SOME REFLECTIONS ON FORUM SELECTION CLAUSES IN THE INTERNATIONAL SCENE

Prof. Dr. Dagmar COESTER WALTJEN*

Prof. Dr. Gülören Tekinalp has devoted some of her learned publications to party agreements concerning jurisdiction. I regard it as a high honour to have the opportunity now to dedicate some lines on this topic to my dear colleague.

I. The Problem

Though *forum* selecting clauses are quite common in international commerce and though most legal systems pay tribute to such kind of party autonomy (at least in principle), it seems to be rather difficult to reach agreement on the limits and details of such clauses when it comes to international conventions. The work at the Hague Conference at the moment is clear evidence of the extremely difficult procedure in preparing a seemingly acceptable Draft. Despite the fact that preparations of a world-wide Convention on Jurisdiction, Recognition and Enforcement in Civil and Commercial Matters – the so called "judgements project", once welcomed with high hopes for the law of international civil procedure – seem to have become limited to choice of court clauses,[1] even this limited approach does not guarantee sufficient

---

* Prof. Dr. iur., LLM. (Univ. of Michigan); Professorin an der Ludwig. Maximilians - Universität München Institut für Internationales Recht / Rechtsvergleichung.

1 See: Report on the Second Meeting of the Informal Working Group on the

prospect of reaching an agreement despite the enormous efforts of the members of the informal working group.

The relevant provision (Art. 17) of the Brussels Convention – in its last version identical with Art. 17 Lugano Convention – has been (at least slightly) changed in the different versions and was again partly reframed when transferred into Art. 23 of the EC Regulation on International Jurisdiction, Enforcement and Recognition of Judgements in Civil and Commercial Matters (Brussels I Regulation – 44/2001 of 22 December 2000), replacing the Brussels Convention between all Member States except Denmark.[2] A look at the jurisprudence of the different Member States proves, in addition, that this provision has given rise to many disputes about its scope and its meaning.[3] Though the (translated) wording of the provision is the same in all jurisdictions, the problems of interpretation and the solutions proposed vary from jurisdiction to jurisdiction. The decisions of the European Court of Justice have, of course, a unifying effect. But as sometimes these decisions are interpreted in a different way by the courts of different Member States, it seems difficult to achieve uniform results.[4]

Of those problems controversially discussed as well in application of the Brussels/Lugano Convention and the Brussels I Regulation as in drafting a world-wide convention by the Hague Conference I would li-

---

Judgements Project – January 6–9, 2002, Prel.Doc. No 21 – http://www.hcch.net/e/workprog/jdgm.html.

2 According to Art. 2 Protocol on the position of Denmark to the Treaty establishing the European Community and to the Treaty on European Union Denmark has not become bound by measures taken under title V. EC and is consequently not to be regarded as a member state of Brussels I Regulation. Insofar the Brussels Convention in its last version has remained applicable. Though under Art. 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty establishing the European Community and the Treaty on European Union those countries also are not bound by measures under title IV. EC, but both have taken the chance to opt in.

3 For details see: NEWTON, *The Uniform Interpretation of the Brussels and Lugano Conventions*, 2002, 163–277.

4 Comp. the "Tilly Russ" – decision of the ECJ (19.06.1984 – C71/83, ECR 1984, 2417) and "The Westfield" Cass. 4.4.1995, Rev.crit. 1995, 611 (concerning bills of lading and third parties).

ke to concentrate on one issue, namely the international context required for such a choice of *forum*.

This discussion will be restricted to *forum* selecting clauses in business to business relationships – thus excluding *inter alia* consumer contracts as well as question of status, family law, and inheritance rights. Arbitration agreements are outside the scope of this discussion because separate international conventions take care of the problems concerned with such agreements.

II. The General Attitudes

With regard to the question of "internationality" it seems well accepted that a certain international element should be present when contracting states to an international agreement are bound to give effect to a *forum* selecting clause. Whether the domestic law of a state allows to oust its jurisdiction in a completely domestic dispute is another matter. Some legal systems allow this – at least to a limited extent (for example in commercial matters only) – like for example German domestic law[5] and – if I am not mistaken – Turkish law, too.[6] Others are rather restrictive – sometimes only with regard to the derogating effect, sometimes with regard to the prorogating effect also.[7]

III. The Brussels/Lugano Instruments

The Brussels/Lugano Conventions and the Brussels I Regulation do not speak out on the issue of internationality expressly. Due to the original roots of the Brussels Convention in Art. 293 EC-Treaty (formerly

---

5 § 38 ZPO – Code of Civil Procedure.

6 Art. 31 PIL, TEKİNALP G. /TEKİNALP U., *Recent Case Law in Turkey on Jurisdiction Agreement,* in: Private Law in the International Arena, *Liber Amicorum* SIEHR Kurt, 2000, 763 seq.

7 Art. 2 of the Old Italian Code of Civil Procedure (now abrogated by Art. 4 Law of March 21, 1995) was extremely hostile to such clauses; the same is partly true for the approach in jurisdictions of the United States, though, in principle, jurisdiction selection clauses in international disputes have been honored since *Bremen v. Zapata Off-shore*, 407 U.S. 1 (1972); for details see: PARK, *International Forum Selection,* 1995, *passim*.

Art. 220) and with regard to the Preamble of the Convention it is felt by many writers that the application of Art. 17 *ratione materiae* is limited to litigation with international elements.[8] Also the Protocol on the interpretation of the Convention, stresses that one of the aims of the Convention is "to strengthen in the community the legal protection of persons established therein".[9] Thus, according to some authors and some court decisions not only an international context, but also a special link to (at least two) Member States is required.[10] On the other hand the European Court of Justice in *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)*[11] made it clear that the Convention is applicable independently of the domicile of the plaintiff. Therefore, a third state domiciliary has to observe the provisions of the Convention when suing a defendant domiciled in a Member State. The European Court of Justice, however, did not have the opportunity so far to decide whether and which international element is necessary to open up the application of Art. 17 Brussels Convention/Art. 23 Brussels I Regulation. From *Coreck*[12] it is not completely clear which elements of internationality a dispute must have, to open the application of Art. 17 Brussels/Lugano Convention/Art. 23 Brussels I Regulation.[13]

---

8 See for example JENARD, Report, OJ 1979 C 59/1, 37 seq.; SCHLOSSER, OJ 1979 C 59/71 no. 174; DROZ, Compétence Judiciaire et Effets des Jugements dans le Marché Commun, 1972, 116 : « Il faut enfin, mais c'est une portée générale, qu'il s'agisse de rapports internationaux. ».

9 Protocol 28.7.1990, OJ 1990, C 189/2, 2.

10 See OLG München, 28.9.1989, IPRax 1991, 47; OLG Düsseldorf, 15.3.1990, IPRspr 1990 No. 167, 339; SAMTLEBEN, *Europäische Gerichtsstandsvereinbarungen und Drittstaaten – viel Lärm um Nichts? Zum räumlichen Anwendungsbereich des Art. 17 I EuGVÜ/LugÜ*, RabelsZ 59 (1995).

11 EuGH of 13.7.2000, C 412/98, ERC 2000 I 5925; this case did not concern *forum* selecting clauses, but the ECJ mentioned – *obiter dictum* – that for the application of Art. 17 it suffices that one party is domiciled in a Member State and that the courts of a Member State have been chosen.

12 *Coreck Maritime GmbH/Handelsveem BV and Others* of 9th November 2000 – C 387/98 ERC 2000 I 9337.

13 The European Court of Justice in *Coreck* only stated: "...the first paragraph of Art. 17 of the Convention only applies if, first, at least one of the parties to the original contract is domiciled in a contracting state and, secondly, the

If the parties to the agreement have their domicile in different Member States this should clearly suffice. Whether it should play a role if the parties choose the courts of the domicile of one party, the other being a third state domiciliary has been discussed controversially especially in Germany. Some courts and authors regard Art. 17 Brussels Convention/Art. 23 Brussels I Regulation as inapplicable because in such a case the relation to the aims of the Convention were lacking.[14] But will a domestic relationship be converted into an international one by having goods delivered in or from another country,[15] by an agreement of the parties on the choice of law? Where other elements of the dispute – for example the place of wrong doing[16] or the place of performance[17] – provide for jurisdiction in another state than that of the common domicile of the parties? One could argue that the latter suffices as international element of the dispute, because in such a case there were already two different possible *fora* having international jurisdiction. Thus, despite the common domicile of the parties, there is an international link of the dispute. But the solution is not completely clear and there are arguments to both directions.

However, despite these uncertainties, it seems clear that the wording of the Conventions/Regulation leaves no room for requiring a link of the dispute to the *forum prorogatum* (besides the choice of the parties) – and this is not disputed. The same is true with regard to the exclusion of the doctrine of *forum non conveniens*. The European instruments do not leave any room for this kind of discretionary decline of jurisdiction where there is a validly concluded *forum* selection clause under Art. 17 Brussels/Lugano Convention/Art. 23 Brussels I Regula-

---

parties agree to submit any disputes to a court or the court of a Contracting State."

14 OLG München, 8.3.1989, IPRax 1991, 289; OLG München, 28.9.1989, IPRax 1991, 47; for the discussion of these problems see also KROPHOLLER *Europäisches Zivilprozessrecht,* 7th ed. 2002, Art. 23 no. 4 seq; SCHLOSSER, *EU-Zivilprozessrecht,* 2nd ed. 2003, Art. 23 no. 6 seq.

15 NEWTON, (No. 3),178.

16 Having international jurisdiction under Art. 5 (3) Brussels/Lugano Convention/Brussels I Regulation.

17 Jurisdiction under Art. 5 (1) Brussels/Lugano Convention/Brussels I Regulation.

tion.[18]

IV. The Approach by the Hague Drafts

The working group of the Hague Conference discussed, whether an international link should be required and in such a case whether it should either be established by the relationship of the parties or by the subject matter or by the nature of the dispute.[19] In addition, the requirement of a specific connection to the chosen *forum* state was discussed. There seem to be states – especially within the United States – which restrict foreign parties in their choice of *forum* with regard to domestic courts or require at least additional steps to be undertaken (for example registration as a foreign company – subjecting the foreign company not only to special fees, but also to general jurisdiction within that state independent of the choice of law clause). It was suggested that a convention should at least allow a reservation of the contracting states, permitting its courts to "refuse to determine disputes by a choice of court agreement, if, except for the choice of court agreement there is no connection between that state and the part-ies of the dispute."[20] In addition, the question, whether the chosen *forum* may decline jurisdiction because it is a "*forum non conveniens*" arises, when jurisdictions with an Anglo-American legal background take

---

18 The question, however, to what extent the domestic law of the Member States is subrogated with regard to this doctrine outside Art. 17/23 is discussed controversially, though English courts seem to feel relatively free in the application of their domestic principles, see in *Re Harrods* [1991] 4 All E.R. 334 (C.A.); the *Nile Rhapsody* [1994] 1 Lloyd's Rep. 382 (C.A.); HOGAN, *The Brussels Convention, Forum non conveniens and the Connecting Factors*, Eur.L.Rev. 1995, 471; FENTIMAN, C.L.J. 60 (2001) 10; certainly not in accordance with the Lugano Convention: *Anton Durbeck GmbH v. Den Norske Bank* [2003] 2 W.L.R. 1296 (C.A.) (now on appeal to the House of Lords).

19 Art. 2 (2) of the Annexed Draft, Preliminary Document no. 21, January 2003, provided an alternative between the last two links and the first one phrased in a way to indicate differences in the allocation of the burden of proof – in the last case burdening the party relying on the agreement, in the first case the other party.

20 Art. 13 Annexed Draft, Preliminary Document no. 21 of January 2003.

part in the discussion.The (for the time being) last Draft of the Hague Convention takes care of these problems in three ways.

First, the chosen court (*forum prorogatum*) does not have to pay attention to a *forum* selection clause, if all the parties are habitually resident within that state (Art. 4 (4)) or if the Contracting State has made a reservation when ratifying the Convention that its courts may refuse to determine the dispute when there is no connection between that state and the parties or the dispute, except for the choice of court agreement (Art. 14).

Art. 4 (4) allows a Contracting State to apply the domestic rules and provisions of other conventions on international jurisdiction and venue, if all parties are habitually resident there.

This might not have important consequences for the international jurisdiction of that state, because – outside the rules respecting exclusive international jurisdiction of another state (for example exclusive jurisdiction of the courts of the *rei sitae* concerning *in rem* rights in immovables)[21] – the State of the common habitual residence of all parties will have international jurisdiction over the dispute even without the choice of the parties. However, the applicability of the domestic rules includes – at least in theory – the application of the doctrine of *forum non conveniens*, if this doctrine is part of the domestic law like for example in the Anglo-American world. Though in practice the courts of the common habitual residence of all parties might hardly ever be regarded as an inconvenient *forum*, this matter is left to the national states to decide. Nevertheless it should be mentioned that the parties habitually resident in one and only one member state may avail themselves of the provisions of the Convention insofar as the choice-of-*forum*-clause electing the courts of their home state will bring (If honoured by the courts) the decision rendered under the Convention and thus ensure recognition and enforcement in the other member states.

Closely but not directly connected to Art. 4 (4) seems to be the problem how the *forum prorogatum* should deal with regard to the rules on exclusive jurisdiction of the *forum derogatum*. The position of the

---

21 For example Art. 22 (1) Brussels I Regulation/Art. 16 (1) Brussels/Lugano Convention.

Draft within this provision is not completely clear. The effect of Art. 4 (4) Draft would be for example that a German court chosen by the parties habitually resident in Germany may by this provision and must by Art. 22 (1) (b) Brussels I Regulation decline jurisdiction, if the dispute concerns a tenancy of immovables (a dispute about *in rem* rights in immovables will not be covered by the Convention altogether[22]) outside Germany.

But problems can still arise if the parties do not have a common habitual residence and the immovable concerned is located in a Member State of the Brussels I Regulation or Brussels/Lugano Convention but not in the state of the chosen *forum*. Because of Art. 4, 22 (1), 23 (3) Brussels I Regulation (Art. 4, 16 (1) (b), 17 Brussels/Lugano Convention) all Member State courts outside the *forum sitae* have to decline jurisdiction, even if there has been a court selection agreement in their favour. Art. 4 (4) of the Hague Draft[23] will not apply to this situation. Art. 4 (1) would ask the courts chosen to give effect to the agreement. A different solution which would be in accordance with Art. 16 Brussels/Lugano Convention/Art. 22 Brussels I Regulation would be to regard this situation as one where the court could find "that the agreement is null and void under the law of that state.[24] However, it is not clear whether this last restriction of Art. 4 (1) Draft only concerns questions of a valid consent (meeting of the minds, full capacity) or whether the Contracting States may provide additional grounds rendering an agreement invalid. In such latter case a whole bunch of questions concerning the applicable law and the possible restrictions on the validity of a court selecting agreement would arise. These are not answered by the Draft so far.

---

22 Art. 1 (3) (i) Draft Work Doc. No. 49E, 1-9. Dec. 2003 formerly Preliminary Document no. 8 of March 2003.

23 Work Doc. No. 49E, 1-9. Dec. 2003 formerly Preliminary Document no. 8 of March 2003.

24 Art. 4 (1) Draft Work Doc. No. 49E, 1-9. Dec. 2003 formerly Preliminary Document no. 8 of March 2003. The Draft No 8 of March 2003 had a slightly different wording: ... null and vold, inoperative or incapable of being performed; but the change does not solve the problem; it only clarifies the applicability of the national law of the forum. Some clarifications can be drawn from the new wording of Art. 5 (a) (b) (c) (d).

The other restriction mentioned concerns the possible lack of any link to the *forum prorogatum*. On the one hand this requirement contravenes the possible idea of the parties to choose a completely "neutral" *forum* for their dispute. On the other hand it might be easy to establish a certain link to the *forum* – for example by a choice of law clause. At least, the Draft ensures certainty and foreseeability for the parties insofar as a reservation of a Contracting State has to be made already upon ratification. The Draft does not allow any discretion of the states making the reservation with regard to the kind of link necessary. Though in the discussion it was left open whether a Contracting State may impose certain extra burdens on foreign parties, a contracting state should not be able to avoid dispute resolutions practically by such imposition at will[25] and thus decline to give effect to the choice of *forum* clause. This provision (Art. 14 Draft) certainly does not allow the application of the *forum non conveniens doctrine* if there is at least some international element to the dispute or the relationship of the parties. This is especially clear from the newly drafted ss 2 of Art. 4, which states that the chosen court may not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state.

Secondly, the Draft provides that a court in a Contracting State other than the state of the chosen court (this will be a *forum derogatum*) will not have to decline jurisdiction if all parties are habitually resident in that state and all other elements of the dispute and the relationship of the parties are connected with that state (Art. 5 (f) Draft).[26] This provision takes care of a situation reverse to that dealt with under the first topic: The Convention does not force its Contracting States to allow the ousting of jurisdiction in completely domestic affairs. This gives room for the application of domestic law or other conventions. Thus, for example a German court, being the *forum derogatum*, need not decline jurisdiction under the Hague Draft, but may decline jurisdiction under its domestic law, i.e. § 38 ZPO if there is a validly concluded *forum* selecting agreement between merchants under the do-

---

25 Other than the refuse to give legal aid to all litigants of the world or the requirement of a security for cost coverage.

26 Work Doc. No. 49E, 1-9. Dec. 2002 formerly Art 5 (b), Preliminary Document no. 8 of March 2003.

mestic law.[27]

However, the situation becomes complicated, if the jurisdiction assigned by the parties to settle the dispute (*forum prorogatum*) has made the above mentioned reservation (Art. 14 Draft). In this case the Convention does not provide a *forum* and the question of international jurisdiction will then be left completely to the domestic law. There will be a *lacuna* if the domestic law of the *forum derogatum* regards the *forum* selection clause as valid (thus declining jurisdiction) and does not provide a substitute *forum* for cases where a valid agreement fails for other reasons.

Thirdly, the Draft provides that upon ratification a Contracting State may make a reservation that it may refuse to recognise or enforce a judgement rendered by a court of another Contracting State (Art. 15 Draft), in the situation mentioned in Art. 5 (f) Draft (ousting the jurisdiction in a completely domestic dispute).[28] Thus, the position of the Contracting States taken under Art. 5 (f) Draft does not automatically dispens of the duty to recognize a judgement obtained in the chosen *forum* (Art. 7 Draft), but allows to do this only if a respective reservation has been made upon ratification of the Convention. It has to be stressed that the purely domestic character of the dispute does not cause a reason for non-recognition of a judgement by a chosen court in other jurisdictions nor does it – absent a reservation under Art. 14 Draft - serve as a ground for refusal of settling the dispute.

To summarize: The Draft does not require an international link as prerequisite of a *forum* selection clause nor a special connection to the *forum prorogatum*. Rather it leaves these issues to the Contracting States to provide by reservations and/or domestic law on nearly symmetrical terms that there must be (from the point of view of the *forum derogatum*) a non-domestic element in order to oust jurisdiction under the Convention and (from the point of view of the *forum prorogatum*) a domestic link to the chosen *forum* in order to confer juris-

---

27 If one would apply Art. 23 Brussels I Regulation (Art. 17 Brussels/Lugano Convention) even in these completely domestic cases, this provision would prevail.

28 Preliminary Document no. 8 of March 2003.

diction. The requirements are asymmetrical insofar as the *forum prorogatum* may apply its domestic law on jurisdiction despite an international link if all parties are habitually resident in that jurisdiction. However, it seems that the judgement rendered by the courts of this jurisdiction (The *mock forum prorogatum)* nevertheless will fall under the Convention's provision on recognition and enforcement. This conclusion may be drawn from the general duty to recognise decisions in Art. 7 Draft and the only limited possibilities of reservation in Art. 15 Draft. But it seems questionable whether all judgements of a Contracting State based on choice of court agreements even to which the Convention does not apply, will fall under the provisions for recognition and enforcement. Clearly decisions on subject matters outside the Convention will not be covered. But decisions of a chosen court have to be recognised even in the *forum derogatum* despite the fact that an international link was missing if the state of the *forum derogatum* did not make a reservation under Art. 15 Draft. The question might arise whether the state of the *forum derogatum* or other member states may decline recognition in such cases on the ground that the choice-of-court-agreement is null and void.

V. Serving Legitimate Interests?

1. The *Forum Derogatum*

A state might have a legitimate interest in preventing parties to oust its jurisdiction. This interest becomes visible especially as far as immovables or status are concerned, very often also in family law matters or where the protection of a so called weaker party (consumer, employee, tenant) is at stake. Whether this patrimonial interest supersedes the advantages of party autonomy is a very delicate question and each jurisdiction has to take its own position on this issue. Insofar it seems appropriate that the Hague Draft leaves it to the Contracting States to restrict the applicability of the general principle of party autonomy with regard to the choice of a *forum* by requiring an international link.

On the other hand conventions concerning *forum* selecting clauses can take care of the above mentioned interests by limiting the scope of

application – as the Brussels/Lugano instruments do and as the Hague Draft also provides. It seems at least questionable whether an additional requirement will serve the purposes satisfactorily, especially as these exceptions may be interpreted very differently in the various Contracting States. Which are the elements relevant to the dispute constituting an international link? Will it be a choice of law clause (in principle valid under the Rome Convention in the EU-States even in purely domestic relations)?[29] Does it suffice if the products being the subject matter of the dispute have been manufactured or delivered in a third state? Is the nationality of the party a relevant element? Uncertainties known already from the discussion of the Brussels/Lugano instruments will be multiplied in a world-wide convention. In addition, for parties being aware of the restrictions it might be easy to construct an international link – for example by including a person habitually resident in another state. Companies might have the advantage that they carry an international element with them, if their statutory seat or their central administration is in a different country than their principle place of business or if the company has been incorporated under another law.[30] Thus, it seems that the requirement of an international link bears the characteristics of a "*paper tiger*" but does, in fact, not protect the legitimate (though paternalistic) interests of the ousted *forum*.

2. The *Forum Prorogatum*

Some jurisdictions are proud if foreign parties entrust their legal disputes to that *forum* – even if any link is missing. It proves the attractiveness of the legal order and the efficiency of the court system by international standards. Other jurisdictions are more reluctant. Especi-

---

29 Art. 27 III EGBGB, Art. 5 EVÜ.

30 In future this might happen more frequently in the Member States of the European Union due to the principle that the freedoms guaranteed by the EC-Treaty oblige the Member States to recognise companies incorporated in another Member State even if they have their principle place of business outside the state of incorporation, EuGH, 05.11.2002, *Überseering BV vs. Nordic Construction Company Baumanagement GmbH (NCC)*; for details see BEHRENS, IPRax 2003, 177 seq.

ally the courts in the United States are hesitant to honor *forum* selecting clauses.[31] This is quite contrasting with the comparatively wide rules on international jurisdiction whereby foreign defendants could be sued in courts within the United States quite easily on a relatively thin link to this jurisdiction. If international jurisdiction involves questions of fair play and justice and if party autonomy is valued very highly, it seems surprising if an agreement by the parties in favour of a certain court does not suffice to give jurisdiction to that court.

But of course, there are legitimate interests of the *forum prorogatum* – as for example especially the financing of the "service" provided by the courts, security for the costs and so on. But these issues could be dealt with independently of the question whether there is no link or only a minor link or a stronger link to the *forum*. And again, it might be easy for a clever party to construct the necessary link without changing the character of the dispute in reality. Insofar it seems doubtful whether any reservation may achieve the results aimed for. Especially, problems of interpretation would have to be served and it might be very difficult to achieve uniformity in application of the Conventi-
on.

3. Summary

De Tocgueville wrote: Un mot abstrait est comme une boîte à double fond : on y met les idées que l'on désire, et on les retire sans que personne le voie.[32] It seems that the requirement of an international link in a *forum* selection clause might turn out as such a box with a false bottom.

---

31 For details see PARK, International Forum Selection, 1995, 17 seq.

32 De la démocratie en Amérique, vol II 1ère partie Ch XVI, 102.