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The Evolving Private International Law / Substantive Law Overlap in the European Union

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I. Introduction

One of the great contributions of the scholarly work of Professor Dr. Ulrich Magnus is his ability to bridge the worlds of private international law and international private law (often referred to as uniform law). His work on private international law instruments such as the Brussels I Regulation[1] converge with his work on international private law instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG).[2] In the process, he demonstrates a comprehensive grasp of the needs of the transnational legal system. He has helped many, including this author, to develop a better understanding of the important overlap of private international law and international commercial law.

One of the most interesting aspects of this confluence of sets of legal rules is the way in which some legal systems have attempted to use rules of private international law for regulatory purposes. This application of non-substantive law rules to accomplish substantive law purposes has not always led to comfortable results.

In this chapter, I consider three areas in which, either through legislation or through the decisions of the European Court of Justice, private international law rules found in the Brussels I Regulation have overlapped with substantive law rules to create uncomfortable–and sometimes undesirable–results.[3] These examples arise at the overlap of (1) the CISG Article

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1 Council Regulation (EC) No 44/2001, O.J. Eur. Comm. (L 012/1) (16 Jan. 2001) ["Brussels I Regulation"], *as amended by* Council Regulation (EC) No 1496/2002 of 21 August 2002 (amending Annex I and Annex II), O.J. Eur. Comm. (L 225/13) (22 August 2002); Regulation (EC) No 1791/2006 of 20 December 2006, O.J. Eur. Comm. (L 363/1); and Regulation (EC) No 1103/2008 of 14 November 2008. O.J. Eur. Comm. (L 304), (consolidated version available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20100514:EN:PDF. The Brussels I Regulation was "Recast" in December 2012. 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), O.J.E.U. L 351/1, 20 December 2012 ["Recast Regulation" or "Brussels I Recast Regulation"]. Under Article 81, the Recast Regulation "shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014."

2 U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/Conf. 97/18, ("CISG") *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

3 Because the Brussels I Recast Regulation, *supra* note 1, has renumbered the articles of the Regulation going forward after 10 January 2015, in this chapter I make primary reference to the new numbering, often providing parallel reference to the Brussels I Regulation original article numbering. The term "Brussels I Regulation" is used both to refer specifically to the original Regula-

31 rules on delivery of goods and the Brussels I Recast Regulation Article 7(1) (original Article 5(1)) contract jurisdiction rules; (2) national rules on contract formation and the Brussels I Recast Regulation Article 25 (original Article 23) rules on choice of court; and (3) consumer protection and the rules of the Brussels I Recast Regulation on jurisdiction in consumer cases. After discussing each of these overlapping areas of law below, I provide comments on how, together, they demonstrate the need to avoid using private international law rules for the purpose of either implementing substantive law goals or for creating new rules that conflict with their substantive law counterparts.

II. Separate substantive and jurisdictional rules on place of delivery in international sales contracts

It would seem odd to most business persons to find that their sales contracts create two separate places for the delivery of goods: one for purposes of substantive contract law and another for purposes of jurisdictional rules. Nonetheless, a series of cases in the European Court of Justice has led to just that result. Most rules of substantive contract law provide reasonably clear rules stating the delivery obligation of the seller in a sales contract, and determining the place at which that obligation occurs.[4] In the principal effort to unify this contract rule on a global basis, Article 31 of the CISG provides that, "[i]f the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer."[5]

CISG Article 31 clearly allows parties to a contract to designate a place of delivery other than the place at which the seller hands the goods over to the first carrier. This can be done in two ways: (1) explicitly, using language clearly designating a place of delivery in the contract, or (2) implicitly, as occurs when a price-delivery term is included in the contract. In a transaction governed by the CISG, this produces three places to look to determine the place of delivery: (1) the place explicitly stated in the contract, (2) the place implicitly chosen by the insertion of a price-delivery term in the contract, and (3) in default of such express or implied designation of the place of delivery, through the default rule found in CISG Article 31. This is a rather simple and common progression for determining party intent in a contract relationship.

Consistency, predictability, and trade practice would seem to favor having the substantive rule on place of delivery apply as well in the application of rules of jurisdiction. Such is not the case, however, in the European Union. The place of delivery in a sale of goods contract

tion and to the Regulation post-Recast when no real change has occurred as a result of the Recast and the context is clear.

4 The U.S. approach to this issue is illustrated in *Windows, Inc. v. Jordan Panel Systems Corp.*, 177 F.3d 114, 117 (2d Cir. 1999), in which the court held that damage to windows while in transit from the seller to the buyer was the responsibility of the buyer, even though the contract stated that the windows were to be "delivered to New York City," because "[w]here the terms of an agreement are ambiguous, there is a strong presumption under the U.C.C. favoring shipment contracts," and "[u]nless the parties 'expressly specify' that the contract requires the seller to deliver to a particular destination, the contract is generally construed as one for shipment."

5 *Id*. art. 31(a).

Electronic copy available at: http://ssrn.com/abstract=2419636

is important for jurisdictional purposes under the Brussels I Recast Regulation. Article 7(1) of the Recast Regulation (original Article 5(1)) provides that "[a] person domiciled in a Member State may be sued in another Member State: (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question." In order to clarify otherwise difficult issues about which obligation is being considered, the original Brussels I Regulation added to the language of its predecessor Brussels Convention, through the insertion of paragraph (b):

> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
> – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
> – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.[6]

In a sales transaction governed by the CISG, if the parties have not otherwise provided in the contract, the place of the delivery obligation is determined by Article 31 – and is the place at which the seller hands the goods over to the first carrier. In Europe, however, this is not the place of delivery for jurisdictional purposes under the Brussels I Regulation. This issue came before the European Court of Justice in *Car Trim GmbH v. KeySafety Systems Srl.*[7] A dispute arose when an Italian manufacturer of airbag systems purchased component parts from a German seller. The German seller brought an action in a German court. The Bundesgerichtshof asked the ECJ to determine whether:

> the place where under the contract the goods sold were delivered or should have been delivered [is] to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser.[8]

In other words, did the CISG Article 31 substantive rule for determining place of delivery apply, or did the Brussels I Regulation create an autonomous jurisdictional rule for determining place of delivery in a sale of goods transaction? The Court of Justice chose the latter of these alternatives, stating that

> The first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the

6 The transformation of the Brussels Convention into the Brussels I Regulation brought with it concern about problems with Article 7(1) (original Article 5(1)) in determining the place of performance of the "obligation in question." Thus, in the Regulation subparagraph (b) was a new provision making clear that the important place of delivery in a contract for goods or services is the place in which the goods or services are to be delivered, regardless of whether the delivery or payment obligation is "in question" in the particular dispute.

7 Case C-381/08, [2010] E.C.R. I-01255.

8 *Id*. ¶ 26.

> place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.[9]

Because the *Car Trim* contract was governed by the CISG, the Bundesgerichtshof effectively asked the ECJ to determine whether the place of delivery for contract purposes was the same as the place of delivery for jurisdiction purposes. By focusing on the place at which the purchaser obtained "actual power of disposal over those goods at the final destination of the sales transaction," the Court created a clear inconsistency between contract law and jurisdictional law on the question of place of delivery in a sales contract.[10]

The *Car Trim* decision was followed in 2011 by *Electrosteel Europe SA v. Edil Centro SpA,*[11] which focused on the *Car Trim* language that "the place where the goods were or should have been delivered pursuant to the contract must be determined on the basis of the provisions of [the] contract."[12] When an Italian seller sued a French buyer in an Italian court, the ECJ was faced with determining " how the words 'under the contract' … are to be interpreted and, in particular, to what extent it is possible to take into consideration terms and clauses in the contract which do not identify directly and explicitly the place of delivery."[13] The Court held that the use of a price-delivery term governed by the ICC Incoterms effectively incorporated the Incoterms' substantive law rules on delivery for purposes of the jurisdictional rule of Article 5(1)(b) (Recast Article 7(1)(b)).

The combination of *Car Trim* and *Electrosteel* means that, in the European Union, (1) an express statement of place of delivery in a sales contract will govern for both substantive law and Brussels I jurisdictional purposes; and (2) an implied statement of place of delivery through incorporation of a price-delivery term will govern for both substantive law and Brussels I jurisdictional purposes; but (3) the absence of any express or implied reference to place of delivery in the contract will mean that the substantive law default rule on place of delivery will control for substantive purposes but not for jurisdictional purposes. There is a fourth category for which the result remains unclear. This is the case in which there is a clear choice of law clause referring to substantive law that has clear rules on place of delivery. After *Electrosteel*, it is not certain if this would be treated like category (2), with the choice of law being the equivalent of a price-delivery term with reference to the Incoterms for purposes of definition, or like category (3), because of no specific reference to place of delivery. While *Car Trim* makes clear that the complete absence of reference to the substantive law will lead to separate substantive and jurisdictional definitions of place of delivery, the language of *Electrosteel* implies that a clear choice of law clause would result in the same rule being applicable for both substantive law and jurisdictional purposes. If this is the proper interpretation, then if in *Car Trim* the parties had explicitly chosen the CISG to govern their

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9 *Id*. ¶ 62.

10 For further discussion of this approach under Article 7(1) (original Article 5(1)), see Ulrich Magnus & Peter Mankowski, European Commentaries on Private International Law: Brussels I Regulation art. 5 ¶¶ 108-112a (2d ed. 2012). See also, Ronald A. Brand, *CISG Article 31: When Substantive Law Rules Affect Jurisdictional Results*, 25 J.L. & Com. 181 (2005-2006).

11 Case C-87/10, [2011] E.C.R. _ (9 June 2011).

12 *Id*. ¶ 16.

13 *Id*. ¶ 18.

relationship, instead of relying on its application by default through CISG Article I(1)(a), the delivery rule in CISG Article 31(a) would have been determinative for both substantive law and jurisdictional purposes.

While the uncertainty caused by the divergence of substantive law and jurisdictional law in the jurisprudence of the Court of Justice may be avoided by careful contract drafting and the choice of an explicit place of delivery, good legal rules should not require such nuanced technical distinctions or such additional contract language. *Electrosteel* was a welcome carve-back from the confusing cut of *Car Trim*, but its facts did not allow the Court to repair all of the transactional unpredictability caused by the earlier decision. Thus, some uncertainty about the substance/jurisdiction distinction on place of contract delivery will remain, and will continue to require careful contract drafting. In the meantime, the overlap of private international law (jurisdictional) rules on top of substantive law rules applicable to the same issue will likely create confusion, at least for those from outside Europe looking in at EU rules.

III. Determining consent to choice of court agreements

Perhaps the most significant private international law development of the twentieth century was the shift to a general recognition of party autonomy in choice of court.[14] The standard rule that parties could not oust a court of jurisdiction was replaced by a general respect for the parties' choice of court. Respect for party choice of forum has become the general rule, with public policy limitations on that choice defining the exceptions to the rule.[15]

Party autonomy in international contracts is exercised by agreement, and no agreement exists without the consent of each party to the agreement. Thus, there can be no agreement on a choice of court without the consent of the parties. This raises the questions of what tribunal determines the existence of that consent and what law governs that determination.

When party autonomy is allowed, the party intent question (whether consent to choice of court exists) is separate from the sovereign limitations question (whether the parties are allowed to agree to have their disputes resolved in a specific court). Consent is a different

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[14] *See generally,* Peter Nygh, Autonomy in International Contracts (1999); Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, Liber Amicorum Hubert Bocken 544 (I Boone, I. Claeys, & L. Lavrysen, eds., Die Keure, 2009).

[15] *See, e.g.*, Hague Conference on Private International Law, Convention on Choice of Court Agreements, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98, arts. 6 & 9; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2), done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ["New York Convention"], available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. For previous discussions by the author on the evolution of the right to party autonomy, see Ronald A. Brand, Fundamentals of International Business Transactions Chapter 6 (2d edition, 2011); Ronald A. Brand, *The European Magnet and the U.S. Centrifuge: Ten Selected Private International Law Developments of 2008*, 15 ILSA Journal of International and Comparative Law 367-393 (2009); Ronald A. Brand, *Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice*, in Universalism, Tradition and the Individual, Liber Memorialis Petar Šarčivič 35-52 (Johan Erauw, Vesna Tomljenovic, and Paul Volken, eds., 2006).

concept from substantive validity, and both the forum and the law applicable to the determination of each concept may differ.

In order to understand the Brussels I Regulation approach to the questions of consent and substantive validity, it is useful to compare its terms with two other international legal instruments: The New York Arbitration Convention[16] and the 2005 Hague Convention on Choice of Court Agreements.[17] In the New York Convention, Article II contains rules on both substantive validity and formal validity, but no rules on consent (agreement formation). On substantive validity, Article II provides that the courts of Contracting States must honor arbitration agreements unless the subject matter of the dispute is not "capable of settlement by arbitration,"[18] or the agreement is "null and void, inoperative or incapable of being performed.[19] On formal validity, Article II requires that an arbitration agreement must be "an agreement in writing."[20] Because the Convention itself contains no rules on consent, it leaves that issue to the law otherwise applicable under the relevant rules of private international law.[21] Moreover, Article II provides no express direction on the law applicable to questions of substantive validity. Thus, a court faced with a substantive validity question under the Convention will apply its own law, including its own rules on conflict of laws, in determining the availability of the very limited substantive validity grounds for refusing to enforce an agreement to arbitrate.

The Hague Convention recognizes party autonomy for choice of court in Article 5, which provides that the court chosen in an exclusive choice of court agreement "shall have jurisdiction."[22] It also provides rules of both formal and substantive validity. On formal validity, Article 3 requires that an exclusive choice of court agreement be documented "in writing," or "by any other means of communication which renders information accessible so as to be usable for subsequent reference."[23] On substantive validity, like the New York Convention, it provides that a court may choose not to respect the choice of forum clause if that clause is "null and void."[24]

On the issue of substantive validity, the Hague Convention introduces an autonomous choice of law rule not found in the New York Convention. In Articles 5, 6, and 9, it provides

16 *Supra* note 15.

17 *Supra* note 15.

18 New York Convention, *supra* note 15, art. II(1).

19 *Id*. art. II(3).

20 *Id*. art. II(1).

21 *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary state-law principles that govern the formation of contracts.").

22 Hague Convention, *supra* note 15, art. 5. Unlike the New York Convention and the Brussels I Regulation, the Hague Convention on Choice of Court Agreements is not yet in effect for any state (Mexico has deposited its instrument of accession and the United States and the European Union have signed the Convention). *See* Ronald A. Brand & Paul M. Herrup, The 2005 Convention on Choice of Court Agreements: Commentary and Documents (2008), and the website of the Hague Conference of Private International Law at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

23 *Id*. art. 3(c)(ii).

24 *Id*. art. 5. Article 6 provides additional bases for non-recognition of a choice of court agreement by a court not chosen in the agreement.

that the determination of whether an exclusive choice of court agreement is "null and void" is to be made by applying the law of the state of the chosen court.[25] It thus begins by treating the choice of court agreement as valid for purposes of determining the law applicable to its own validity.

Article 25(1) of the Brussels I Recast Regulation (original Article 23(1)) provides the relevant rules on choice of court in the European Union, stating that "[i]f the parties, *regardless of their domicile*, 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, *unless the agreement is null and void as to its substantive validity under the law of that Member State*."[26] The two italicized clauses were added by the Recast Regulation. The second of them creates a new autonomous choice of law rule applicable to choice of court agreements.

The choice of law rule added by the Recast Regulation is applicable only to determinations of substantive validity. This is separate from the question of consent, which determines whether there exists an "agreement," the validity of which can then be tested. In 1976, the European Court of Justice interpreted the Brussels Convention predecessor to this provision, determining that it first requires that the court consider "whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated."[27] While the Court made reference to the predecessor provision to Recast Article 25 in that decision, it did so only to indicate that compliance with those rules helps to provide evidence of consent, not to demonstrate that those rules are substitutes for the rules of consent.

Prior to the Recast, commentators suggested that the Brussels I Regulation creates an autonomous rule on the question of consent as well as on the question of substantive validity. This was done while acknowledging that "the wording of Art. 23 is not very supportive in this respect," but stating nonetheless that "it is widely accepted that the basic requirement of the consensus can be inferred from the Article through an autonomous interpretation."[28] Professor Magnus, in his treatise on the Brussels I Regulation, noted that the "grounds for the material invalidity of the consent … have to be determined in accordance with the applicable national law,"[29] and concluded by stating that "the precise demarcation line between the autonomous scope of Article 23 [Recast Article 25] and the field covered by the applicable national law still remains rather vague."[30]

The European Court of Justice has effectively acknowledged the doctrine of separability in ruling that validity questions regarding a choice of forum clause are to be governed by the Brussels I Regime, while validity questions regarding the underlying contract in which that clause exists are to be governed by the substantive law applicable under the appropriate

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25 *Id*. arts. 5(1), 6(a), and 9(a).

26 Brussels I Recast Regulation art. 25(1) (original art. 23(1)). The language in italics was added by the Recast Regulation.

27 Estasis Salotti di Colzani Aimo et Gianmario Colzani v RÜWA Polstereimaschinen GmbH, (Case 24/76) [1976] ECR 1831, ¶ 7.

28 Ulrich Magnus, *Article 23*, in Ulrich Magnus & Peter Mankowski, Brussels I Regulation, art. 23, ¶ 78 (2d Rev ed. 2012).

29 *Id*. at ¶ 80.

30 *Id*.

rules of private international law.[31] It has also stated that the question of consent to a choice of court agreement is to be decided by national courts applying an analysis of "practice in force in the area of international trade or commerce in which the parties in question are operating."[32] This places the consent issue in the realm of national law, even though evidence of consent may be found in the indicia of formal validity required by Article 25 (original Article 23) of the Brussels I Recast Regulation. Moreover, the new language to Article 25 in the Recast removes the vagueness of the "line of demarcation" between the scope of Article 25 and national law.

The Brussels I Recast Regulation, like the New York and Hague Conventions, contains no autonomous rule of applicable law for determining consent in the formation of the relevant choice of forum agreement. The autonomous choice of law rule added by the Recast is clearly limited to substantive validity. Thus, the matter of consent is left to the law of the forum. The question of consent is an issue of party autonomy. It is a factual determination focused on identifying the intent of the parties. It is governed by rules of contract formation. Validity, on the other hand, is determined by rules expressing interests of the state. Those rules may place limits on party autonomy (*e.g.,* no agreement made by a minor is valid) and otherwise determine what agreements will and will not be recognized by the state. It is the state interest issue–the question of validity – that is the subject of the autonomous choice of law rule found in Article 25 of the Brussels I Recast Regulation.

This distinction between party intent (consent) and state interest (substantive validity) is an important one, and the existence of an autonomous rule applicable to one should not be read to infer that the same rule is applicable to the other. The new language contained in Article 25(1) of the Brussels I Recast Regulation arguably adds clarity on the question of the law applicable to the issue of substantive validity. This should enhance predictability for both contract drafters and litigators. Because Article 25 applies to choice of court agreements selecting member state courts (1) even when the parties are both from outside the

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31 Benincasa v Dentalkit Srl., Case C-269/95, [1997] ECR I-3767, ¶ 25:
A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the lex causae determined by the private international law of the State of the court having jurisdiction.

32 *See, e.g.*, Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravieres Rhenanes SARL, Case C-106/95 [1997] ECR I-911, ¶¶ 20 & 25:
The fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice. […]
It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it.

European Union,[33] and (2) even if those agreements pre-date the effective date of the Recast Regulation,[34] the importance of this distinction as finalized in the Recast Regulation is significant for current drafting of choice of court agreements by many parties.

IV. The Brussels I Recast Regulation and consumer protection

While the general rule of Article 25 of the Brussels I Recast Regulation (original Article 23) gives respect to party autonomy in upholding choice of court agreements, this respect for party autonomy is limited and does not apply to agreements to which one party is a consumer. Consumer contracts are governed by Articles 17-19 (original Articles 15-17)).[35] Article 18 (original Article 16) provides that a consumer may sue either at the domicile of the merchant or in the consumer's home jurisdiction, but the merchant may sue only in a court located in the consumer's state of domicile.[36] Choice of court is then limited in Article 19, by prohibiting any pre-dispute choice of forum clause by a consumer that would lead to the courts of a different state.[37] This arrangement is assumed to protect consumers from being drawn into undesirable choice of forum agreements by unscrupulous merchants.[38]

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33 Brussels I Recast Regulation, *supra* note 1, art. 25(1). As noted in the text at note 26, above, the Recast added the phrase "regardless of their domicile" which describes the parties to a choice of court agreement governed by Article 25.

34 In Case 27/79, *Samicentral GmbH v René Collin*, [1979] E.C.R. 3423, the Court of Justice stated with regard to the Brussels Convention that choice of court agreements that pre-dated the Convention were governed by the convention so long as the action was brought after the effective date of the Convention. This concept would appear to continue to apply to the Brussels I Regulation and the Recast Regulation.

35 *See generally,* Brussels I Recast Regulation, *supra* note 1, recital 18 (original recital 13) ("In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."). While Articles 18 and 19 of the Recast Regulation (original Articles 16 and 17) do not technically "prohibit" pre-dispute binding choice of court agreements, that is their practical effect given the limitations placed on such agreements.

36 *Id*. art. 18 (original art. 16). While Article 16 of the original Brussels I Regulation applied the benefit of home court jurisdiction to a consumer only as to suits against merchants domiciled in an EU Member State, the Recast Regulation added language to what is now Article 18(1), making this rule applicable regardless of the domicile of the merchant:

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, *regardless of the domicile of the other party*, in the courts for the place where the consumer is domiciled. (emphasis added). Thus, while the bulk of the Chapter II jurisdiction rules of the Recast Regulation apply only to cases in which the defendant is domiciled in a Member State, the consumer jurisdiction rules are extended to have global reach. This extends the discriminatory aspect of Recast Articles 5 and 6 (original Articles 3 and 4), previously discussed in Chapter 2 at notes 17-18 and accompanying text.

37 *Id*. art. 19 (original art. 17).

38 Recast Regulation, *supra* note 2, recital 18. *See also*, Ole Lando & Peter Arnt Nielsen, *The Rome I Regulation*, 45 Common Mkt. L. Rev. 1687, 1712 (2008) (consumers "are in need of protection for social and economic reasons, they are considered weak parties").

The limitations on party autonomy contained in Articles 18 and 19 (original Articles 16 and 17) of the Brussels I Recast Regulation are mirrored in Article 6 of the Rome I Regulation,[39] which provides that, in consumer contracts, the applicable law shall be "the law of the country where the consumer has his habitual residence."[40] While a consumer may agree to a choice of law clause, "[s]uch a choice may not … 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" of the consumer's habitual residence.[41]

Articles 17-19 of the Brussels I Recast Regulation (original Articles 15-17) represent a clear effort to use rules of private international law to achieve substantive law objectives. They combine with the Rome I Regulation to provide that a consumer always has available his home court and his home law. Such an approach assumes that, if consumers are not so limited, they will be coerced into bad choices of forum that favor the merchant. The problem is that the prohibition is complete, and consumers are thus also prohibited from entering (pre-dispute) into good choice of forum agreements.

The approach to choice of forum and consumer protection is very different in the United States, where a private international law approach to substantive regulation has been clearly rejected. This is most evident in the U.S. Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*,[42] upholding the use of a small print choice of court clause on the back of a cruise ticket that required litigation of all disputes in Florida. Considering a suit brought by the consumers in the state of Washington, Justice Blackmun's majority opinion acknowledged the lack of equal bargaining power or negotiation.[43] At the same time, however, it found economic value for the consumer at the transactions stage that offset the disadvantage at the dispute resolution stage:

> Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.[44]

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39 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 177 O.J.E.U. 6, 4 July 2008, art. 6.

40 *Id*. art. 6(1).

41 *Id*. art. 6(2).

42 499 U.S. 585 (1991).

43 "Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." *id*. at 593.

44 *Id*. at 593-94 (citations omitted).

Thus, party choice of forum in the United States is met with a very different approach than occurs under the Brussels I Recast Regulation, with no reference to any overriding public policy or mandatory rule that might prevent a consumer from entering into a valid choice of forum agreement.[45] Instead, the Court considered the benefits to the consumer at the transaction stage based on three economic interests served by upholding the choice of court agreement: (1) the merchant's interest in litigating all similar disputes in a single forum, (2) merchant and consumer interests in predictability, and (3) the general (public) interest of all consumers of such cruises in the lower price that is assumed to result from upholding such clauses on the basis of the first two interests. The result has been a general lack of restrictions on choice of forum and choice of law in consumer contracts.[46]

The U.S. approach to choice of court and consumer protection thus focuses on the transaction stage, and the benefits to both the merchant and the consumer of predictability that results in a lower price to the consumer. This benefit is then available to all similarly situated consumers, regardless of whether a dispute arises over the transaction. The EU approach focuses on the litigation stage, providing a benefit to the consumer who ends up in a dispute with the merchant, but ignoring the value to both the merchant and the consumer of having valid choice of forum agreements at the transaction stage. The EU approach also assumes that a consumer is likely to turn to the courts in a low value dispute with a party from another country, in which it would be necessary first to obtain a judgment in the consumer's home jurisdiction and then seek recognition and enforcement of that judgment in the jurisdiction in which the merchant has assets. Each system sanctions a trade-off between benefits at the transaction stage and benefits at the dispute resolution stage.

The European Union Parliament has stated that the use of private international law re-

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45 The *Shute* Court did consider the argument that the choice of court clause violated a federal statute prohibiting waiver of liability clauses in contracts for the carriage of persons, but found the statute not to have been applicable. *Id*. at 595-96. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972), the court indicated that the enforcement of choice of forum clauses generally will not apply if there exists "fraud, undue influence, or overweening bargaining power."

46 In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n 21 (1985), the Supreme Court, referring to limits on agreements to arbitrate, stated, in a footnote, "Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the [New York] Convention." Some U.S. statutes do limit the use of pre-dispute binding arbitration agreements. *See, e.g.*, 10 U.S.C. §987(e)(3) ("It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which – (3) the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute"); 15 U.S.C. §1639c(e)(1) ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction."); 15 U.S.C. §1226(a)(2) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."). Such limits exist, however, only in legislation dealing with purely domestic matters, thus saving to the parties the ability to bring suit in U.S. courts. They do not generally apply to cross-border transactions.

strictions on choice of forum and choice of law "is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings."[47] Moreover, it is difficult to find reported cases in which a consumer has clearly benefitted from the application of the Brussels I and Rome I rules designed to protect consumers by saving for them their home court and home law.[48] One could conclude from this that practical experience has proved the "illusory" nature of the perceived benefits of such rules.

The problem with the European Union's use of private international law rules to implement substantive consumer protection goals has recently been demonstrated in negotiations in UNCITRAL Working Group III, which is attempting to create a set of model procedural rules for online dispute resolution (ODR) in high-volume, low-value online transactions.[49] Those negotiations are founded on the premise that, for such transactions, access to courts is not access to justice,[50] and an alternative forum is necessary that is both efficient and effective. Thus, the Working Group has attempted to design soft law rules that would insure procedural fairness in efficient and effective ODR.[51] The EU has insisted in the negotiations that its private international law rules that implement its concept of consumer protection be applied within the UNCITRAL ODR rules through a prohibition on pre-dispute binding choice of forum (arbitration) agreements. Thus, the system being designed to provide mostly buyers (*i.e.*, a group largely populated by consumers) with a binding and enforceable decision against an offending seller in such transactions, would be made unavailable to the group of buyers most in need of such a system. The EU approach would effectively confront the basic premise that access to courts is not access to justice for the type of transactions being considered with the demand that European consumers must always retain access to courts (even though that avenue creates only "illusory" benefits). The result, if enshrined in the rules,[52] would demonstrate a misguided attempt to extend the application of rules of private

47 European Parliament, Committee on Legal Affairs, Final Compromise Amendments to the Rome I Regulation, 14 Nov. 2007 (DT\Rome IENREV.doc), at p. 9/36, *available at* http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj%282007%291119_romei_am_/JURI_OJ%282007%291119_RomeI_AM_en.pdf.

48 In Case C-464/01, Gruber v. Bay Wa AG, 16 September 2004, the European Court of Justice ruled that a farmer who contracted to receive roof tiles to be used on farm buildings that included both his residence and buildings for livestock "may not rely on the special rules of jurisdiction" developed for consumer protection in the Brussels Convention. In Meglio v. Societe V2000, Cour de cassation, 1997 Rev. arb. 537 (21 May 1997), the French *Cour de cassation* held that a French resident's purchase of limited series Jaguar placed the matter outside of the scope of similar restrictions on consumer arbitration.

49 The public documents for the Working Group negotiations [Working Group documents] may be found at http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

50 Report of the 43rd Session of UNCITRAL (June 21-July 9, 2010), U.N. Doc. A/65/17, ¶ 257 ("traditional judicial mechanisms for legal recourse [do] not offer an adequate solution for cross-border e-commerce disputes," in "small-value, high-volume business-to-business and business-to-consumer disputes").

51 For a more detailed discussion of the negotiations, see Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 Loyola U. Chicago Int'l L.Rev. 11 (2012).

52 The Report of the 28th Session of the Working Group, held in New York on May 20-24, 2013, were

international law for substantive law purposes in a manner that achieves exactly the opposite of the stated goal of the negotiations.

V. Avoiding the misuse of private international law rules

The three examples discussed above demonstrate the problems of using rules of private international law either to implement substantive law goals or to create rules that conflict with substantive law (particularly international private law) rules. The results are at best uncomfortable and at worst counter-productive.

The path taken by Europe since the inclusion of the original Article 220 in the Rome Treaty,[53] which led to the Brussels Convention,[54] and through the Treaty of Amsterdam,[55] to the Brussels I Regulation and now its Recast, has also led to the assumption of Union competence for many other matters of private international law and judicial cooperation. This has, overall, had a very positive and harmonizing effect on private international law within the European Union. Nonetheless, specific examples exist in which the resulting instruments and ECJ decisions have overlapped with substantive law, whether national or international, in a manner that is less than fully satisfying from a systemic perspective.

This overlap is particularly evident in the interaction between (1) CISG Article 31 rules on delivery of goods with the Brussels I Recast Regulation Article 7(1) (original Article 5(1)) contract jurisdiction rules; (2) national rules on contract formation and the Brussels I Recast Regulation Article 25 (original Article 23) rules on choice of court; and (3) consumer protection rules and the rules of the Brussels I Recast Regulation on jurisdiction in consumer cases. These examples provide more than grist for academic discussion. They demonstrate an area in which the road forward in the development of EU rules of private international law should be built on a clear understanding of the need to avoid conflict between private international law and substantive law. They also demonstrate the value of using rules of private international law only for their traditional purposes and not to create substantive law change.

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not available at the time of this writing, but include the EU proposal through bracketed language in the provisions of Article 1 of the Draft Procedural Rules. Working Group documents, *supra* note 49.

53 Treaty Establishing the European Economic Community (1957), available at http://eur-lex.europa.eu/en/treaties/index.htm#founding. The current version is found in the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, O. J. Eur. U. (C 83/1) (30 Mar. 2010).

54 European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, Sept. 27, 1968, 33 O.J. Eur. Comm. (C189/1) 1 (28 July 1990) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1989 accession of Spain and Portugal), ["Brussels Convention"]. The Convention was also subject to the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, done at Brussels, Nov. 29, 1996, 40 O.J. Eur. Comm. (C15/1) (15 Jan. 1997). It was generally replaced by the Brussels I Regulation in 2001.

55 Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities, available at http://eurlex.europa.eu/en/treaties/dat/11997D/htm/11997D.html.