for interest upon a loan, although the sources upon which Sharia’a is based, Qur’an and Sunnah, clearly do not allow for the charging of interest upon a loan. It is hard to see how the parties to the contract would have desired this outcome when they incorporated the reference to Sharia’a in their contract.

In brief, it must be said that the Regulation made a very small step in the right direction in terms of enhancing party autonomy since it now expressly mentions in its preamble that the parties to a contract have more legal systems to choose from if they incorporate

⁶⁹³ Amendment 14 of the Commission’s Proposal:
<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0450&language=EN&mode=XML>.

⁶⁹⁴ *Halpern v Halpern* [2007] EWCA Civ. 291.

⁶⁹⁵ *Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ. 19.

the rules in their contract. There is, on the other hand, no real reason to think they did not have this possibility before the insertion of recital 13. The enhancement of party autonomy, if any, is therefore of a symbolic rather than a real practical nature. It must be regretted, therefore, that the possibility to choose non-state law is not provided for in the actual legal instrument but only in its preamble. That means it is not part of the binding legal instrument but a tool for its interpretation and application. Furthermore the Regulation itself will still determine the applicable law.

It is also regrettable that the Commission, in regards to the proposal, said that a choice for the application of *lex mercatoria* was invalid because these rules are either not precise enough or insufficiently recognised by the international community.⁶⁹⁶ That could indicate we are still a long way from true recognition of absolute party autonomy in regards to which law may be chosen by the parties as the applicable law.

In that sense the transformation of the Convention into the Regulation is a missed opportunity, although it must be acknowledged that there is of course clearly no consensus yet on whether an option to choose a non-state law as the applicable law is desirable. It is submitted that it is for reasons of fully respecting party autonomy as well as reflecting commercial reality and present day global business. Parties should have an all-inclusive range of legal systems to choose from so that a choice of a non-national system would not lead to the application of the rules determining the applicable law in the absence of a choice by the parties. The latter result is not what they intended under such circumstance and therefore clearly undermines party autonomy.

One final note must be made however, in regards to the potential problem, already flagged up in this section, that a particular non-state legal system may not contain provisions on certain matters such as burden of proof, consequences of a breach etc. The solution opted for in the proposal was a sensible one to resolve such problems. The Regulation could provide that, where the law chosen by the parties does not address certain questions, these should be answered applying the law which would have been applicable in the absence of choice under the Regulation.

⁶⁹⁶ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (05) 650, final.

4. Conclusion

In conclusion, it must be said that the *lis pendens* rule in the original Brussels I Regulation was very unsatisfactory in terms of respecting jurisdiction agreements and therefore party autonomy. Despite a clear and exclusive jurisdiction agreement, parties could seize a court in bad faith, rendering the chosen court powerless and left with the only option of staying its proceedings. The new rule in the Brussels I recast is a big improvement in regards to party autonomy as it reverses the priority in the old rule. As such, the chosen court will be the court to rule on its jurisdiction first, while the other court seized must stay its proceedings. This means great importance is attached to the jurisdiction agreement, which must be applauded. The potential difficulties in relation to the new rule, as identified in the previous two chapters, do not apply in the context of party autonomy.

Secondly it has been researched what the concept of an implied choice of law is and how the recognition of this concept related to party autonomy. It is submitted that it is important to recognise such a choice but some problems regarding its application emerged. It appeared that the relevant rule had not been applied uniformly throughout the EU under the Rome Convention – you are using past tense so suggests no longer a problem. Under the Rome Convention this could, at least in part, be explained by the differences in terminology depending on the language version used. The fact that the Regulation disposed of these differences was therefore positive. My research investigated however, whether more fundamental reasons could be identified for this lack of uniform interpretation and application. It became clear that it is as of yet uncertain in how far a choice of court is relevant to determine the existence of an implied choice of law. The only guidance available consists of national precedent as the conversion of the Rome Convention into the Rome I Regulation did not manage to appropriately address the problem. It is expected that interpretations will therefore continue to vary depending on the forum, which could be problematic in terms of party autonomy as the parties may wrongly assume that an express choice is not needed because their choice will be clear from the circumstances of the case or the terms of their contract.

Finally, it has been investigated how far parties are allowed, under the Rome I Regulation, to make a choice of a non-state law. This was clearly not an option under the Rome Convention and it was proposed in the context of its conversion into the Regulation that such a choice, albeit not for any non-state legal system, should be allowed. Because of a lack of consensus on the issue, the proposal did not survive, which is regrettable in terms of party autonomy. A true respect for, and enhancement of, party autonomy means that parties should be allowed to choose whichever legal system they want to choose.

Chapter 8. Protection of Weaker Parties

1. Introduction

The previous chapter emphasised that party autonomy is viewed as one of the cornerstones of EU private international law. As a result, both the Brussels I and the

Rome Regulation contain by way of key provision that the parties to a contract have the freedom to choose which court will have jurisdiction and which law will apply to their contractual relationship respectively. It was then researched whether these legal instruments fully respect and enhance party autonomy in relation to several of their provisions. It was concluded that party autonomy is generally encouraged and respected but that some improvements could still be made.

It must be highlighted here, that the pursuit of other policy objectives may lead to a limitation of the parties' freedom to choose. The most obvious objective which may produce such a result is the protection of weaker parties, which is the subject of this chapter.

This objective is pursued by both the Brussels I Regulation and the Rome I Regulation. The preamble of the Rome I Regulation states: "*As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.*" The preamble of the Brussels I Regulation provides: "*In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provided for.*" The question may be asked why parties such as consumers and employees need to be protected, or, why rules more favourable to their interests are needed.

Certain types of contracts are characterised by an inherent imbalance between the bargaining strength of the parties to it.⁶⁹⁷ Consumer contracts, individual employment contracts and insurance contracts are such agreements because the consumer, the employee and the policy holder or beneficiary are typically in a socio-economically weaker position than the professional trader, the employer or the insurer respectively.⁶⁹⁸ Generally they have less financial resources and less experience in legal matters than their contracting partners.⁶⁹⁹

⁶⁹⁷ E.g. Calliess, G., 2011. *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*. Alphen aan den Rijn: Kluwer Law International. p. 125; Oren, J., 2003. International Jurisdiction over Consumer Contracts in E-Europe. *International and Comparative Law Quarterly* [online], 52(3), 669. Available via: Westlaw.

⁶⁹⁸ E.g. Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 123; Tang, Z.S., 2005. Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce. *Journal of Private International Law* [online], 1(2), 237-268. Available via: HeinOnline.

⁶⁹⁹ Case C-464/01, *Gruber v Bay Wa AG* [2005], E.C.R. I-439. Para. 34.

In order to reduce the imbalance between the parties in the aforementioned contracts, several legal systems, such as for example the Belgian legal system,⁷⁰⁰ contain rules, deviating from the general private international law rules, in order to protect the interests of weaker parties. These rules typically have two aspects. First, they seek to determine jurisdiction and applicable law in a fashion favourable to the weaker party. Second, they limit the enforceability of choice of jurisdiction clauses and choice of law clauses because of the risk that they have been forced on the weaker party.

Different legal systems try to achieve protection of the weaker party in different ways.⁷⁰¹ For example, the English common law system follows a discretion-based approach. Thus although English private international law does not contain rules specifically targeting consumer or individual employment contracts, the court has the discretion not to apply a choice of court clause or a choice of law clause under certain circumstances.⁷⁰² Civil law systems traditionally and typically employ a rule-based approach. As such, Belgian law contains specific detailed rules regarding consumer contracts and individual employment contracts. More specifically Belgian law provides additional grounds of jurisdiction regarding consumer and employment contracts for consumers habitually resident in Belgium and for employees habitually carrying out their duties in Belgium.⁷⁰³ The applicable law for consumer and employment contracts is determined in accordance with the Rome Convention.⁷⁰⁴

Similarly EU private international law contains detailed provisions regarding jurisdiction and applicable law for these types of contracts and thus follows a rule-based approach. Following the research conducted in the previous chapters, it is submitted that, at EU level, a rule-based approach must be preferred. Particularly in relation to legal certainty and predictability, and the evaluation in chapter 5, it is submitted that discretion for the courts could severely undermine that policy objective. As a result, a rule-based approach is the more desirable option.

⁷⁰⁰ See chapter 4.

⁷⁰¹ Tang, Z., 2005. Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce. *Journal of Private International Law* [online], 1(2), pp. 237-268. Available via: HeinOnline. The author discusses this in-depth re. electronic consumer contracts.

⁷⁰² E.g. *The Hollandia* [1983] 1 A.C. 565.

⁷⁰³ Art. 97 juncto Art 96 Code PIL; see chapter 4.

⁷⁰⁴ Art. 98 Code PIL; see chapter 4.

This chapter will discuss the rules first, and then critically evaluate whether they achieve the protection of the weaker parties they aim for. The chapter focuses on consumer contracts as exemplary of contracts in which one of the parties is a weaker party. The reason for this focus is twofold. First, some of the provisions regarding jurisdiction and applicable law for consumer contracts have undergone changes over the years. These changes will inform the evaluation as to whether the rules achieve their underlying objectives. Second, it is contended that the EU has been at the forefront when it comes to the implementation of consumer protection policies⁷⁰⁵ and has even been called a true pioneer in this area.⁷⁰⁶

The question this chapter seeks to answer is whether the rules achieve effective weaker party protection and, if so, whether this is to the detriment of other policy objectives.

As a preliminary point, one argument in regards to consumer protection rules in private international law must be addressed. It has been said that these rules are of little practical importance because litigation is not an appropriate method to address international consumer claims⁷⁰⁷ as the claims will often be of little monetary value so that the cost of litigation, even in the consumer's home country, exceeds the value of the claim.⁷⁰⁸ Although this may be true, it must be highlighted that this argument takes nothing away from the fact that some consumer claims are different in nature so that a protective regime in fact does have practical relevance. Furthermore the argument does not render insignificant the academic relevance of the rules and what they are trying to achieve.

2. Consumer contracts

2.1 Introduction

⁷⁰⁵ Gillies, L., 2007. Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation. *Journal of Private International Law* [online], 3(1), 94. Available via: HeinOnline.

⁷⁰⁶ Tang, Z.S., 2010. Review Article Private International Law in Consumer Contracts: A European Perspective. *Journal of Private International Law* [online], 6(1), 225. Available via: EBSCOHost.

⁷⁰⁷ Hill, J., 2008. *Cross-Border Consumer Contracts*. Oxford: Oxford University Press. p. 9-10 and p 132.

⁷⁰⁸ Tang, Z.S., 2010. Review Article Private International Law in Consumer Contracts: A European Perspective. *Journal of Private International Law* [online], 6(1), 235. Available via: EBSCOHost.

The European Union has been concerned with the issue of consumer protection for a long time even though the Treaty of Rome 1957⁷⁰⁹ did not contain a specific legal basis for such protection. The introduction of a formal basis happened in the Single European Act⁷¹⁰ which supplemented the Treaty of Rome by article 100a (3),⁷¹¹ stating that "the Commission, in its proposals [...] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection."

The Treaty of Maastricht 1992⁷¹² inserted a specific article into the EC Treaty under its "Title XI Consumer Protection". Article 129a stated that "The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to article 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."

The Treaty of Amsterdam 1997,⁷¹³ which also rennumbers the EU and EC Treaties, alters this provision (now Art. 153 EC).⁷¹⁴ The main change consists of the addition of a paragraph stating that "consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."⁷¹⁵

Furthermore, through the Treaty of Lisbon 2007,⁷¹⁶ the Charter on Fundamental Rights of the European Union⁷¹⁷ became legally binding: Article 1(2) TFEU states that "this Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded"⁷¹⁸ and Article 6 TEU in turn states that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European

⁷⁰⁹ Treaty of Rome Establishing the European Economic Community (EEC), *OJ* 25 .03.1957 (not published).

⁷¹⁰ Single European Act, *OJ* L169, 29.06.1987.

⁷¹¹ Now art. 114(3) TFEU.

⁷¹² Treaty on European Union (EU), *OJ* C191, 29.07.1992.

⁷¹³ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, *OJ* C340, 10.11.1997.

⁷¹⁴ Now art. 12 and 169 TFEU.

⁷¹⁵ Art. 153 (2); now art. 12 TFEU.

⁷¹⁶ *OJ* C306, 17.12.2007.

⁷¹⁷ *OJ* C83, 389, 30.03.2010.

⁷¹⁸ Art. 1(2) TFEU.

Union, [...] which shall have the same legal value as the Treaties”.⁷¹⁹ Article 36 of the Charter states that “Union policies shall ensure a high level of consumer protection”.

The original Brussels Convention 1968,⁷²⁰ which laid down EU-wide rules for jurisdiction in cross-border disputes, did not originally contain specific rules regarding jurisdiction over consumer contracts. It did specifically protect buyers in instalment sales and borrowers in loan contracts as the weaker parties in those two types of contracts,⁷²¹ but it did not mention consumers. However, the Court of Justice decided that these provisions did not apply to commercial contracts, which suggests that it interpreted these rules as protecting weaker parties.⁷²²

It is therefore not surprising that the 1978 Accession Convention, which enabled those Member States which joined the then EC after 1968 to accede to the Brussels Convention, inserted a section on jurisdiction over consumer contracts in the Brussels Convention.⁷²³ This insertion was undoubtedly influenced not just by the CJEU’s case law but also by the drafting of the Rome Convention 1980,⁷²⁴ which laid down EU-wide rules for the applicable law in cross-border disputes involving contracts and which contained an article on the law applicable to certain consumer contracts. This Convention had been prepared since 1969, a preparation in which the Member States who joined the EC in 1973 were involved.⁷²⁵

The Brussels I and Rome I Regulations, successors of these Conventions, both contain specific rules on consumer contracts as well. The conversion of the Brussels Convention into a Regulation took place in 2001, while the Rome Convention was converted into the Rome I Regulation in 2008.⁷²⁶ It must be noted that one of the aims pursued by the conversion of the Rome Convention was to bring the provisions on

⁷¹⁹ Art. 6 TEU.

⁷²⁰ 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *OJ* L299, 31.12.1972, 32.

⁷²¹ Art. 13-15 1968 Brussels Convention (original).

⁷²² Case 150/77, *Société Bertrand v Paul Ott KG* [1978] E.C.R. 1431.

⁷²³ Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice (78/884/EEC), *OJ* L304, 30.10.1978, 1.

⁷²⁴ Collins, L. et al. eds. 2006. *Dicey, Morris and Collins on the Conflict of Laws*. 14th ed. London: Sweet & Maxwell. p. 440.

⁷²⁵ For an in-depth discussion of this process see: Guiliiano, M. and Lagarde, P., 1980. Report on the Convention on the Law Applicable to Contractual Obligations, *OJ* C282, 31.10.1980, p. 1.

⁷²⁶ See chapter 1.

consumer contracts back in line with those in the Brussels regime that had been revised seven years prior.⁷²⁷ Because of this aim for synchronism between the two regimes,⁷²⁸ the case law available on the consumer contract provisions in the Brussels regime is also relevant to the Rome regime. First it will be examined what a consumer contract is according to the Regulations.

2.2 Definition of a consumer contract

In Brussels I a consumer contract is defined as a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, the consumer, with a person who pursues commercial or professional activities, the professional.⁷²⁹ Rome I defines a consumer contract as a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).⁷³⁰

First it must be noted that Brussels I defines the consumer as a person, while Rome I defines him as a *natural* person. This difference exists not only in the English language version of the Regulations but also in a number of other language versions.⁷³¹ It must therefore be assumed that this is no erroneous omission of the word *natural* in the English version of Brussels I, especially since the Brussels I Regulation recast⁷³² does not contain the word either. The question then arises whether both Regulations seek to protect the same category of contract parties.

The text of Rome I makes it clear that only a *natural person* can be a consumer. Since Brussels I only mentions the word *person* however, technically, a consumer could be

⁷²⁷ Calliess, G., 2011. *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*. Alphen aan den Rijn: Kluwer Law International. p. 131.

⁷²⁸ See also: (7) Preamble Rome I; Guiliiano, M. and Lagarde, P., 1980. Report on the Convention on the Law Applicable to Contractual Obligations, *OJ C282*, 31.10.1980, 23.

⁷²⁹ Art. 15 (1) *juncto* Art. 15 (1) (c) Brussels I. As mentioned the definition remained unchanged in the Brussels I recast.

⁷³⁰ Art. 6 (1) Rome I.

⁷³¹ i.e. the Dutch, French and German versions.

⁷³² Art. 17 Brussels I recast.

both a natural person and an artificial (or legal) person.⁷³³ It is difficult to see how an artificial person could ever be classed as a consumer because it would be nearly impossible, if not illegal, for an artificial person to contract for a purpose outside its trade or profession.⁷³⁴ Furthermore Rome I expressly refers to consistency with Brussels I.⁷³⁵ It must therefore be assumed that the definition of a consumer and of a consumer contract are intended to be identical in both instruments, which seems to be the approach taken by the courts. In *Shearson Lehmann Hutton*⁷³⁶ the ECJ held that the provisions in Brussels I regarding jurisdiction over consumer contracts refer only to final consumers acting in a private capacity i.e. the end users of a product or service.

In *Benincasa v Dentalkit Srl*⁷³⁷ the ECJ specified that a consumer is an individual. While it seems to be clear from case law that a consumer is by necessity a natural person in Brussels I, as in Rome I, it would have been consistent and more accurate to express this in the relevant provision of Brussels I. As mentioned, however, the Brussels I recast did not address this inconsistency and thus still refers to “*a contract concluded by a person*” rather than “*a contract concluded by a natural person*”.

Second, the definition of a consumer contract as a contract concluded for a purpose outside the consumer’s trade or profession needs some further clarification before the extent to which weaker party protection is achieved can be discussed.

Before the term “consumer contract” was even expressly used in the Brussels Convention,⁷³⁸ the CJEU had already interpreted the special rules on instalment sales and loans as applying only to consumer contracts. The Court held:

“A restrictive interpretation of the second paragraph of Article 14 , in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage described above to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that

⁷³³ See the definition of *person* in e.g.: Garner, B.A. ,ed., 1999. *Black’s Law Dictionary*. 7th ed. St. Paul: West Group; Woodley, M.G., ed. 2009. *Osborn’s Concise Law Dictionary*. 11th ed. London: Sweet & Maxwell.

⁷³⁴ See the discussion of this criterion *infra* in this chapter.

⁷³⁵ (7) and, for consumer contracts specifically, (24) preamble Rome I.

⁷³⁶ Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993], E.C.R. I-139. Para. 22.

⁷³⁷ Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997], E.C.R. I-3767.

⁷³⁸ See section 2.1 of this chapter.

they are private final consumers and are not engaged, when buying the product acquired on instalment credit terms, in trade or professional activities.”⁷³⁹

Thus borrowers or buyers who were not private final consumers gained no additional protection under the Brussels Convention.

As mentioned in section 2.1, the changes made to the Brussels Convention by the 1978 Accession Convention incorporated the notion of consumer contracts and later case law clarified the definition of a consumer contract further.

In *Shearson Lehmann Hutton v TVB*⁷⁴⁰ a private individual, a judge by profession and domiciled in Germany, contracted with an American company through their German subsidiary, following an advertisement in the German press. He later wanted to sue them and assigned his right to claim to a German fiduciary company, TVB. TVB brought an action against the American company in the German courts. The question then arose whether TVB, the assignee of the claim, could also be classed as a consumer, as the assignor would have been.

The CJEU responded in the negative. It was held that:

*“the special arrangements laid down in Article 13 et seq. of the Convention are prompted by a concern to protect the consumer as the party to the contract who is deemed to be economically weaker and legally less experienced than the other party and that, therefore, he should not be discouraged from taking legal proceedings by being obliged to bring an action before the courts of the State where the other party is domiciled.”*⁷⁴¹ *The protective function of these provisions means that the application of the special jurisdictional rules laid down for this purpose by the Convention should not be extended to persons for whom such protection is not justified.*⁷⁴² *It is clear from the wording and the function of [article 13 and 14 of the Brussels Convention] that they refer only to final consumers acting in a private capacity and not in the course of their trade or profession, who are bound by one of the contracts listed in Article 13 and who*

⁷³⁹ Case 150/77, *Société Bertrand v Paul Ott KG* [1978] E.C.R. 1431, at 21.

⁷⁴⁰ Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993], E.C.R. I-139.

⁷⁴¹ *Shearson Lehmann Hutton v TVB*, at 18.

⁷⁴² *Shearson Lehmann Hutton v TVB*, at 19.

are a party to proceedings in conformity with Article 14.⁷⁴³ The Convention protects the consumer only if he personally is the plaintiff or defendant in proceedings.”⁷⁴⁴

This conclusion seems logical. As was discussed in the introduction to this chapter, the protective rules in EU private international law instruments are intended to protect parties who are regarded to be in a socio-economically weaker position because they have less financial means and less legal experience or expertise. The fiduciary company in *Shearson Lehmann Hutton* is not such a party. It is therefore difficult to see how granting them the benefit of the Brussels I protective regime for consumers would add to the protection of weaker parties.

In *Benincasa*⁷⁴⁵ an Italian company, Dentalkit, licenced Benincasa to set up and run a Dentalkit franchise in Germany. Benincasa set up his shop, paid the initial fee and bought some goods from Dentalkit, but then ceased trading. Benincasa started proceedings in Germany, claiming, first, that the choice of court agreement favouring the Italian courts was void because the whole franchising agreement was void. Second, he argued that he was a consumer as he never started trading. He should therefore be allowed to sue in Germany, where he was domiciled.⁷⁴⁶

The question relevant to this section therefore was whether a person who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer.

The ECJ, referring to *Shearson Lehmann Hutton*, stated:

“Article 13 [Brussels Convention] [...] affects only a private final consumer, not engaged in trade or professional activities. In order to determine whether a person has the capacity of a consumer, [...] reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in

⁷⁴³ *Shearson Lehmann Hutton v TVB*, at 22.

⁷⁴⁴ *Shearson Lehmann Hutton v TVB*, at 23.

⁷⁴⁵ Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997], E.C.R. I-3767.

⁷⁴⁶ Based on Art. 14 of the Brussels Convention.

*terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.”*⁷⁴⁷

This decision seems consistent with the approach opted for in the Convention (and the current Regulation), which is that the defendant must be sued in the courts of the Member State where he is domiciled.⁷⁴⁸ As such, the provisions on consumer contracts provide an exception to that general rule. It seems logical that this exception must only be allowed in those cases specifically protecting consumers as the weaker party to the contract. A person contracting for the purpose of a trade or commercial activity is not a consumer and this is what Benincasa was doing. Although his commercial activity had not started yet, he was contracting for the purpose of that activity.

The issue of so called “mixed” contracts, i.e. contracts which relate to activities which are partly business and partly private, arose in *Gruber v Bay Wa AG*⁷⁴⁹. A farmer in Austria bought tiles from a supplier established in Germany to reroof his farmhouse which was used partly as a private dwelling and partly for the housing of livestock and fodder. Claiming that the tiles were defective, the farmer commenced proceedings in Austria, relying on the Brussels Convention rules on jurisdiction over consumer contracts. The question therefore was whether a person who concluded a contract relating to goods intended for purposes which were in part within and in part outside his trade or profession, could rely on these provisions. It was held that the answer to this question was in the negative unless the professional usage was negligible.⁷⁵⁰

Had the CJEU decided in the positive, that would mean many commercial contracts could be made into “consumer” contracts simply by ensuring that a small part of the goods or services contracted for was to be used for private purposes. That way parties

⁷⁴⁷ *Benincasa*, at 15-17.

⁷⁴⁸ Art. 2 Brussels Convention; now Art. 2 Brussels I Regulation; Art. 4 Brussels I recast.

⁷⁴⁹ Case C-464/01, *Gruber v Bay Wa AG* [2005], E.C.R. I-439.

⁷⁵⁰ *Gruber v Bay Wa*, at 41.

who are not really weaker parties could enjoy the same protection, which would not be in line with the EU's objective.

The CJEU, in *Gruber v Bay Wa AG*, also found that the burden of establishing that the business use is only negligible lies on the person wishing to rely on the special jurisdiction rules, and his opponent may produce evidence to the contrary.⁷⁵¹ Furthermore it was held that:

*“the court seized must also determine whether the other party to the contract could reasonably have been unaware of the private purpose of the supply because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes. That would be the case, for example, where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax. In such a case, the special rules of jurisdiction for matters relating to consumer contracts enshrined in articles 13–15 are not applicable even if the contract does not as such serve a non-negligible business purpose, and the individual must be regarded, in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions.”*⁷⁵²

In the sections of the judgment cited here, the CJEU refers to the legitimate expectations of the other party to the contract. The Guiliano-Lagarde report also mentions this issue and refers to the situation where a person acts primarily outside his trade or profession but where the other party did not know this and, taking all the circumstances into account, should not reasonably have known this. Under such circumstances the good faith of the other party is protected so that the alleged consumer cannot rely on the protection afforded to consumers in the relevant provisions.⁷⁵³

It is clear from the law discussed that the concepts of “consumer” and “consumer contract” must be strictly construed because they enshrine an exception to the general rules.⁷⁵⁴ As such, apart from the cases expressly provided for, the attribution of

⁷⁵¹ *Gruber v Bay Wa*, at 46.

⁷⁵² *Gruber v Bay Wa*, at 51-53.

⁷⁵³ Guiliano, M. and Lagarde, P., 1980. Report on the Convention on the Law Applicable to Contractual Obligations, *OJ C282*, 31.10.1980, 1.

⁷⁵⁴ See *infra*.

jurisdiction to the courts of the claimant's domicile should not be favoured.⁷⁵⁵ Similarly it must be argued that the favourable applicable law regime should only be applied in the cases expressly provided for.

It could be argued that, because of the wording of the relevant instruments themselves, and *a fortiori* because of the strict interpretation of these, some parties are not protected even though they should be, based on the underlying policy objective,⁷⁵⁶ because of their weaker negotiating and economical position as compared to the professional trader.⁷⁵⁷ For example a hairdresser buying six chairs to put in his salon, compared with a couple buying six chairs to put around their dining room table, are arguable in a similarly weak position. The couple will be classed as consumers and therefore enjoy the protection of the relevant private international law provisions. The hairdresser, buying the chairs for a professional purpose, will not be classed as a consumer and can therefore not rely on the same provisions. It could be said that the only difference between them is that the hairdresser buys the chairs for his customers' use and the couple for their personal use. According to the case law discussed this difference between them is enough to render the protective provisions inapplicable to the contract concluded by the hairdresser.⁷⁵⁸ It could be argued, however, that the hairdresser is the weaker party in his contract with the company selling the chairs and therefore equally deserving of the protection provided for the couple.

As such it must be assessed whether the definition of a consumer contract should be revised for the purposes of protecting weaker parties.⁷⁵⁹ Recalling the definition of a consumer contract – a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession with a person who pursues commercial

⁷⁵⁵ Case C-220/88, *Dumez France v Hessische Landesbank (Helaba)* [1990], E.C.R. I-49, at 16 and 19; *Shearson Lehman Hutton*, at 17; *Benincasa*, at 14; Case C-168/02, *Kronhofer v Maier* [2004], E.C.R. I-6009, at 20.

⁷⁵⁶ Tang, Z.S., 2009. *Electronic Consumer Contracts in the Conflict of Laws*. Oxford: Hart Publishing. p. 32.

⁷⁵⁷ Tang, Z.S., 2010. Review Article Private International Law in Consumer Contracts: A European Perspective. *Journal of Private International Law* [online], 6(1), 236. Available via: EBSCOHost.

⁷⁵⁸ E.g. Case 150/77, *Société Bertrand v Paul Ott KG* [1978] E.C.R. 1431, at 21.

⁷⁵⁹ See also: Wild, C., Weinstein, S. and Riefa, C., 2005. Council Regulation (EC) 44/2001 and Internet Consumer Contracts: Some Thoughts on Article 15 and the Futility of Applying 'In the Box' Conflict of Law Rules to the 'Out of the Box' Borderless World. *International Review of Law Computers & Technology*, 19(1), 14. Available via: EBSCOHost.

of professional activities⁷⁶⁰ - a deletion of the words “or profession” or “professional” in the relevant provisions could be suggested.

However, this argument and suggestion are open to criticism. Firstly, a professional will often seek advice from people with expertise in legal and business matters, such as a lawyer or an accountant, placing them in a more powerful position compared to a consumer who contracts for, for example, the purchase of goods for private use.

Secondly, protective law may encourage them to rely on the law rather than due diligence by seeking legal advice, when in fact it is not a substitute for such advice, especially when starting up a business, being inexperienced, or when things go wrong and litigation is imminent. However, as they will often make similar or identical contracts in the future, they will automatically gain personal experience and expertise, which puts them, at least after some time, in a more equal position to their counterparty than the consumer.

Thirdly, professionals purchasing goods or services for their business often have advantages consumers do not have such as the ability to negotiate discounts because of large or repeat purchases and the ability to recover value added tax for professional purchases.

Fourthly, in many cases the monetary value of professional purchases will often be higher than that of consumer purchases, lowering the threshold to litigate in a state other than their own because more is at stake so it pays to pursue a claim.

Finally, in view of uniformity, clarity and legal certainty, an EU wide definition of the concepts of “consumer” and “consumer contract” is preferable. In this respect reference should be made to the Draft Common Frame of Reference. Although an in-depth discussion of this subject falls outside the scope of this research, it must be mentioned that this Draft Common Frame of Reference forms part of the process on the way to the so called Common Frame of Reference. The Draft, which was made by academics and informed by decades of legal research,⁷⁶¹ will form the basis of and inform the Common

⁷⁶⁰ Art. 15 Brussels I; Art. 6 Rome I.

⁷⁶¹ Von Bar, C. Et al., eds., 2009. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Available via: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 6, para. 2.

Frame of Reference,⁷⁶² first called for by the Commission's Action Plan on a More Coherent European Contract Law.⁷⁶³ According to this Action Plan a common frame of reference will establish common principles and terminology in the area of European contract law. It will be a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law. It should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world's most dynamic economy.⁷⁶⁴

Because the Draft Frame of Reference will serve as a basis for common principles and terminology in the area of European contract law, the definition it proposes of a consumer is highly relevant. The Draft defines a consumer as "any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession".⁷⁶⁵ This definition is modelled on common features found in EU directives in the field of consumer protection law, EU procedural law and EU private international law.⁷⁶⁶

Although there is an argument for saying that small businesses are also in need of the kind of protection afforded to consumers,⁷⁶⁷ it would be logical, in order to maintain clarity and legal certainty, to maintain the definition enshrined across all areas of EU law.⁷⁶⁸

⁷⁶² Von Bar, C. Et al., eds., 2009. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Available via: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 6, para. 1.

⁷⁶³ Communication from the Commission to the European Parliament and the Council. A More Coherent European Contract Law. An Action Plan, COM (2003) 68 final, *OJ* C63, 15.03.2003, 1.

⁷⁶⁴ Communication from the Commission to the European Parliament and the Council. A More Coherent European Contract Law. An Action Plan, COM (2003) 68 final, *OJ* C63, 15.03.2003, 1. At para 4.1.1.

⁷⁶⁵ Von Bar, C. Et al., eds., 2009. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Available via: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 178.

⁷⁶⁶ Von Bar, C. Et al., eds., 2009. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Available via: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 139.

⁷⁶⁷ Von Bar, C. Et al., eds., 2009. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Available via: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 70.

⁷⁶⁸ See also: Gillies, L., 2007. Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation. *Journal of Private International Law* [online], 3(1), 103. Available via: HeinOnline.

2.3 The Protection Afforded to Consumers

2.3.1 Introduction

It has been assessed which persons are consumers and, by extension, which contracts can generally be regarded as consumer contracts, that is, without looking into the exceptions and exclusions. It must next be evaluated whether consumers are adequately protected, as the weaker parties to the contract, by the rules in both the Brussels I Regulation and the Rome I Regulation. It must be assessed, in particular, whether the relevant provisions facilitate consumers' access to justice by removing some of the obstacles they may face, being the weaker parties to the contract.⁷⁶⁹ The relevant provisions will be provided first for reasons of clarity. After that a critical discussion and assessment, structured around the themes key to this thesis, will be conducted.

Article 16 Brussels I states:

“1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.”

Article 17 Brussels I provides:

“The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

⁷⁶⁹ Cachia, P., 2009. Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations. *European Law Review* [online], 34(3), 477. Available via: Westlaw; Case Comment. Jurisdiction Rules for Consumer Do Not Require Distance Contract. *EU Focus* 2012[online], 300, 6. Available via: Westlaw.

2. *which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*

3. *which is entered into by the consumer and the other party to the contract, both of whom are at the time of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.”*

Article 6 Rome I provides:

“1. [...] a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.”

2.3.2 Jurisdiction in the Absence of Choice

The protective rules for consumers in the Brussels I Regulation depart from the general rule, which is that persons shall be sued in the courts of the country in which they are

domiciled.⁷⁷⁰ Consumers may, of course, sue their counterparty in the Member state in which that party is domiciled,⁷⁷¹ which is in line with the general rule. In addition to that however, consumers may sue the other party in the courts of the country where they themselves are domiciled.⁷⁷² This is a clear departure of the general rule. Furthermore the consumer can only be sued in the courts of the Member State in which he is domiciled.⁷⁷³ This is a departure from the general regime as well because, although the general rule is that a person shall be sued in the courts of the Member State where he is domiciled, the Brussels I Regulation provides alternative grounds of jurisdiction as well.⁷⁷⁴ As a result there are several fora available for claims regarding other contracts, while a consumer can only be sued in where he is domiciled. This leads some to say that consumers are over-protected.⁷⁷⁵

The most significant protection for the consumer here lies in the fact that they can sue the other party in their “own” courts i.e. the courts of the place where he is domiciled. This possibility is a radical departure of the overall Brussels regime and has been criticised even more because it lead to the fear that companies conducting business online could be sued anywhere in Europe, deterring them from pursuing online trade.⁷⁷⁶ These arguments must be assessed in view of the scope of application of the relevant provisions.

Article 15 Brussels I provides that the jurisdiction rules for consumer contracts apply if:

- “1. [...] (a) it is a contract for the sale of goods on instalment credit terms; or*
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the*

⁷⁷⁰ Art. 2 Brussels I.

⁷⁷¹ Art. 16(1) Brussels I.

⁷⁷² Art. 16(1) Brussels I.

⁷⁷³ Art. 16(2) Brussels I.

⁷⁷⁴ Art. 5 Brussels I. The first paragraph provides special jurisdiction grounds in relation to contracts.

⁷⁷⁵ Hess, B., 2012. The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission’s Proposed Recast. *Common Market Law Review*, 49(3), 1092.

⁷⁷⁶ E.g. Oren, J., 2003. International Jurisdiction over Consumer Contracts in E-Europe. *International and Comparative Law Quarterly* [online], 52(3), 665. Available via: Westlaw.

consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.”

These rules entail that the protective rules do not apply because of the mere fact that the person concerned is a consumer. If these requirements are not met, recourse must be had to the general jurisdiction rules in the Regulation.⁷⁷⁷

Paragraph (a) and (b) have not been changed compared to the relevant paragraphs in the predecessor of the Brussels I Regulation and, as such, are contained in the Brussels I recast in the same wording. Paragraph (c) however, was a novelty introduced in the Brussels I Regulation. The discussion will therefore centre around this provision, also because it remained unchanged in the Brussels I recast so that the present discussion is highly relevant for the future.

First, it must be mentioned that the protective rules for consumer contracts under the Brussels Convention applied, as mentioned, for contracts as specified in subparagraphs (a) and (b). The third subparagraph however, provided that the protective rules also applied for contracts for the supply of goods or services if the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising in the State of his domicile and provided that the consumer took in that State the steps necessary for the conclusion of the contract.⁷⁷⁸ This provision was widely interpreted by the CJEU so that the concepts of “a specific invitation addressed to the consumer” and “advertising” covered a very wide range of activities. In *Gabriel*⁷⁷⁹ the CJEU held that these concepts covered “*all forms of advertising carried out in the consumer's state of domicile, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that state, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.*”

This interpretation, albeit very wide, comes across as slightly old-fashioned. It can absolutely be argued that contracts concluded through the internet were covered by this

⁷⁷⁷ See also: Cachia, P., 2009. Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations. *European Law Review* [online], 34(3), 479.

⁷⁷⁸ Art, 13(3) Brussels Convention.

⁷⁷⁹ Case C-96/00, *Rudolf Gabriel* [2002], ECR I-036367.

provision. The Brussels I Regulation is worded in different terms, aiming to clarify that contracts concluded through the internet are covered by Article 15 (1) (c).⁷⁸⁰ As touched upon briefly above in this section, this provision lead to quite a bit of anxiety among commercial enterprises trading via the internet, who now feared an enormous increase in costs rising from litigation in any Member State.⁷⁸¹ It must therefore be investigated whether this anxiety is justified.

The joined cases of *Peter Pammer v Reederei Karl Schlüter GmbH & Co. And Hotel Alpenhof GesmbH v Oliver Heller*⁷⁸² suggest it is not. The CJEU explained that the change, as compared to the Brussels Convention, was made because of the development of internet communication.⁷⁸³ The court further said that the words ‘directs such activities’ refers to the intention implicit in certain methods of advertising.⁷⁸⁴ Those words must not be interpreted as relating to a website merely being accessible in Member States other than that in which the trader concerned is established.⁷⁸⁵ Referring to the Rome I Regulation’s preamble,⁷⁸⁶ the court added that, in order for Article 15 (1) (c) to be applicable, the trader must have manifested his intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer’s domicile.⁷⁸⁷ Clear expressions of such an intention include mention that he is offering his services or his goods in one or more Member States designated by name. The same is true of the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader’s site by consumers domiciled in various Member States.⁷⁸⁸

⁷⁸⁰ E.g. Tang, Z.S., 2010. Review Article Private International Law in Consumer Contracts: A European Perspective. *Journal of Private International Law* [online], 6(1), 226. Available via: EBSCOHost; Tellini, D.E., 2005. Applicable Law and Electronic Consumer Contracts: A European Perspective. *International Company and Commercial Law Review* [online], 16(1), 4. Available via: Westlaw.

Vasiljeva, K., 2004. 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online. *European Law Journal* [online], 10(1), 130. Available via: EBSCOHost; Stone, P., 2010. *EU Private International Law*. 2nd ed. Cheltenham: Elgar European Law. p. 136.

⁷⁸¹ McClean, D. and Ruiz Abou-Nigm, V., 2012. *Morris. The Conflict of Laws*. 8th ed. London: Sweet&Maxwell. p. 89.

⁷⁸² Joined Cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. And Hotel Alpenhof GesmbH v Oliver Heller* [2010], ECR I-12527.

⁷⁸³ At para. 62.

⁷⁸⁴ At para. 63-65.

⁷⁸⁵ At para. 69.

⁷⁸⁶ At para 74.

⁷⁸⁷ At para. 75.

⁷⁸⁸ At para. 81.

The CJEU continued by giving more examples of features which could constitute evidence of an activity directed to one or more Member States: the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example ‘.de’, or use of neutral top-level domain names such as ‘.com’ or ‘.eu’; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.⁷⁸⁹ Furthermore, if the website permits consumers to use a different language or currency, this can constitute evidence that the trader’s activity is directed to other Member States.⁷⁹⁰

It is clear from this decision that the mere accessibility of a website in a Member State will not trigger the applicability of the protective rules for consumers. This seems logical as, in the light of protection of weaker parties, access to justice will be improved for consumers if they can sue the other party close to home. A balance must be struck, however, between consumer protection, on the one hand, and the need for legal certainty among business on the other hand,⁷⁹¹ or, the reasonable expectations of the professional.⁷⁹² It is submitted that the current rule, as interpreted by the CJEU, strikes a correct balance.

The discussion and assessment of the relevant rules has focussed on the Brussels I Regulation rather than the Rome I Regulation so far. The relevant rules of the Rome I Regulation are the subject of the next subsection.

2.3.3 Applicable Law in the Absence of Choice

⁷⁸⁹ At para. 83.

⁷⁹⁰ At para. 84.

⁷⁹¹ Vasiljeva, K., 2004. 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online. *European Law Journal* [online], 10(1), 1328.

⁷⁹² Garcimartín, Alférez, F., 2008. The Rome I Regulation: Much Ado about Nothing? *The European Legal Forum* [online], 2(I), 71. Available via: <http://www.simons-law.com/library/pdf/e/884.pdf>.

Article 6 of the Rome I Regulation provides:

“1. [A consumer contract] shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.”

This provision is very similar to that in the Brussels I Regulation and the preamble to the Rome I Regulation refers to that Regulation and the need for consistency with that legal instrument in regards to the concept of directed activity as a condition for applying the consumer protection rule. Furthermore it states that the concept must be interpreted harmoniously as between the two Regulations.⁷⁹³

As a result, the discussion and evaluation of the rules under the Brussels I Regulation is highly relevant to the Rome I Regulation. Similarly to the protective regime under Brussels I, the application of the protective rules in Rome I, as a result of which the applicable law will be the law of the country in which the consumer is habitually resident, will not be triggered by the mere fact that a website is accessible in another Member State.⁷⁹⁴

As such, the arguments made above. will not be repeated here. It is submitted that the conclusion reached in that section applies here as well.

2.3.4 Jurisdiction and Applicable Law Following a Choice by the Parties

As mentioned in chapter 7,⁷⁹⁵ party autonomy is one of the cornerstones in private international law regarding contract. The parties to a consumer contract also have the

⁷⁹³ (24) Preamble Rome I.

⁷⁹⁴ (24) Preamble Rome I.

⁷⁹⁵ See Introduction chapter 7.

option to choose the court which can hear disputes arising out of their contractual relationship and the law which will govern it, but this choice is limited.⁷⁹⁶

In regards to jurisdiction, Article 17 Brussels I provides:

“The provisions of this Section may be departed from only by agreement:

- 1. which is entered into after the dispute has arisen; or*
- 2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*
- 3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.”*

This rule clearly limits party autonomy as the parties to a consumer contract have only limited options as to which court they can favour in a jurisdiction agreement, compared to parties to other contracts.⁷⁹⁷ The questions must be asked, therefore, whether this limitation is desirable in view of party autonomy.

It is submitted that it is, as it is aimed at first, making the consumer think twice before agreeing on a particular choice of forum.⁷⁹⁸ Second, the options in terms of courts that can be chosen are limited in favour of the consumer. As such, it must be concluded that the limitations on party autonomy are acceptable because they contribute to weaker party protection.

One remark must be made here in regards to legal certainty and predictability however. Article 17 is unclear as to whether jurisdiction agreements where one party is a consumer, are subject to the conditions of Article 23 of the Brussels I Regulation, which imposes certain formal requirements for jurisdiction agreements.⁷⁹⁹ It can be argued

⁷⁹⁶ Garcimartin Alferéz, F., 2009. The Rome I Regulation: Exceptions to the Rule on Consumer Contracts and Financial Instruments. *Journal of Private International Law* [online], 5(1), 85. Available via: EBSCOHost. See also: Langer, D., 2000. Arranging and Concluding Contracts on the Internet. Choice of Law and Consumer Protection. *The European Legal Forum*, 2, 117-121. Available via: <http://www.simons-law.com/library/pdf/e/148.pdf>.

⁷⁹⁷ See chapter 2.

⁷⁹⁸ E.g. Van Calster, G., 2013. *European Private International Law*. Oxford: Hart Publishing. p. 73.

⁷⁹⁹ See chapter 2.

that there is no need for such formal conditions as the agreement can only be entered into after the dispute has arisen so that the consumer will be fully aware of what they are agreeing to. Furthermore the options are such that they already protect the consumer.⁸⁰⁰ As such, no additional weaker party protection is required in the form of formal conditions. It would be conducive to legal certainty, however, if this was made clear in the text of Article 17.

Next, the rules on the freedom to choose the applicable law must be assessed.

Article 6 (2) Rome I provides:

“[...] the parties may choose the law applicable to a [consumer] contract, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable [...]”

This provision has been criticised because it affords consumers a double protection when a choice of law is made. In particular they will benefit from the protection of the chosen law as well as the protection of the so called mandatory rules of the law which would have been applicable in the absence of a choice by the parties.⁸⁰¹

This criticism even led the Commission to propose an abandonment of the option to choose the applicable law in consumer contracts.⁸⁰² It is submitted by the researcher that this would have been a step too far. Party autonomy is, as mentioned several times throughout this thesis, one of the cornerstones of EU private international law rules. Although it is acceptable to limit this autonomy in the pursuit of weaker party protection, not allowing the parties to choose the applicable law at all is taking would mean that one policy objective is preferred to the absolute detriment of another.

⁸⁰⁰ Van Calster, G., 2013. *European Private International Law*. Oxford: Hart Publishing. p. 73.

⁸⁰¹ Lando, O. and Nielsen, P.A., 2008. The Rome I Regulation. *Common Market Law Review*, 45(6), 1708.

⁸⁰² Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final. p. 6.

Furthermore, in consumer contracts, it is almost exclusively the trader who decided whether there is a choice of law clause and which law will be favoured in such a clause. Especially in electronic consumer contracts, where consumer will often simply tick a box not realising what they are agreeing to.⁸⁰³ In many cases it is therefore easy for the trader to avoid this double protection by simply not inserting a choice of law clause into the contract.⁸⁰⁴

It must be concluded that the current rule therefore strikes a balance between achieving party autonomy, on the one hand, and protecting the weaker party to the contract, on the other hand.

3. Conclusion

It was investigated in this chapter, first, which contracts are considered consumer contracts, or, which persons are considered consumers. It was researched whether the relevant provisions needed amending in the light of the policy objective of protection of weaker parties. Specifically it was assessed whether persons contracting with companies for a purpose related to their profession, should enjoy the protection consumers enjoy. It was held that there are several reasons why such persons must be distinguished from consumers. Despite these arguments there may still be a valid argument that this category of persons need protection as the weaker party to the contract. However, in view of legal certainty a definition employed across all EU instruments must be preferred so that amendment in Brussels I and Rome I is not desirable.

It was researched, second, in how far the protective jurisdiction rules depart from the general jurisdiction rules and whether consumers are over-protected, as argued by some. This issue was researched with a particular focus on electronic consumer contracts, as part of the argument was that this over-protection would deter businesses from pursuing online trade. An assessment and evaluation of the relevant law and case

⁸⁰³ Tang, Z., 2005. Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce. *Journal of Private International Law* [online], 1(2), pp. 239. Available via: HeinOnline.

⁸⁰⁴ Lando, O. and Nielsen, P.A., 2008. The Rome I Regulation. *Common Market Law Review*, 45(6), 1708.

law in which this was applied, led to the conclusion that a balance was struck between consumer protection on the one hand, and legal certainty and respect for the reasonable expectations of the professional, on the other hand. As the Rome I rules on a choice by the parties are almost identical to the Brussels I rules, an in-depth separate investigation of those was not needed.

Next the provisions on a choice by the parties in consumer contracts were evaluated in the light, not just of party autonomy, but the other EU private international law policies as well. In regards to a choice of jurisdiction, it was argued that the limitations on party autonomy were justified in order to achieve weaker party protection. A suggestion for the enhancement of legal certainty was made however.

Finally, the Rome I rules on party autonomy in consumer contracts were researched. Although these have been subject to some criticism, the researcher finds that these criticisms could be rebutted and therefore concluded that the relevant rules strike a balance between the respect of party autonomy and the protection of weaker parties.

Conclusion

The first chapter provided an overview of the history of EU private international law with reference to wider historical events. In this initial research, it became clear that, although the EU private international law project has been underway for many decades, it is not yet completed. Particularly relevant in this respect was a recent development which took place during the period in which the PhD research was conducted. The Brussels I Regulation was revised and resulted in the Brussels I recast. Recent changes have been made, therefore, illustrating that EU private international law is not just undergoing a mere evolution, but a real change still.

Chapter 1 also identified four key objectives underlying EU private international law rules generally. As the general objective, access to justice was identified. The second important policy objective identified was legal certainty and predictability. Thirdly, party autonomy was discussed as one of the cornerstones of EU private international law rules. Finally, the protection of weaker parties to a contract was identified as one of the fundamental aims underlying EU private international law.

These four policy objectives formed the spine of this thesis, around which the discussion and evaluation of the Brussels I Regulation and the Rome I Regulation was centred.

In order to be able to identify the most relevant issues to investigate in the light of these four policy objectives, and in order to place them into context, chapter 2 provided an overview of both the Brussels I and the Rome I Regulation. The chapter identified several issues as particularly relevant for the purposes of the thesis and touched upon the fact that the rules pertaining to these issues seemed to, *prima facie*, fail at achieving the policy objectives underlying EU private international law. More specifically, the issues identified related to the scope of the Brussels I Regulation and external defendants, the *lis alibi pendens* rule, the possibility of an implied choice of applicable law, the possibility to choose non-state law as the applicable law, the rules on applicable law in the absence of choice by the parties and the rules protecting consumers.

Having identified these issues, the researcher decided to address them in-depth in chapters 4 to 8, with specific attention for the Brussels I recast. This was held to be crucial as the initial and basic analysis in chapter 2 suggested that some problems could

be identified which seemed not to have been addressed yet, or at least not appropriately addressed.

Chapter 3 outlined national English private international law rules which have now largely been replaced by EU private international law instruments in the area of contractual obligations. It appeared that traditional English rules could be a source of inspiration, however, when it comes to finding creative solutions. That would not necessarily be without problems though, as became apparent later on in the research.

In general it appeared that English private international law focuses on jurisdiction and procedural rules more than on applicable law. Another observation was that English private international law rules are generally characterized by a large degree of flexibility, focusing on the objective to do justice in the individual case rather than legal certainty and predictability. As such, many rules provide the courts with a degree of discretion, which seems quite different from the EU private international law approach, which is generally focused on achieving the highest possible degree of legal certainty and predictability and views discretion of the courts as undermining that. EU private international law is therefore far more rule-based than English private international law.

Chapter 4 outlined Belgian private international law and its underlying policy objectives. It became clear very quickly that Belgian law is far more rule-based than English private international law and, as such, more similar to EU law in its approach. It can be argued therefore, that EU law has been largely inspired by civil law systems rather than common law systems. For example, Belgian law does not recognise a large degree of judicial discretion but contains very detailed rules instead. This seems to be the approach taken by EU law as well.

It is also clear, on the other hand, that Belgian law has been largely influenced by EU law in the area of private international law. Of course, EU private international law replaced the Belgian provisions to a large extent, equal to what happened with English law. Moreover, however, the Belgian legislator decided to declare applicable EU law even in those areas where it would not otherwise be applicable.

Chapter 5, on access to justice, focused on the Brussels I *lis pendens* rule and how the potential for its abuse caused serious concerns in terms of access to justice. The EU held it to be particularly problematic in cases where there was a choice of court

agreement, and, as such the relevant rules in the Brussels I Regulation were amended on the occasion of the recast. It was found that the Regulation is thus a significant improvement in terms of access to justice for cases in which there is an exclusive choice of court agreement. The researcher found, however, that the same stalling tactics could be used in cases in which there was no jurisdiction agreement. Furthermore there are drawbacks to the new rule. Especially the risk of the use of more advanced torpedo tactics could be problematic in view of access to justice.

It was therefore assessed whether Belgian or English law could provide a solution. These were held to be undesirable for several reasons, but mainly because they could undermine legal certainty, another key objective of EU private international law. It was submitted that perhaps there was no perfect solution so that parties' access to justice may, in a limited number of cases, still be affected by abusive litigation tactics their counterparties. In such cases they may have to rely on the domestic law of the Member States for a remedy.

Chapter 6 focused on legal certainty and predictability and evaluated the *lis pendens* rule from that perspective. It was found, just as in relation to access to justice, that the current rule had proven problematic in its application, or rather, the fact that parties had relied on it in bad faith to delay proceedings. As was also mentioned before, in relation to access to justice, the new rule in the Brussels I recast did not solve all the problems as there is now scope for reverse torpedo tactics, or the tactic whereby a party alleges there is a jurisdiction agreement when really there is none. Furthermore the original rule in the Brussels I Regulation remained untouched.

Next, attention turned to the possibility for parties to a contract to make a tacit choice of law. The differences in linguistic versions that existed under the Rome Convention, were removed from the Rome I Regulation, which increased legal certainty and predictability. Uncertainty also existed under the Rome Convention on the question in how far a choice of a particular court constituted a choice of the law of that court's country. The amendment of the preamble of the Rome I Regulation to the effect that such a choice of court should be one of the factors to be taken into account in determining whether parties had made an implied choice, was held to be insufficient to significantly improve legal certainty.

It was also examined whether the parties to a contract had the possibility under the Rome I Regulation to make a choice of non-state law, as this was clearly excluded under its predecessor. Although the Rome I proposal sought to introduce such an option which could have adversely affected legal certainty and predictability, the proposed provision was deleted so that it was concluded the Rome I Regulation does not raise particular issues in relation to legal certainty in this respect.

Finally, the rules determining the applicable law in the absence of a choice by the parties were researched. It was identified that the concept of characteristic performance was problematic in terms of legal certainty as it is appeared very difficult to identify the characteristic performance for complex contracts. It was therefore concluded that it must be regretted that this concept, adopted under the Rome Convention, was retained in the Rome I Regulation.

In regards to the applicable law in the absence of choice, the Regulation made improvements in terms of legal certainty as well however. The much-criticised presumptions in the Rome Convention were replaced by fixed rules for eight types of contracts, improving foreseeability of the applicable law. It was concluded that it must be regretted though, that the exception clause in the Rome Convention, which had caused a lack of uniform application of the rules and which had therefore led to division for as long as it had existed, remained in the Regulation. As such legal certainty may still be undermined.

Chapter 7 on party autonomy emphasised that, although the original *lis pendens* rule in the Brussels I Regulation was highly undesirable in terms of party autonomy, this situation has drastically improved though the Brussels I recast. By reversing the priority in the current rule, great importance is now attached to a jurisdiction agreement, which is obviously a victory for party autonomy.

The concept of an implied choice of law was researched next, and it was investigated how this concept related to party autonomy. The researcher found that it was important to recognise such a choice in law but that the relevant rules had not been applied uniformly throughout the EU. It was concluded that the streamlining of the different language versions was an improvement made by the Rome I Regulation, as compared to its predecessor, but that there were more fundamental reasons for the lack of uniform application so that additional clarification in the matter is needed.

Finally, it was investigated in how far parties are allowed, under the Rome I Regulation, to make a choice of a non-state law. Under the Rome Convention this was unequivocally not an option and it was proposed in the context of its conversion into the Regulation that such a choice, albeit not for any non-state legal system, should be allowed. Because of a lack of consensus on the issue, the proposal did not survive, which is regrettable in terms of party autonomy. It was submitted that a true respect for, and enhancement of, party autonomy means that parties should be allowed to choose whichever legal system they want to choose.

The final chapter on weaker party protection first investigated whether the definition of a consumer contract needed amending in order to protect parties worthy of protection who do not currently fall under the definition. In the light of the other policy objectives identified, it was held that the current definition should be preserved in both the Brussels I and the Rome I Regulation.

It was researched, second, in how far the protective jurisdiction rules depart from the general jurisdiction rules and whether consumers are over-protected, as argued by some. This issue was researched with a particular focus on electronic consumer contracts. An assessment and evaluation of the relevant law and case law in which this was applied, led to the conclusion that a balance was struck between consumer protection on the one hand, and legal certainty and respect for the reasonable expectations of the professional, on the other hand.

Next the provisions on a choice by the parties in consumer contracts were evaluated in the light, not just of party autonomy, but the other EU private international law policies as well. In regards to a choice of jurisdiction, it was argued that the limitations on party autonomy were justified in order to achieve weaker party protection. A suggestion for the enhancement of legal certainty was made however.

Finally, the Rome I rules on party autonomy in consumer contracts were researched. Although these have been subject to some criticism, the researcher finds that these criticisms could be rebutted and therefore concluded that the relevant rules strike a balance between the respect of party autonomy and the protection of weaker parties.

This recast Regulation made some significant changes to the law, which were the subject of the research. As such, in-depth research was carried out in areas in which little or no publications were available.

Consequently changes may be needed and will hopefully take place in the future.

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