

JURISDICTION AND CHOICE OF LAW:  
A EUROPEAN PERSPECTIVE

BY

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1. This paper covers the most significant trends in the European PIL with a special look at the global transactions, that is to say to the external dimension and effects of European regulations.

In dealing with such issues, both in the field of jurisdiction and choice of law rules the starting point is the so called process of Communitarisation of private international law, that is the increasing competence of the European Community in this area from the Amsterdam Treaty in 1999 onwards, upon which the European Community can adopt measures in the field of PIL.

In particular, two relevant acts come under special consideration for our purposes:

- the *Brussels I Regulation* (No. 44/2001 of 22 December 2000) unifying jurisdiction rules and the treatment of foreign judgments;
- and the *1980 Rome Convention*, which was intended to complete the Brussels system by ensuring that the same law is applied irrespective of the State in which a decision is given and that is being in its turn transformed into a Community regulation (Rome I). Its adoption is expected in the next meeting of the Justice and Home Affairs Council, to be held in a few days and the final text is already available in the internet.

From a general standpoint, it is submitted that some recent developments show the creeping out of a rigid approach in dealing with jurisdiction and choice of law rules and in building a European PIL. Efficiency and predictability seem to be the prevailing concerns and objectives pursued by the ECJ as well as by the EC institutions while on the contrary the quest for other goals, such as the search for appropriate results in every single case, is mainly set aside.

In the following pages I'll try to give adequate proof of this trend.

2. Let's start with jurisdiction. Some leading cases from the ECJ are of paramount importance in this field.

In the *Owusu* judgment, rendered under the Brussels Convention, but clearly applicable also within the Regulation (1 March 2005, case C-281/02), the ECJ took the view of a somewhat universal application of the rules on jurisdiction.

In the case, the plaintiff, Mr. Owusu, was injured while swimming during a vacation in Jamaica and brought suit in the UK, naming as defendants an individual from whom he had rented the vacation home - domiciled in the UK – and several Jamaican companies allegedly responsible for not giving proper notice of the hazardous conditions that led to the accident. Therefore, the case was an international case, but there was not connection with another European State, as the only defendant from within the European Community was from the same State as was the plaintiff.

In the second place, the issue at stake was whether the convention prohibited to dismiss the relief on the *forum non conveniens* motion on the ground that Jamaica was the more appropriate forum. The Court held that “the convention precludes a court from a contracting State from declining the jurisdiction conferred by art. 2 on the ground that a court of a non contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of a non Contracting State is in issue or the proceedings have not connecting factors to any other Contracting State”.

As a consequence the doctrine of *forum non conveniens* is in principle banned from the Brussels system.

However, it is not clear – and is indeed much debated - whether *forum non conveniens* can still operate, by the way of national relevant rules, under some other circumstances.

This is the case of parallel proceedings, where identical or related proceedings are pending in a member State and before a court of a third State and the defendant is domiciled in a European State so that the a European court should have jurisdiction under the Regulation. This situation is actually not expressly covered by the *Owusu* judgment.

The same rigid approach is taken by the Court also in other fields, such as the forum selection.

In this area the Brussels I Regulation is considered to expand greatly the role of party autonomy, thereby reducing the control of the State in private affairs.

In particular, art. 23 provides that the courts chosen by the parties shall have exclusive jurisdiction, if one of the parties is domiciled in a member States, and that such jurisdiction shall be exclusive unless the parties have agreed otherwise.

This rule prevails over the general jurisdiction of art. 2 and the special rules of art. 5 but is subject to the exclusive rules of

jurisdiction in art. 22 and to some protective rules for insurance, consumer and employment contracts (art. 8 through 20 ).

However, albeit these liberal principles, sometimes unexpected limitations can be imposed upon parties. Two situations are here envisaged.

a) The first is taken from the much criticized *Gasser* case, decided by the ECJ in 2003 (case C-116/02), that involved the application of the rules on parallel litigations.

The case was about a transaction between an Austrian seller and an Italian buyer where the Austrian company brought a suit for payment in Austria according to a clause providing for jurisdiction of Austrian courts. However, the Italian party had already brought a suit before an Italian tribunal and the Court affirmed that the rule on *lis pendens* in art. 21 should have applied and prevailed over the choice of court agreement. Therefore, Austrian courts had to dismiss the case in favor of litigation in Italy.

Such a rigid adherence to the temporal rule in favor of the court first seized is to be respected even when the jurisdiction clause comes out to be valid and thereby provides for exclusive jurisdiction.

The quest for predictability here shows many limits, insofar as the judgment clearly promotes inappropriate parallel proceedings by encouraging negative declaratory actions intended to frustrate litigation in the forum chosen by the parties.

b) The second situation that I would like to deal with covers jurisdiction agreements in favor of non European judges.

Europe accepts different treatment of such clauses as they are in principle outside the scope of the Regulation and left to the national PIL rules of each member State so that the deference to them may vary according to the court seized.

In principle, such agreements are capable of depriving the courts of a member State of jurisdiction conferred on them by the Regulation. This view finds support in a case decided by the ECJ in 2000 (*Coreck Maritime*).

However, some limitations upon the freedom of Member States to apply their own law can be flawed by the Brussels system that can interfere also in these situations.

As a matter of fact, the need of applying protective rules regarding insurance, consumer and employment contracts as well as some exclusive rules contained in art. 22 may lead to some exceptions and to a frustration of the choice of a non European judge. To the extent that the latter has jurisdiction under the mentioned protective and exclusive rules, it is not permitted to decline jurisdiction on the ground that a court of a non member State has exclusive jurisdiction under a choice of court agreement. Such a clause is destined not to deploy any effect.

Recently in this sense in England, Court of Appeal (Civil Division), 12 July 2007, *Samengo-Turner*, disregarded a jurisdiction clause in favor of a New York court in an employment dispute as it held applicable Section 5 of the Brussels I Regulation providing that EU domiciled employees can only be sued before the courts of the State where they are domiciled and that jurisdiction can be agreed only “after the dispute has arisen”.

3. Also within the choice of law rules, a more rigid line seems to prevail, at least compared with the recent past.

The Rome Convention, as it stands now, is inspired by a certain degree of flexibility.

Art. 3 states that a contract shall be governed by the law chosen by the parties. The choice of law can be either express or implied and is of course subject to public policy and mandatory rules, according to the general principles of PIL.

When the parties do not select any applicable law, the general rule is that the contract is governed by the law of the country with which it is most closely connected, with a presumption in favor of the law of the residence (or the main place of business in commercial affairs) of the party that has to carry out the characteristic performance of the contract (art. 4). As a matter of fact, case law proves that courts are allowed to put more or less weight on this presumption.

Some further flexibility may result from the application of art. 7.1 that is from the relevance of the mandatory rules of a country other than the country providing the applicable law of the contract.

The conversion of the Rome convention into a regulation is about to step back.

This is especially true when deciding the law applicable to contractual obligations in the absence of a choice of law by the parties.

The new art. 4 of the Regulation becomes a hard rule followed by an escape clause. In principle, the law governing the contract is now determined in accordance with specific rules for particular types of contacts (sale of goods, provision of services, franchising, distribution and so on), all of them inspired by the principle of the characteristic performance. Only when it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than those indicated, the law of that other country shall apply.

In other words, the presumptions under the characteristic performances theory have been spelled out and elevated to strict rules. This detraction from flexibility explains why UK has so far chosen to opt out from the Regulation.

Some other modifications of the Convention go along the same line.

This is the case for the – indeed slight – restriction of the admissibility of an implied choice of the applicable law (see the new version of art. 3.1 where the choice demonstrated “with reasonable certainty” has been replaced with a choice “clearly demonstrated”).

Or is also the case of the decreased scope of the mandatory rules of the law other than the law governing the contract. The new art. 9 (former art. 7) states now that effect may be given to the overriding mandatory provisions only of the law of the country where the obligations arising out of the contract have to be or have been performed insofar as those provisions render the contract unlawful.

But, above all, it seems to me that the most significant trend is the increasing of Community public policy principles. These principles tend to become more and more uniform in the member States, as a consequence of the growing European harmonization of national laws.

This is reflected by the need to insert in the Regulation the new art. 3.4, aiming at safeguarding the Community not derogable provisions, to the same extent as the corresponding national rules are protected in the foregoing rule (Art. 3.3). Therefore, “where all other elements relevant to the situations 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 an agreement”.

The effects of public policy or similar considerations may be indeed even more far reaching.

For example, in the *Ingmar* Case (2000), the ECJ, even without discussing conflict of laws provisions and techniques, stated that the choice made by a Community agent and an American principal to make Californian law applicable could not be followed because the requirements provided by the Commercial Agents Directive and the consequent harmonized set of rules must be respected in any case. These rules were considered by the Court a “minimum requirement throughout the EU”.

4. Which are the perspectives for the future? And in particular does the Communitarisation leads to harder rules and more rigid policies, especially with regard to relationships connected with third States?

In spite of the described trends, it is difficult and too soon to give a general answer. A clear common policy has not yet been defined. From this point of view, the comparison with the recent Rome II Regulation on the law applicable to non contractual obligations is quite puzzling as it adopts flexible rather than strict solutions.

However, at least a direction seems to be undertaken, that is to say a more harmonized approach with regard to global transactions.

This touches indeed only jurisdiction (apart from the recognition of judgments), as choice of law rules have already universal application.

As to jurisdiction, with regard to situations involving individuals or companies domiciled in a non Member States, under Brussels I Regulation States – subject to the *Owusu* case - remain in principle free to apply their national rules over defendants domiciled in third countries (art. 4.1). Save the case of Italy, national rules are normally wider, and many States make use of improper *fora*, with the goal to broaden the possibility to bring proceedings against persons domiciled in third States.

After the *Lugano* Opinion (2006), where the ECJ stated that the Community enjoys exclusive competence in signing and ratifying the new Lugano Convention on jurisdiction and enforcement of judgments, further replacements of national rules and international conventions entered by States by Community acts are expected.

This is assumed to be beneficial for intercontinental transactions, even if it is far from sure that this trend would lead to more liberal rules than the new existing now at national level. On the contrary, the development of Community improper *fora* is very probable in order to protect individuals and companies domiciled within the European Union as a whole rather than as national or domiciled of a specific State.