International Contracts in the EU *Conflictus Iurisdictionum et Conflictuum Legum*. What Future?

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Abstract

This article aims to give a general overview of the way in which international contracts are regulated within the European Union, problematizing the implications of the conflictual approach in the designation of the applicable law. For a better contextualization of the problem, we will analyze, primarily, the jurisdiction rules of Regulation Brussels I bis - 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) - only in contractual matters, and then the conflict rules of the Rome I Regulation – Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the applicable law to contractual obligations - maxime articles 3 and 4.This methodology is justified due to conflicts of jurisdiction; competence standards of the courts (including the possibility of the parties entering into pacts which assign jurisdiction) positioning themselves, chronologically, before the issue of the law applicable to the situation/conflict to be resolved (this by determining the principle of autonomy of the parties in choosing the applicable law to the contract or, in the absence of choice, through the "supplementary criterion"). Finally, we will seek to discuss the possibility of, under the principle of autonomy, the parties referring to non-state law and what its implications are.

Keywords: *European Union, international contracts, competent courts, applicable law.*

JEL Classification: K22, K33

1. Introduction

Predictability and legal certainty are hallmarks of international trade. Its operators want to know, in advance, what the outcome of a controversial issue might be. If we add to this the fact that many contracts are long-term, we see that everything that can contribute to their stability will be an element that can be considered by the contracting parties.

Long ago, in the 16th century, Charles Dumoulin, a French jurist, considered the principle of autonomy of the will in Private International Law.[2] We all know this is about the choice of law to govern the contract[3]. However, the principle also extends to the

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[2] Cf. Ancel, B. and Lequetie, Y., *Grands affêts de la jurisprudence française de droit intemational prive*, Paris: Ed. Sirey, 1987, p. 66 and following.

[3] Eva Jančíková, Janka Pásztorová, *Promoting EU values in international agreements*, Juridical Tribune - Tribuna Juridica, Volume 11, Issue 2, June 2021, pp. 203-217. See also Silvia Matúšová, Peter Nováček, *New generation of investment agreements in the regime of the European Union*, Juridical Tribune - Tribuna Juridica, Volume 12, Issue 1, March 2022, pp. 21-34; Cristina-Elena Popa Tache, *International investment protection in front of the states role in crisis times to managing disputes*, Juridical Tribune - Tribuna Juridica, volume 10, issue 3, December 2020, pp. 454-465; and Botond Zoltán Petres, *Behind every mask… is another mask – structural considerations on trade usages in international commercial law – dissolving some*

possibility for the parties to choose the body that will judge their disputes.

The autonomy of the will undoubtedly presents itself as a corrective factor for legal uncertainty, both regarding the courts and in relation to the applicable law.

Because conflicts of jurisdiction precede conflicts of laws, we will first focus our attention on the law of international jurisdiction and then on the law of conflicts to determine the law applicable to the contract.

The resolution of a dispute can, therefore, take two forms: either the parties want a state court, and, in this sense, they must subscribe to a jurisdiction clause, or they want another form of justice, arbitration, and will subscribe an arbitration convention, in the form of an arbitration clause in a contract or in the form of a separate agreement[4].

If the parties have not provided for jurisdiction in their contract to assess disputes arising from their relations, they will also have the possibility of signing an agreement conferring jurisdiction at the time the dispute occurs or an arbitration convention, in the form of a separate agreement[5].

If, by any chance, they disagree regarding the method of resolving disputes, they will still have the final possibility of submitting themselves to the judicial courts through the rules of international jurisdiction of the forum State.

Currently, this competence, because of the Europeanization of private international law, has rules applicable in all Member States.

In this context, we will look at some aspects of the 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), called by Brussels I bis Regulation.

Next, we will reflect on the parties' choice regarding the applicable law, enshrined in the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the applicable law to contractual obligations, called by Rome I Regulation, and the possibility of electing a-national material rules, *v.g. lex mercatoria* and/or soft law rules.

2. *Conflictus Iurisdictionum*

Within the scope of international contracts, there is often a clause indicating the method of resolving disputes that may arise from relations between the contracting parties, commonly known as the forum selection clause.

Over time, this clause has proven to be extremely important for the predictability of the body or institution that will assess disputes and, consequently, the law applicable to the dispute's resolution, if the parties have not designated it in the contract through a clause of choice of law.

In terms of private international relations, especially in matters of contractual, civil, and commercial obligations, and with regard to the jurisdiction of state courts to

confusions, Juridical Tribune - Tribuna Juridica, Volume 10, Issue 2, June 2020, pp. 290-307.

[4] Cristina Elena Popa Tache, *Adapting an Efficient Mechanism for Resolving International Investment Disputes to a New Era. Vienna Investment Arbitration and Mediation Rules*, International Investment Law Journal, Volume 1, Issue 2, July 2021, pp. 91-101.

[5] Mentor Lecaj, Granit Curri, *Advantages of International Commercial Arbitration in Resolving the Commercial Contests*, Perspectives of Law and Public Administration, Volume 10, Issue 2, June 2021, pp. 96-101.

assess the respective disputes, it will be important to determine which court is internationally competent for this purpose.

Currently, Member States have, in their legal systems, rules of secondary law on international jurisdiction, capable of determining the competent forum to assess a dispute arising from a multi-sited relationship.

From an early stage, the European Community, today the European Union, expressed its concern with implementing a European area of freedom, security, and justice.

In the article 220 of the Treaty establishing the European Economic Community, Treaty of Rome of March 25, 1957, it was provided that contracting States could implement the simplification of formalities aimed at the recognition and enforcement of judicial decisions.

Two years later, in 1959, the Commission of the European Communities considered that the creation of a true internal market would only be achieved if there was effective legal protection within the Member States.

In 1968, when the six original Member States of the European Economic Community concluded the Convention on Jurisdiction and the Enforcement of Decisions in Civil and Commercial Matters (Brussels Convention), it was clear that the provisions of Article 220 of the Treaty of Rome had been exceeded. The new instrument had also established rules of international jurisdiction.

This legal instrument thus provided for rules of direct jurisdiction, rules that define the jurisdiction of the Courts of Community States, and rules of indirect jurisdiction, regarding the recognition and enforcement of judicial decisions in a State other than the one that issued them.[6] The embryo of the future European civil procedure was thus laid.

However, it was quickly realized that, for the existence of a true internal market of free movement of commodities, people, goods, and capital, it would be necessary to establish a common area of justice, where every European citizen could, equally, assert their rights, regardless of the Member State in which they reside. The recognized role of harmonizing the rules of private international law has thus become an essential objective.

In this sense, the Tampere European Council, in 1999, established three priority axes of action for the creation of that space, reinforcing the importance of Private International Law in its various dimensions. Namely: determining the State whose courts will be competent to hear the dispute - measuring the international jurisdiction of the courts or conflict of jurisdictions; designate the applicable law by the court that assesses the case's merits (conflict of laws); and recognize in another Member State the decision given by the competent court - recognize effects of the foreign decision - also enabling its execution outside the territory where it was given.

The 1968 Brussels Convention, as well as the Regulation that replaced it, Council Regulation (EC) No. 44/2001 of 22 December 2000 on judicial jurisdiction and the recognition and enforcement of decisions in civil and commercial matters, allowed the applicant/author/plaintiff to choose a certain forum. Although the Convention depended on ratification by the States, and the Regulation imposed its general and mandatory application, in all its elements, in all Member States, the environment created

[6] Sousa, M.T.; Vicente, D.M, *Comentário à Convenção de Bruxelas, Lex* Edições Jurídicas, Lisbon, 1994, p. 15 to 17.

by these two instruments proved to be conducive in relation to the party that intended to establish an action, allowing you to choose a court in one Member State over another. This possibility gave particular emphasis to *forum shopping*, an "activity" that presupposes the existence of concurrent competences between two or more jurisdictions, encouraging the handling of the *iuris* competence factor due to the material result that is intended to be obtained.[7]

It was soon established that the fact that there were "harmonized" rules regarding the courts' jurisdiction did not prevent the disparity in substantive legal solutions. The conflict rules of each Member State, which were different at the time, would inevitably lead to the application of different laws due to different individualizing criteria.

It was urgent, as we will see later, to harmonize the rules on conflicts of laws, to guarantee that the law applicable to the dispute was the same wherever the issue arose. Currently, in the Europe of 27.

Conflictus iurisdictionum arise when it is intended to initiate legal action relating to a dispute arising from a private international relationship. It is necessary to ask which court is internationally competent.

Once the jurisdiction has been established, the court must decide on the law applicable to the case's merits (normally coinciding with the law applicable to the contract), and there may also be a need to recognize the effects of the decision, as a jurisdictional act, outside the territory of the court that handed down it, and also execute it extraterritorially.

Regulation 44/2001, Brussels I Regulation, enshrined in its Article 73 that "*no later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation"*.

In this context, the Brussels I bis Regulation emerged. In accordance with the provisions of its article 81, it came into force on January 10, 2015, presenting itself as a fundamental instrument, as law of international competence, in contractual matters, within the EU scope.

Like the previous one, it establishes rules of international jurisdiction and rules on the recognition and enforcement of judicial decisions and other foreign executive titles.

Regarding its material scope, in the wake of the Brussels Convention and the Brussels I Regulation, it continues to apply in civil and commercial matters, regardless of the nature of the court, even though civil liability actions against the public administration are, now expressly excluded from its scope.[8]

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[7] This manipulation of the competence connection factor was not always seen as something undesirable. Pay attention to the case, The Atlantic Star, which was heard in the Supreme Court of Judicature, Court of Appeal, England & Wales, with Lord Denning claiming that the right to litigate in that court was not exclusive to Englishmen and could be extended to foreigners. He also mentioned that they can also litigate in our Courts. At the time, they normally faced the possibility of litigating in court depending on the result. Cf. *Case of Atlantic Star v. Bona Spes* (1972) apud Guthrie, N., *A Good Place to Shop: Choice of Forum and the Conflict of Laws* (1995). Ottawa Law Review, Vol. 27, No. 2, 1996. Available at SSRN: https://ssrn.com/abstract=2713217. See some specific issues in Cristina Elena Popa Tache, Silviu Constantin, *Allocation of Costs in ICSID Arbitration a Continuing Challenge to International Law*, International Investment Law Journal, Volume 3, Issue 1, February 2023, pp. 4-16, 2023.

[8] The status and capacity of natural persons, matrimonial regimes, wills and successions, bankruptcies,

Given its extension, it presents itself as the main instrument with regard to international (European) civil proceedings, constituting, compared to other instruments (Regulations), a framework for interpreting possible gaps present therein.[9]

2.1 Jurisdiction law in Brussels I bis Regulation

2.1.1. Jurisdiction attribution agreements

The Brussels I bis Regulation elected as general criterion of competence the domicile of the defendant, although enshrining, in parallel and alternatively, rules of special jurisdiction aimed at protecting the weaker party.

It provided for the possibility of extending jurisdiction, through jurisdiction-attributing pacts, and established rules of exclusive jurisdiction for certain matters, due to the close connection of the dispute to a certain territory and the need to harmonize exclusive jurisdictions between Member States.

The delimitation of the notion of some institutes used by the Regulation, e.g. the pact attributing jurisdiction, must be made autonomously, using the interpretation criteria recognized by European jurisprudence and doctrine, predominating the purposes of the norms and the objectives to be achieved within the scope of the EU Institutions and their original primary law.[10] Therefore, the domestic law of each Member State must be excluded, only considering the goals and interests that the legislative act in question intends to protect.[11]/[12]

It is also noted the concern of the European legislator's in enhancing the application of the Regulation whenever one of the parties involved in the process does

concordats and similar processes remain excluded; social security; and arbitration. Regimes that regulate relationships with effects comparable to marriage in accordance with the law applicable to them are excluded; actions related to food, which were included in the previous regulation, are now excluded from the scope of application of the Brussels I bis regulation, given that, in the meantime, Council Regulation (EC) no. 4/2009 December 2008, relating to jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations. See also for a comparative view Tugce Oral, *Exemption from liability according to the art. 79 of the Convention on International Sale of Goods (CISG)*, Juridical Tribune - Tribuna Juridica, Volume 9, Issue 3, December 2019, pp. 644-656; or Cristina Elena Popa Tache, *Overview of the purpose of international banking agreements*, Perspectives of Law and Public Administration, Volume 11, Issue 1, March 2022, pp. 11-16; and Zdenek Fiala, Olga Sovova, *Current Issues of the Public Service and Administration. Theoretical Bases and Experience in the Czech Republic*, Perspectives of Law and Public Administration, Volume 9, Issue 2, December 2020, pp.160-166.

[9] Vouga, R.T, *Reconhecimento e execução de decisões no âmbito do Regulamento Bruxelas I-Bis*, Coleção Caderno especial, Centro de Estudos Judiciários, 1st edition, 2019, p. 24 and following. Available at: https://cej.justica.gov.pt/LinkClick.aspx?fileticket=AGVisiY_Syo%3D&portalid=30.

[10] Pinheiro, L. L., *A interpretação no direito internacional privado/Interpretation in private international law*, Cuadernos de Derecho Transnacional (Octubre 2020), Vol. 12, Nº 2, p. 497 and 498.

[11] Cf. Judgement of the Supreme Court of Justice (SCJ). Case: 6919/16.0T8PRT.G1.S1, 13-11-2018. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:82018PT1113(51)&from=NL.

[12] SCJ, in Portugal, argues that the notion of a pact attributing jurisdiction, art. 25 of Regulation (EU) 1215/2012 of the Parliament and of the Council, of December 12, 2012, is autonomous, in relation to the domestic law of each Member State (in fact, it's also the understanding of the ECJ and, currently, of the CJEU) – the validity of the pact of jurisdiction must be exclusively assessed in light of the provision of the Regulation itself, excluding the summons, in this case and in particular, of art. 94th of the Portuguese Civil Procedure Code and the Regime of General Contractual Clauses (DL 446/85, of 25 October).

not reside in a Member State, e.g., in consumer contracts and individual employment contracts.

For the topic under analysis, it is highlighted the important role recognized by the autonomy of the parties in determining international jurisdiction. Article 25 of Brussel I bis Regulation allows them, in terms of extension of competence, to be "all" domiciled in non-member States, and this particularity constitutes a broadening of the scope compared to previous instruments, which provided for the need for one of the parties to be domiciled in a Member State.

In paragraph 1, it is also determined which law is competent to determine the nullity of the pact granting jurisdiction.[13]/[14]/[15]

It appears that the legislator did not delimit the autonomy of the parties, which denounces the possible attribution of jurisdiction to a specific court or, globally, to the courts of a Member State. In the latter case, the respective jurisdiction will be determined according to the nature of the disputes arising from the legal relationship that unites them.[16] It should be noted that such indication must always fall to a court located in a Member State. The existence of a jurisdiction agreement means that the jurisdiction of the designated court is exclusive unless the parties agree otherwise.

As for formal requirements, article 25 establishes that the pact can be written or verbal, but with written confirmation. The requirement for written form is linked to the need for the parties to reflect on the meaning of their agreement and its consequences. If, eventually, a jurisdiction clause is included in the list of general contractual clauses, it will be understood that such a clause is lawful whenever the contract is signed by both parties and expressly refers to the general contractual clauses that include the clause.[17]/[18]

In fact, the existence of a written document, with constitutive or confirmatory content, that enshrines the agreement of wills in the conclusion of a pact attributing jurisdiction, in the precise terms set out in point a), paragraph 1 of article 25, constitutes a formality *ad substantiam*. On the other hand, the absence of a written agreement cannot be overcome by resorting to tacit acceptance.[19]

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[13] This corresponds to what is enshrined in article 5, paragraph 1 of the Convention on Choice of Court Agreements (Concluded 30 June 2005). "*The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State".*

[14] Cf. Whereas (20) Brussels I bis Regulation, "*Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-oflaws rules of that Member State"*.

[15] Pinheiro, L.L., *Temas de direito marítimo – III pactos de jurisdição e convenções de arbitragem em matéria de transporte marítimo de mercadorias*, III Jornadas de Lisboa de Direito Marítimo, 2013. Available at: https://portal.oa.pt/upl/%7B67540703-e86b-4bd8-8e74-81c02f60f0f6%7D.pdf, p. 575 et seq.

[16] In this sense, Gonçalves, M. M., *Competência Judiciária na União Europeia*, Scientia Ivridica, nº 339 (2015), p. 441 et seq.; Ruiz, E. C., *International private law and the scope of private enforcement of competion law*, Valladolid, L*ex* Nova, 2011, p. 619.

[17] Judgement of 7 July 2016, Hőszig Kft. v. Alstom Power Thermal Services, (and referred case law). Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=181461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1001315.

[18] Judgement of 8 March 2018, Saey Home & Garden, NV/SA v. Lusavouga-Máquinas e Acessórios Industriais, SA. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=200063&doclang=PT.

[19] Ibidem.

If the pact, within the scope of an international contract, is in accordance with usages that the parties know or should know, usages that are widely known in this sector of activity and regularly observed by the parties in contracts of the same type, it must be admitted, article 25, point b).

However, pacts can be valid but ineffective. We are talking about pacts that are contrary to the provisions of insurance and consumer contracts or violate exclusive competences, article 25, paragraph 4.

In accordance with paragraph 5, it is enshrined the autonomy of the pact in relation to the contract in which it is inserted. Jurisdiction agreements that form part of a contract are treated independently from other terms of the contract. Therefore, the validity of the agreement cannot be challenged for the sole reason that the contract is invalid.

Regarding the tacit extension, the Brussels I bis Regulation, maintaining and developing the spirit of protection of the weak party provided for in its predecessor, establishes, in terms of protecting the weaker party, that the "spontaneous" appearance of the defendant before a court, requires this body to inform the defendant about his right to challenge the jurisdiction of the court and about the consequences of his appearance, before assuming its jurisdiction.

2.1.2. Determination of the jurisdiction of the court in the absence of an agreement

Whenever the court has not been designated by agreement of the parties, nor through a tacit extension, it is then the responsibility of the party which initiates the action, to observe the rules of international jurisdiction enshrined in the Brussels I bis Regulation, *in casu*, in the context of contracts. In these terms, the Regulation establishes a general criterion of competence and several alternative special criteria, created to protect the most vulnerable party.

Article 4 sets out the general criterion, choosing the defendant's domicile connection in a Member State. As expressly stated in Recital (15) of the Regulation "*the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor.*"

In short, people domiciled in a Member State can be sued, regardless of their nationality, before the courts of their place of domicile. This requirement therefore constitutes a condition for the applicability of the rules of direct jurisdiction provided for in the Regulation. If the applicant is not domiciled in a Member State, the Regulation cannot be applied. In this case, appeal will be made to the internal law of the forum State, to its rules of international jurisdiction.

In addition, all other special competence criteria must be interpreted restrictively, as they represent exceptions to that general principle, namely, the special criteria of article 7, paragraphs 1 and 2 of the Regulation. However, it is important to emphasize that the special rule does not derogate from the general rule. The applicant can therefore choose between bringing the action in the court where the defendant is domiciled or in one of the competent courts in accordance with the criteria of special

jurisdiction.[20]

The regulation, following its predecessor, provides that, in contractual matters, the competent court will be that of the place where the obligation in question was or must be fulfilled. In the absence of an agreement stating the contrary, in the case of the sale of goods, it will be the place, in a Member State, where, under the terms of the contract, the goods were or are to be delivered, if there are several, to the place of main delivery (which is demonstrate a strong connection with the place)[21]; and, in the provision of services, the place, in a Member State, where, under the terms of the contract, the services were or are to be provided, if there are several, where the main service is to be provided.[22]

One can also conjecture about what we should understand by service provision. This contract must have as its main goal the carrying out of an activity, not involving the transfer of ownership of a thing, nor the use of it.[23]

If jurisdiction cannot be determined in accordance with the criteria of article 7, paragraph 1, point b), it will be applied point a) of the same precept, and the court of the place where the obligation is fulfilled, determined according to the dispute, will have jurisdiction, as per point c) of the same precept. If point a) is applied, the connection of jurisdiction, as referred to, is the place where the obligation in question was or must be fulfilled. If the parties have not mentioned this place, it must be determined in accordance with the supplementary criteria set out in the Rome I Regulation.

The concept of "contractual matter", within the meaning of this provision, must be interpreted, like all other concepts, generally present in secondary legislation, autonomously in relation to national laws, considering the system and objectives of the instrument in question and in a restrictive manner, taking into account the exceptional nature of these special criteria for attributing competence, in view of the general principle set out in article 4, paragraph 1.[24] In this sense, it must cover a situation in which there is a commitment freely assumed by a part regarding to the other.[25]

If the defendant is not domiciled in a Member State, we must apply article 6 of the Brussels I bis Regulation, appealing to the rules of jurisdiction of that same State.

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[20] Gonçalves, M. M., *Competência Judiciária na União Europeia*, Scientia Ivridica, nº 339 (2015), p. 427.

[21] The place of delivery may be expressly determined in the contract, or the parties may have adopted INCOTERMS.

[22] Judgment of the Court (Fourth Chamber) of 3 May 2007. Color Drack GmbH v Lexx International Vertriebs GmbH. Available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=61471&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1584477.

[23] López-Tarruella Martínez, A. *La Regulación De Los Contratos Internacionales En La Unión Europea*. *AGENDA* 2015, *22*, p. 175. Available at: https://revistas.pucp.edu.pe/index.php/agendainternacional/article/view/13852.

[24] Cf. Judgment of the Court (Fourth Chamber) of 23 April 2009 (reference for a preliminary ruling from the Oberster Gerichtshof — Austria) — Falco Privatstiftung, Thomas Rabitsch v Gisela Weller-Lindhorst (Case C-533/07); Judgment of the Court (Third Chamber) of 16 July 2009 (Reference for a preliminary ruling from the Cour de cassation — France) — Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, married name Hadadi (Hadady) (Case C–168/08). Info Curia Case-law. Available at: https://curia.europa.eu/juris/recherche.jsf?language=en.

[25] Judgment of the Court of 17 June 1992. Jakob Handte & Co. GmbH vs. Traitements mécano-chimiques des surfaces SA. Available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=BCE0BC63BB680A927053FBF7B7F8E32D?text=&docid=97769&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1587903

2.1.3. Protection forum

Regarding contracts in which there is a weaker party, insurance, labor and consumer contracts, the legislator established rules of jurisdiction capable of balancing the parties, thus speeding up the possibility for the weaker contracting party to elect the court where he intends to institute the action.

Regarding the former, it offers the applicant (insurance policyholder, insured or beneficiary) the option of bringing the action in the court of their domicile.

Regarding the second ones, it established that the employer can only bring the action in the general forum of the defendant's domicile, while the worker can choose between that forum or another that is closer to him, such as the place where he develops or habitually developed his work, or even, in the case of carrying out its activity in several countries, the place where the establishment that hired him is or was located.

As for third parties, it if consumers may be sued by the professional before the courts of the Member State in whose territory they are domiciled. However, the commercial or professional activity of the person who contracts with the consumer, the professional, must be carried out in the Member State in which the consumer is domiciled or go, by any means, to that State.[26] This is justified due to electronic commerce.

In Article 18, paragraph 1, the consumer may bring proceedings against the other party in the contract, either in the courts of the Member State where that party is domiciled, or in the court of the place where the consumer is domiciled, regardless of the domicile of the other party.

It should also be noted that articles 15, 19 and 22 protect the most vulnerable parties by not allowing agreements after the dispute arises, allowing weaker parties to resort to courts other than those provided for in the Regulation or, in the case of policyholders and consumers, grant jurisdiction to the courts of the State in which both parties are domiciled or have their habitual residence.

3. *Conflictuum legume*

3.1. The principle of autonomy of will in the Rome I Regulation

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), establishes the normative framework for determining the law applicable to contractual obligations within the European Union.

Pursuant to the Treaty of Amsterdam of 1997, provisions were introduced into the Treaty that established the European Economic Community (TCE) that confer competence on the community to adopt legislative measures relating to judicial cooperation, aiming to create an area of freedom, of security and justice. The purpose was to promote the compatibility of the rules applicable in the Member States regarding

[26] A website accessible to the consumer is not a requirement for it to be considered a directed activity. It is also necessary that such a website invites the conclusion of distance contracts and that a distance contract has actually been concluded, by any means. Cf. Civil Law, European Judicial Cooperation, p. 15. Available at: https://carlospintodeabreu.com/public/files/direito_civil_cooperacao_judiciaria_europeia.pdf.

conflicts and jurisdiction, article 81, paragraph 2, point c) Treaty on the Functioning of the European Union (TFEU), (former article 65 TCE).

Its material scope of application concerns contractual obligations in civil and commercial matters that involve a conflict of laws, article 1, paragraph 1 of the Rome I Regulation, excluding a list of matters from its scope of application, applying to contracts concluded after December 17, 2009.

Due to the need to harmonize the rules relating to contractual relationships, due to the importance they assume in the context of the four freedoms, it has become urgent to determine the designating criteria to be used between Member States.

In addition to its universal character, which, through its conflict rules, can be determined as the law applicable to that of a third State, it continued to be enshrined, as in the Rome Convention, the principle of private autonomy, allowing the parties the choice of a law that has no connection with the contract, and the choice may be express, quasi-express, that is, resulting clearly from the provisions of the contract, or tacit, resulting from the circumstances of the case, article 3, paragraph 1. The parties may instead refer to the provisions contained in a law, customs, contractual models, standard clauses, or consider previous relationships (between the same parties) that demonstrate a choice of law, among other manifestations.

This choice can be made before the contract is signed or after it is signed, considering the formal validity of the contract and the expectations of third parties, paragraph 2.

In paragraph 1, it is also possible to dismember the contract, allowing the parties to elect different laws for independent parts of their contractual instrument (*dépéçage*).

In the case of a single-site contract, in contact with a single legal system, the parties are allowed to choose a different law. However, this cannot have the purpose of removing mandatory rules of law where the contract has all its elements, paragraph 3.

If the contract is in contact with one or more Member States, the choice of parts of a Member State law cannot call into question the application of provisions of Community law, which cannot be derogated from by agreement, as applied by the Member State of the forum, paragraph 4.

3.1.1. The meaning of the law chosen by the parties

It is important to understand whether, under article 3, paragraph 1, the parties can choose non-state rules, namely *lex mercatoria*. Regardless of the issue regarding its autonomy as a normative system and its respective sources, we must consider it as a set of a-national rules, spontaneously created, capable of responding to the dynamics of international trade in each sector considered. Regardless of its incompleteness, we will always say that predictability, certainty, and specialty will be its prerogatives.

It was in the Middle Ages that it developed, going beyond the territorial nature of the rights of that time, presenting itself as transnational and based on mercantile uses and customs.

In the Modern Age, 17th century, it was postponed, but, little by little, because of the intensification of international commercial relations and some skepticism towards state rights, there was a need to recognize its merit. The dynamics of relationships and the specificities of international trade ended up dictating the phenomenon of self-regulation.

However, there was some tension, especially caused by the not always easy dialogue between State/market. This environment certainly gave rise to rules drawn up by entities, which developed early on, especially after First World War, and more intensely after the Second World War. Consider the rules on documentary credit, the INCOTERMS, standard contracts drawn up by certain organizations, which have been consolidated and have acquired their status as "quasi-law". We, then, talk about the *new law marchant*.

We cannot fail to emphasize the importance of arbitration in consolidating the habits and customs of commerce, expressed in the respective decisions.

States also ended up being infected and became more permeable to these needs and the adequacy of their regulation. Instruments emerged that, due to their nature, required approval by States, obeying criteria defined and implemented in their respective national laws (e.g. the 1980 Vienna Convention on International Purchase and Sale) and others that only appeared as references for States and often adopted by the parties (e.g. the UNCITRAL Model Law on International Commercial Arbitration[27]; UNIDROIT Principles).[28]

Regarding the Rome I Regulation, most of the doctrine excludes the possibility of applying any set of regulations other than state law to the contract. As we have seen, the principle of autonomy enshrined in article 3, paragraph 1 only determines that the parties can choose the state law applicable to their contract.

We cannot fail to mention the fact that we can apply a-national rules to the contract, in accordance with material autonomy. The regulation itself, in recital 13, allows the parties to include, by reference, non-state rules in their contract.

Since the Rome Convention, it has been argued that state courts can only apply state law, calling into question its binding nature, the ability to integrate gaps and its legal hermeneutic criteria.

If we consider the breadth of the principle of autonomy, considering the limits outlined by the Rome I Regulation, especially regarding norms of immediate application and the exception of public order of the forum, we see that the parties can combine the application of different state laws, presenting this regulation as its creation, with a result that is certainly different from that predicted by the legal systems individually considered.

Interestingly, the possibility of the parties to articulate different laws may result in the distortion of the concretely applicable rules. We cannot forget that these will be applied outside the systematic context in which they are inserted. We are of the opinion that they may require adaptations to the system in which they were initially inserted.

In the Proposal which resulted in the Rome I Regulation, the Commission suggested a compromise solution. Article 3, paragraph 2 of the Proposal provided that the parties could choose as applicable law the principles and rules of substantive contract law, recognized at international or community level.

We think that *de iure condendo*, perhaps the Court of Justice of the European Union may come to broaden the understanding that was, unsuccessfully, adopted in the Rome I Regulation.

We cannot fail to emphasize arbitration as a frequent way of resolving disputes

[27] United Nations Commission on International Trade Law.
[28] International Institute for the Unification of Private Law.

in international trade and its contribution to the application of the *new law marchant*, covering the habits and customs of spontaneous creation and the rules that have been drawn up by international organizations that have dedicated to the regulation of international commercial relations. Regardless of whether they are applicable to all contracts, especially in Business-to-Business relationships, or sectoral application, to a certain type or types of contracts.

Arguments such as the incompleteness of these instruments were the basis for non-approval, mainly because the aim was to achieve European contractual law, not contributing to the desired certainty and stability.

3.1.2. The lack of choice by the parties

The Rome I Regulation established objective criteria, overcoming the presumptions previously established in the Rome Convention.

In its article 4, it uses rigid connections, implementing, for some contracts, the presumption of the closest connection provided by the criterion of consideration for the pecuniary benefit. Pay attention to points a) and b) of the precept.

This rule is presented as the supplementary regime if the parties did not choose the applicable law, or the choice was not valid or effective.

However, the legislator did not give up the characteristic performance criterion, especially for mixed contracts or contracts not provided for in the paragraphs of paragraph 1. It intended to establish a unitary criterion, not allowing, in this context, contractual *dépéçage*.

The legislator also established an exception clause, in paragraph 3, privileging the principle of the closest connection. Through it, we will be able to reach a different law than that determined by paragraphs 1 and 2. In recital 20 and in the normative in question, no auxiliary or guiding criteria are indicated for the implementation of the clearly closer connection.

In fact, to be honest, it must be said that the presumptions existing in the Rome Convention constituted interpretative guidelines, only helping to determine the relevant or primary connection, in face of a given multi-sited relationship. This difficulty arises whenever there is a large dispersion of connection elements. These are not true presumptions, in a technical sense, as they do not relate to the burden of proof.[29]

Its paragraph 4 protects against situations in which the connection cannot be determined based on paragraphs 1 and 2, and all those in which it is not possible to achieve the performance which is characteristic of the contract. To do so, it is necessary that the primary connection has not worked or that the contract presents a closer connection with a State other than that indicated by that connection.[30]

The Regulation also has special conflict rules for certain types of contracts, especially considering the protection of the most vulnerable party. We talk about transport, consumption, insurance, and labor contracts.

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[29] Pinheiro, L.L, *O novo regulamento comunitário aplicável às obrigações contratuais (Roma I) - Uma Introdução*, Revista da ordem dos advogados, ISSN 0870-8118. - Lisboa, Ordem dos Advogados. - A. 68, n.º 2/3 (setembro-dezembro 2008), p. 602. Available at: https://portal.oa.pt/upl/%7Becc8c284-43f7-449b-85da-d008ab992ec7%7D.pdf.

[30] *Ibidem*, p. 608.

3.1.3. Special connections

Given the vocation of this study for commercial relations, and not aiming, due to the impossibility of exhausting it, we will focus our reflection on contracts that involve the transfer of goods or services and the provision of work, *maxime* purchase and sale, the provision of services and the subordinate employment contract.

Regarding contracts concluded by consumers, these are regulated by the law of the country in which the consumer has their 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,* article 6, paragraph 1.

This norm has a broad scope, including in its regulations a mandatory contract concluded by an individual, for a purpose that may be considered outside their commercial or professional activity («the consumer»), with another person acting within the framework of their commercial or professional activities ("the professional").

It is important to bear in mind the concept of directed activity, on which the application of the connection of the consumer's habitual residence depends, in accordance with paragraph 1, point b), in fact, protective connection of the most vulnerable party, the consumer. The change brought about by this instrument compared to the previous one clearly results from the intensification of contracts concluded remotely, through new technologies and their intensification on a global scale[31].

The expression "directed activity" also appears in the Brussels I Regulation. We cannot forget that in contracts with consumers, the rules on conflicts of jurisdiction and laws must encourage the minimization of expenses inherent to the resolution of disputes and consider the dynamics of distance-selling.

Therefore, the need for that expression to be interpreted coherently was imposed, given that it is presented as a condition for the application of the consumer protection rule. It was, therefore, the subject of a harmonized interpretation through the Joint Declaration of the Council and the Commission regarding articles 15 and 73 of the Brussels I Regulation. It is stated that it is not enough for point c) of article 15 to be applied, the fact that a given company directs its activities to a Member State where the consumer is domiciled, or to several Member States, including that Member State. A contract must have been signed within the scope of these activities. The simple fact that there is a website and that it is accessible is not enough for the standard to be applied. It is therefore necessary that the website invites the conclusion of distance contracts and that a distance contract has been concluded by any means. It must be said that the identification of language and currency are irrelevant, although they can be auxiliary indicators in their determination.[32]

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[31] For literature review see Federica Cristani, *Designing a Governance System for Cybersecurity of Foreign Investment in Europe*, International Investment Law Journal, Volume 3, Issue 2, July 2023, pp. 102-120; Elise Nicoleta Vâlcu, *Brief Considerations on the "Behaviour" of Professional Traders and Consumers in the Context of the Shift from Brick-And-Mortar to E-commerce. Union and Transposition Regulations*, International Investment Law Journal, Volume 3, Issue 1, February 2023, pp. 90-98 and Olga Tatar, *Types of International Commercial Agreements and Their Legal Regulation*, International Investment Law Journal, Volume 3, Issue 1, February 2023, pp. 72-89.

[32] In the same sense, cf. Pinheiro, L.L, *op. cit. (O novo regulamento comunitário...)*, p. 618.

Article 6, paragraph 2, establishes a limit to the principle of autonomy of will, safeguarding the application of the mandatory provisions of the law on habitual residence that are more favorable to the consumer.

Although the law on the consumer's habitual residence constitutes a minimum standard of protection, it may happen that the parties, if it was not chosen the law to be applied, none of the assumptions in paragraphs a) and b) of paragraph 1 have been met, and, even, to be dealing with an active consumer, which in this last case, excludes the application of the protective regime from the outset, so it is necessary to appeal to article 4, as a supplementary criterion.

Regarding employment contracts, article 8, paragraph 1 of the Rome I Regulation followed very closely what is enshrined in the Convention, allowing the possibility of choosing the applicable law. However, this cannot deprive the worker of the protective regime that would provide him with non-derogable provisions by agreement, under the law that, in the absence of choice, it would be applicable under the terms of paragraphs 2, 3 and 4, of that article.

In the absence of a choice of law, the contract will be governed by the law under which the worker habitually performs his work in execution of the contract or, failing that, under which the worker habitually performs his work in execution of the contract, paragraph 2. These are objective criteria that are based on the principle of a plus wake connection. The legislator was concerned with circumscribing the place where the worker usually works, ruling out any temporary change (recital 36).

TCE's understanding, in relation to article 6, paragraph 2, subparagraph a), of the Convention, of the same connection that is now being discussed, is that it should be interpreted in the following sense: *in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the greater part of his obligations towards his employer*.[33]

With regard to the criterion based on which the worker habitually performs his work, the Court of Justice of the European Union[34] stated that: *"in the air transport sector, it is advisable, in particular, to determine in which Member State the location is from which the worker carries out their transportation missions, the place to which they return after these missions, receive instructions regarding them and organize their work, as well as the place where the work tools are located. In the specific case, the location where the aircraft on board which the work is usually carried out are parked should also be taken into account".*

If it is not possible to determine the applicable law under the terms of paragraph 2, the contract is governed by the law of the country where the establishment that hired the worker is located, paragraph 3. An exception clause is also established for situations where it results, from all the circumstances, that the contract has a closer connection with

[33] Judgment of the Court (Grand Chamber) of 15 March 2011 (reference for a preliminary ruling from the Cour d'appel — Luxembourg) — Heiko Koelzsch v État du Grand-Duché de Luxembourg (Case C-29/10) (Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CA0029

[34] Press release no. 97/17, Luxembourg, 14 September 2017. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170097pt.pdf.

a country other than that indicated in paragraphs 2 or 3, applying the law of that other country, paragraph 4.

3.1.4. Scope of the law applicable to the contract

Finally, it is important to note that the law applicable to the contract, under the terms of article 12, paragraph 1, lists, by way of example, some matters for which the application of the law regulating the contract is relevant.

Regarding the methods of compliance and the measures that the creditor must take in the event of defective performance, the law of the country where the obligation is fulfilled must be taken into account, paragraph 2. This is necessary due to the greater effectiveness of the solutions therein provided for the benefits of the creditor's interests.

In view of the regime enshrined in the Rome I Regulation, the importance of contract law as the sole statute of the contract is evident from the outset. It is in accordance with the law regulating the contract that the acceptance and substantial validity of the contract will be determined, as well as its formal validity, articles 9 and 10.

Outside the scope of application of *lex contractus* are the matters referred to in article 1, paragraph 1, *in fine*, and paragraph 2.

It should be noted that the Regulation only applies to contractual obligations and their respective mandatory effects. For all others, the conflict rules of each Member State's domestic law will apply.

4. Conclusions

At this point, it is important to bear in mind that the discipline of international contracts, within the European scope, is governed by conflict, in terms of competence and applicable law.

International procedural discipline will apply whenever another method is not chosen by the parties to resolve their disputes. A space of harmonized international competence was created, through essentially direct standards. At the same time, conflict of laws rules was harmonized, seeking to implement a European judicial space marked by freedom, security, and predictability.

However, in the context of international contracting, it appears that state regulation, which we arrived at through conflict rules, is not always suitable for international private relations, especially commercial ones. These often require regimes other than national ones, which have been developed, updated, and improved due to "legislation" activity carried out by international organizations/entities.

The possibility of choosing several laws to regulate the contract, within the scope of the Rome I conflict system, will encourage the distortion of the norms in question, contradicting the principle of unity of the legal system, in the case of the legal systems to which these norms belong.

In fact, the initial proposal for the Rome I Regulation was not accepted, the final version demonstrating great skepticism on the part of States towards non-binding law. We think that the articulation of the *New Law Marchant* with the subsidiary application of conflict rules would be beneficial in terms of implementing the principle of autonomy of will and the adequacy of the rules that have been drawn up by various international

entities, aimed at regulating international commercial relations, especially between their respective commercial partners.

However, the incompleteness of these regimes calls for the application of the Regulation's conflict rules whenever one of the parties is based in a Member State.

In short, the Brussels I bis Regulation will have its field of application whenever the parties have not elected arbitration and, consequently, the competent court will apply, in the rigid version of the European system, the Rome I Regulation, to determine the applicable law. These standards also can be applied beyond the aforementioned context. In arbitration, the arbitrator will apply, if the parties have not agreed otherwise, the rules of conflict of laws that he considers applicable, article 28, paragraph 2 of the UNCITRAL Model Law on International Commercial Arbitration. In this case, they will be able to use the Rome II conflict system.

It is expected that the legislator, in the future, will allow the application of a-national standards, certainly excepting the mandatory standards of the Member States and Community Law. The public order of the forum must always be considered, *a priori*, in relation to the rules of immediate application and, subsequently, as an exception to international public order.

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