Revival of Rabel's trans-national characterization for rules of conflict? Some answers in a European Convention

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In the memory of my father

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Abstract

During the 30s, Ernst Rabel, a great German scholar, formulated a program, persuading national judges to use comparison in determining trans-national (autonomous) characterizations of rules of conflict of laws.

In the years to come nothing was achieved of his ambitious approach in a world where the practice of national judges is still dominated by characterization according to 'lex fori'.

However, relatively recent evolutions, in relation to Convention of Brussels I about conflicts of jurisdiction in Europe, have reactivated the program of Rabel, although within a different, international setting.

The paper explores in a first, historical part, the significance and the articulations of the original program formulated by Rabel.

The second part focuses the comparison used in trans-national/autonomous characterization of terms of Convention of Brussels I by the European Court of Justice.

Based on significant decisions within a 40 years period, this analysis uncovers the reasons, the features and the limits of such a powerful interpretative instrument.

Eventually, this instrument might be used outside of international settings, for example in interpreting more recent EU Regulations (such as Brusels1, Brussels 2, Brussels 3 or Rome I, Rome 2 and Rome3).

Keywords: Ernst Rabel**,** conflicts of characterization, International Private Law, conflict of Laws, conflict of jurisdictions, autonomous characterization, comparison, Convention of Brussels I, European Court of Justice, comparison as a method of interpretation.

I. The original program of Rabel for overcoming conflicts of characterization

The conflict of characterization as roadblock to unification of IP Law

The conflict of characterizations was discovered independently at the end of XIXth century, by Franz Kahn, in Germany, and by Etienne Bartin, in France[1]. Such a conflict of characterizations appears when different national judges give various characterizations of a legal relationship under elements of rules of conflict, (depending on categories of national law of the seized judge)[2]. In the famous case of 'Dutch will', such a relationship was characterized as a matter of capacity (in Netherlands), while it would have been characterized as a matter of form of the act (in France)[3].

As a result, different Rules of Conflict of Laws (RCLs) would be chosen and different national material laws would be applied by each national judge. Cases would be treated differently by various national judges and that would open a door for 'forum shopping'.

The problem of characterization was a roadblock to unification of RCLs in International Private Law (IPLaw). Even if different countries would have the same system of RCLs, (through international conventions of IPLaw, for example) there might be a divergence of outcomes because of the 'national' characterization of a case.

Proposed answers to conflict of characterizations and a skeptical attitude of Rabel

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[1]Franz Kahn, 'Gesetzkollisionen' in 39 *Jherings Jahrbücher für die Dogmatik des heutigen römischen Privatrechts* (1891); Etienne Bartin, *De l'impossibilité d'arriver à la suppression définitive des conflits de loi* in (1897) *Journal de droit international privé,* 225. For a deep analysis of the topic see Veronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23 Case W. Res. J. Int'l L.479 (1991), Available at: http://scholarlycommons.law.case.edu/jil/vol23/iss3/5.

[2] It is well known that rules of conflict of laws (RCLs) in International Private Law (IPLaw) link together two elements: a legal relationship or category (such as property rights, contract claims, tort claims, etc); a connecting factor (factual category) which one might call the 'seat' or the place of the relationship (such as the *situs* of the *res*, the place of performance of a contract, the place of wrongdoing, the nationality-domicile of a person, etc).

As a result a conflict of characterizations for RCLs may arise in respect of legal category, in respect of factual category (the 'seat'), or in respect of *both.*

See for details the discussion in Veijo Heiskanen, 'And/Or: The Problem of Characterization in International Arbitration', *Arbitration International*, Volume 26, Number 4, 2010.

[3] In the famous 'Dutch will' of 1859, Gold, a Dutch, wrote a holograph will while being in France. When he died, there was the question of the validity of the will.

The Dutch Civil Code banned the holographic will (ie, the will made in full by the hand of the deceased) and required a judicial officer to writes itl. According to Dutch law, the possibility of a holographic will related to a capacity problem, because the system protects, according to Dutch legislation, the testator. As such, the Dutch law of conflict was applicable (as a matters of capacity) and therefore the will would have been void.

According to French law, that was a pure issue of form of the act. The French conflict rule stated that "the form of acts is subject to the law of the place where the act is concluded". Therefore, the French law was applicable and the will would be valid. The conflict of characterizations is quite visible.

Since Khan and Bartin, the issue has been recognized by other jurisdictions, including in the Common Law world, and has given rise to voluminous legal literature, 'much of it highly theoretical'[4]. Both Kahn and Bartin concluded that no uniform solution existed for characterization problem and that national judges would have to deal with it on the basis of own internal law (*lex fori*). Despagnet attempted to reach uniformity by suggesting a characterization using *lex causae*, the law governing legal transaction in question, but this view has found few followers[5].

In a famous article[6] Rabel distanced himself of standard characterization according to `lex fori".

He considered it as inadequate, first of all, because the object, purpose of national RCLs was different from rules of internal law of 'fori', the court judging a case: "Unlike concepts and systematic of domestic law of the judge, the right of conflict will not resolve itself a legal question, but determine a legislation, either his own or a foreign one, to reach the solution. To this end, the legal question may not be formulated only on the basis of national law" [7].

At that time, according to Rabel, such circumstances were already acknowledged. For example, scholars preaching 'lex fori' characterization mended it by considering elements of foreign law characterization ('lex cause'), either for specific 'seats' of legal relationships (such as, according to Bartin, the 'res rei site' of immovable property), either in later phases of litigation, whenever a foreign law institution did not have a clear correspondent in 'lex fori'.

Rabel considered this as implicit recognition of the weakness of characterization 'lex fori', It was also an improper use of comparison which, however, pointed in right direction since: "The branch of law seeking the implementation of all legislation on Earth shall include each of them in the circle of its foresight"[8] .

Rabel's program of using comparison for autonomous-transnational[9] characterization

[4]See for a through discussion Ernest G. Lorenzen, 'The Characterisation, Classification, or Characterization Problem in the Conflict of Laws' (1941) 50 *Yale LJ* 743, at http://digitalcommons.law.yale.edu/fss_papers/4584, or Ernest G. Lorenzen, 'The Theory of Characterisations and the Conflict of Laws' (1920) 20 *Colum. L Rev.* 247.

[5] Lorenzen, 'The Characterisation', op cit, pp 746.

[6] E. Rabel Das Problem der Qualifikation, *Zeitschrift für ausländisches und internationales Privatrecht* 5. Jahrg. (1931), pp. 241-288. This paper had a huge impact on contemporary doctrine, and it was translated in Italian and French very soon after its publication in German. The French version, E. Rabel *Le Probleme de Ia Qualification* (1933) 28 REV. DE DR. INT. Privé, pp1 is the basis for this article. All the following citations were translated by us from French to English.

[7] E. Rabel *Le Probleme..,* op cit, pp 1 et ss.

[8] Idem.

[9] In the following pages the term autonomous characterization will be used as synonym for trans-national characterization.

Besides this critical position, Rabel proposed equally a shift of paradigm, a characterization based on autonomous notions. The national judge must separate of national concepts of 'lex fori' while characterization must be grounded on autonomous notions determined by comparison between national legal systems (conflict of laws or material laws) of civilized world.

Rabel gave a few scattered indices in his article of a practical implementation of such a paradigm. It seems that he considered comparison, both at level of construction of common, unified RCLs (within a sort of constructive/legislative process), and at the level of interpretation-characterization of RCLs (process to be accomplished by judges) [10].

At the level of designing common rules of conflict (the legislative process) Rabel suggested some ideas. The factual part of any new rule of conflict (RCL) must use, the least possible, terms of national legal systems[11]. Its concepts and institutions are not something to be borrowed from national substantive law, but abstractions to be established by comparing various national laws[12].

There were also certain limits since : "It is true that the method of comparative law[13] is not able to solve all problems of characterization, since such problems appears especially when differences between legislation of judge dealing with the case and the legislation applicable according to rules of conflict are so important that agreement between opposing viewpoints seems unattainable. However (…) the law of conflict to be designed can use all the means the legislator have, in ruling phenomena of social life. For example it can formulate principles and recognize in the mean time exceptions". "In particular one can multiply the rules of conflict, and they can be divided into main rules and secondary rules. For example, one would not place under a single 'status' the private law of inheritance [and], the inheritance tax law(…).

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[10] Idem , pp 28, "Indeed, account must be taken of foreign law as well before the formation of the conflict rule on the other hand, in the application of the rule thus obtained" "[o.tr].

[11] Idem, pp6:"The ideal rule of conflict, in fact an utopia, would be, as Barr and Kahn also recognize, the one depending only upon pure facts"[our translation-o.tr].

[12] Idem, pp 22.

[13] See Robert A. Pascal*,'* Characterization as an Approach to the Conflict of Laws', *Luisiana Law. Rev*, Volume 2 ,No 4, May 1940, pp 715, available at: http://digitalcommons.law.lsu.edu/lalrev/vol2/iss4/8.

One can highlight interesting considerations of Robert A Pascal in regard to comparative method and its limits: "If the different bodies of law belong to the same system or tradition, the common elements may be found in the institutions and concepts themselves. If the bodies of law are more widely separated in tradition, but agree in seeking to perform the same functions and to protect the same interests, the common elements will manifest themselves in the function and purposes of the institutions. If the different bodies of law do not seek to protect the same interests, in short, if they are not based on the same philosophy of law, conflicts will appear and they cannot be avoided. Thus the possibility of using the system of characterization, selection, and application is directly proportional to the points of similarity in the systems of law involved. It must be noted that this method presupposes an examination of the various laws which may be applicable in order to discover the characterization which will fit them all". Robert A. Pascal, op cit, pp 722.

And the secondary rule serves to eliminate from the main rule, based on the diversity of national concepts, a partial issue which will be completely submitted to a specific legislation."[14]

At the level of interpretation-characterization of RCLs, Rabel proposed national judge to use general, abstract meanings resulting from comparison. For example, one must understand by " 'tutorship' in a conflicts rule not only the meaning ascribed (...) [by Article 23 of the Introductory Part of the German Civil Code], but whatever civilized world in general meant by it, guardianship or any other institution with the same function in other law systems"…"and more exactly: all legal institutions which are intended to adjust the representation or protection of not fully capable persons who are not under paternal or parental power...(…)" [15].

One can identify a chronological order of judicial and legislative processes which both use comparison: "As for the judges, they will contribute only with raw empirical material. It is the work of scientific legal comparison [which]…establishes the relationship of legal institutions which provide a 'tertium comparationis' which can suggest a rule of conflict. It also discovers differences that might be so important that a meaningful rule of conflict cannot ignore them".

Rabel seemed to suggest that, in a first stage, the judge should determine, by practical comparison, the right characterization and the right concepts. In the long run, it would achieve a consolidated characterization, based on sedimentation of precedents.

Only within a later stage, the national legislators would codify such precedents into proper rules of conflict, using scientific comparison.

The role of national judges would be still decisive, but not very different from the role assumed by national courts in characterization 'lex fori'. In France, for example, absent any legal texts of IPLaw, including for characterization, such rules were established by Court de Cassation, following on pathway of Bartin, by sedimentation of precedents during more than 100 years of practice.

At the end of his article, Rabel made a last, passionate pleading for comparison: "Who knows! Free the conflict of laws of their links to the 'lex fori', and they will adjust to one another through legal comparison."[16].

The great scholar saw, rather optimistically, that comparison, as instrument of national judges/legislators, would achieve unification of IPLaw, faster and on broader terms than international treaties since "(…) it is wrong to believe that only an international convention

[14]Rabel, op cit, pp37. There is obviously here,, a need for legislative intervention since such a solution is outside of reach of a judge.

[15]Idem, Pp 23.

[16]Idem, pp 62.

might create common legal concepts".

The negative response of scholars and practitioners to original program of Rabel

Rabel's program of autonomous characterization has been rejected by scholars or practitioners. For example Gutteridge considered "... difficult (...) to accept [such program]. Nobody seems to have tried to indicate which these [common] principles are and, if they exist, they seem to be quite a few. Even if we could determine them, it is unclear how they could help solve the problem of characterization. Besides it does not seem practical to push for a solution that would require of judges and practitioners an understanding of analytical science of law and an experience of the comparative method that probably few of them possess [17]".

René David stressed that "practical considerations (the current shortage of our knowledge of foreign legal systems) more than theoretical considerations, are opposed to the admission and case law implementation of this doctrine (...)[18] ".

Maury conceded at least its theoretical significance since "M Rabel's response to question of characterizations is a worthy response, if ever, for a fairly distant future... it is still a working hypothesis, the more ingenious and deeper working hypotheses one can make today. This is not a real practical, present solution to the problem and even if it would be admitted as such, one must alternatively indicate a much simpler and more general solution"[19].

As for answering, such critics about impracticability of his initial program, Rabel rephrased it in a later article, by adopting a 'simplified' comparison[20] : "General concepts, which may be used universally, are being built up but slowly.[21] (…) Judges are fully entitled to limit their inquiries to the two or three laws primarily influencing a case in which legal science has done nothing to help. Instinctively this is what the courts do. With respect to the narrower subject of characterization, expediency alone is decisive" [22].

Such limited comparison, determining common concepts of 'lex fori' and a foreign relevant law (mainly 'lex causae'), in situations of conflicts of characterizations, might be more easily accomplished than a multilateral comparison looking for common principles of civilized world (according to the initial program).

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[17]Gutteridge (H. A.) *Le droit comparé*, LGDJ, Paris, 1953, pp 83,this is our translation .

[18]David (Réné*) Traité élémentaire de droit civil comparé*, LGDJ , Paris, 1950 pp 108, 109, this is our translation.

[19]Maury (Jaques) *Règles générales des conflits de lois*, RCADI 57, 1936,III, Pp 476-477, this is our translation.

[20] See Rabel, Ernst,*The Conflict of Laws: A Comparative Study*, 2nd ed. Vol. 1. Ann Arbor: The University of Michigan Press, 1958, available at: http://repository.law.umich.edu/michigan_legal_studies.

[21]Idem, pp 65.

[22]Idem,pp 65.

Rejected by doctrine, Rabel's program, in both of its forms (with multilateral or bilateral comparison) was never implemented by national judges. And without `raw materials` provided by national judges, national legislators did not adopt their part of the program either.

In our opinion one should question the achievement of unity by the process imagined by Rabel. In fact, even by freeing national judges of 'lex fori', the national judges would diverge on the meaning and constructions of trans-national concepts of rules of conflict, because they diverge in their interpretative practices. One would obtain a divergence among 'trans-national concepts' fractured at national borders. Only a sort of unifying mechanism for interpretation could overcome this implicit limitation.

Much more was achieved of Rabel's ideas in designing uniform rules of conflict, however not by national legislators, but by international conventions. This effort, pursued still today, was based on comparison of national rules of conflict/national material laws, and attained global dimension, (in the system of Hague Conferences) or regional dimension, (within in the frame of European Union/ Communities).

Indirectly, certain international instruments have also rehabilitated the autonomous characterization by judges. Based on special institutional arrangements, the European judge adopted a comparative trans-national characterization implementing, in a 'sui generis' way, Rabel's guidelines. The analysis of this practice forms the substance of the next chapter.

II. Analysis of comparison used by ECJ in interpreting the Convention of Brussels I

Convention of Brussels I and the emergence of unification of procedural law in Europe

Ambitious projects of conventions, considered in the beginning of the XX century by first internationalists of IPLaw, have been replaced recently by more limited and better focused efforts within the frames of Hague Conferences or European Union. These are self-executing treaties, where individuals might invoke rights and obligations resulting of such conventions before their national judges.

In the normal state of things, it is for national judge to perform interpretation on its own terms ('lex fori'). Adopted by internal procedures, and becoming part of internal legal orders (according to monist or dualist doctrines), the uniform law provisions might be interpreted by judges with the same criteria and principles as own national laws. However, when problems of characterization/interpretation arise in such a treaty, the traditional characterization by *lex fori* cannot be used, since it would twist the stability of agreement. The problem of

characterization, freed this time of 'lex' fori', is shifting, to a problem of uniform, common characterization of terms of RCLs of the international instrument.

Certain conventions of unification attempted to answer the problem and avoid interpretative divergences[23]. The Rome Institute for the Unification of Private Law publishes Court reports on the legal matters subject to unification. This is an empirical approach ensuring uniform interpretation by aggregation of successive solutions of national judges, which are free to get inspired of one each other. Nevertheless, the failure of such solution is assured by the absence of real mechanisms to guarantee such unity, since it depend only on the goodwill of national courts.

The real answer was found with institutional arrangements for unitary interpretation/characterization among national judges, a step taken, for the first time, in Convention of Brussels I, a treaty signed in 1968, by the then six members of the European Communities.

The Convention[24] concerned the most important questions of international civil litigations, namely jurisdiction and recognition/ enforcement of judgments. It covered almost all civil and commercial matters and established as general rule that individuals were to be sued in their state of domicile and then provided a list of exceptions. Its rules were intended to replace similar national rules.

The Convention has not escaped difficulties of interpretation-characterization since it used generic, undefined concepts (civil and commercial matters, matrimonial, etc.). Therefore, its uniform interpretation was secured by European Court of Justice (ECJ) which became competent to finally and solely decide, through preliminary rulings, binding on parties of original dispute. This ECJ's competence followed directly from EC Treaty[25] and from a separate protocol granting its jurisdiction over Brussels Convention. The Convention was amended on several occasions and most recently was replaced by a Regulation which was amended too[26].

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[23] The Rome Convention of 1980 in its Article 18 provided under "uniform interpretation", that for the purposes of interpretation and application of uniform rules, "regard shall be due to their international character and the desirability of achieving uniformity in the way they are interpreted and applied".

This provision appeared to censure not only reference to internal law concepts ('lex fori'), but also to prescribe national courts an autonomous and common meaning. Lessons previously learned in national law of the court should be considered as only illustrative and on the same footing as interpretations emerged from judges of other Member States. To ensure the knowledge of decisions from all jurisdictions of Member States in major conventions, such decisions are published and shared, so that national judges are aware of latest developments.

[24] In the following developments, Convention (without any qualifications) refers to Convention of Brussels I.

[25] Initially it was art 220 EC, and later become art 234 EC.

[26] The Brussels I Regulation of 2001 was the primary piece of legislation in the Brussels framework from 2002 until January 2015. It substantially replaced the 1968 Brussels Convention, and applied to all EU Member States excluding Denmark. It came into effect on 1 March 2002. In 2012, the EU institutions adopted a recast Brussels I

Comparison used by drafters in designing the architecture of Convention

Comparison played a role in designing the Convention, a role made visible by the publication of Jenard report[27], a systematic exposure of preliminary proceedings.

Comparison helped establish common rules of *general jurisdictions* having, as fundamental criterion, the defendant's domicile[28]. When such common rules were impossible to find, the drafters formulated rules of conflict (for example, for domicile[29]). By *special jurisdictions*, the Convention indicated directly the national court that may be used, by referring to internal rules of jurisdiction in the State where that court was situated[30].

Comparison played also a role in designing the legal architecture of Convention, for example, for differentiating *general* and *special jurisdictions*[31].

In fact, comparison was an essential tool in the legislative process, (negotiation of the treaty) that preceded the use of comparison by the Court. This is a reverse order in regard of initial program of Rabel (who considered also a legislative contribution but only during a later stage). As such, the comparison at the service of ECJ would be a second use, in spaces unexplored by comparison of drafters or using, sometimes, its negative results.

General regard of comparison used by the Court

The reasons to analyze comparison as practice by ECJ in interpreting/characterizing the Convention are manifest. The Convention is, today still the only legal instrument with

Regulation which replaced the 2001 regulation with effect from 10 January 2015. In 2014, the EU amended the Brussels I Regulation to clarify provisions regarding two courts which are "common to several Member States": the Unified Patent Court and the Benelux Court of Justice jurisdiction.

For a through discussion on Regulation Brussels I, see Ulrich Magnus, Peter Mankowski (ed), *Brussels I Regulation*, Sellier. European Law Publishers, 2007.

[27] See Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard, Official Journal of the European Communities No C 59/3, 5.3.79, Council.

[28] Article 2: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State (…)".

[29] Art 52: "To determine whether a party is domiciled in the State in whose territory the courts was solicitated, that court shall apply its internal law".

[30] Article 5, for example, contains specific lists of cases where a defendant may be brought to a judge on the territory of a Contracting State other than that of his domicile, cases chosen because of close connection between the forum and the litigation.

[31] The drafters found that sometimes there was a close relationship between a dispute and the court called to solve it. If they had chosen the solution of general jurisdiction, that would have required a combination of competences to maintain this link. For example, the Dutch law did not recognize the jurisdiction of the for of the place where the obligation was or should be performed. Accordingly, the applicant would not have the ability to assign the defendant in Netherlands to such a forum, unless the Netherlands would change their domestic law (procedural law) to adapt European rules of general jurisdiction.

To avoid difficulties of this kind (adaptability of a legal solution), the drafters adopted for such cases, special jurisdictional rules, directing immediately to the competent court, with no consideration to internal jurisdiction rules in force in the State where the court is located. See Jenard report, op cit , pp 22 et ss.

extensive and consistent case-law (more than 400 decisions delivered in 40 years of judicial practice). Among such decisions there are a quite a few, where comparison was used in interpretation/ characterization through a process very similar the one considered by Rabel.
The research focused, first of all, decisions where comparison was explicitly assumed by Court. It also added decisions where Court implicitly followed comparative researches made by other legal actors, such the States, the Commission and the advocate generals.
ECJ used multi-comparison in a functional research, starting from the legal problem at hand[32] and considering less formal sources of law, like the actual legal practice of national judges (case law). It was an approach based on 'law in action' ('factual approach')[33] within national legal systems using a methodology developed by professor Schlessinger[34].

A. The first form of comparison in interpretation/characterization as search of 'common/general principles'

The coming out of Court's doctrine for a first use of comparison: the search for 'common principles'

In its first judgment on Brussels Convention, "Tessili vs Dunlop" of 6 October 1976[35], the Court of Justice formulated an 'obiter dicta' about the general policy it would follow in interpretation.
The Court formulated, in the beginning, a balance[36] between autonomous and national characterization since considering that concepts of Convention "must be regarded as having their own independent meaning and as being thus common to all the Member States" or "as referring to substantive rules of the law applicable in each case under the rules of conflict of

[32] Neumayer (Karl) 'Law in the books, law in action et les methodes du droit compare', in Rotondi (M) (ed) *Buts et méthodes du droit comparé*, Cedam, Padova, 1973, p. 507 et suiv.
[33]With a different terminology it is all about using a common element representing the legal problem (legal function) which is quite different from the social problem. In addition it is about using case law as a source of law. See for details Constantinesco (L-J), *Traité de droit compare*, Vol 2, Librairie générale de droit et de jurisprudence, 1974,. no. 29.
[34]Professor Schlesinger led in the 50s-60s a team of nine professors (three Americans, two Germans, one Australian, one French, one Indian, Italian) who worked for several years in a research launched at Cornell University to determine common rules of several legal systems in respect of contract formation.
The precise problem was the offer and acceptance of offer, and the purpose was to discover what unites rather than what separate different legal systems in order to obtain the 'common core' of legal systems.
Professor Schlessinger observed that possible misunderstandings among participants trained in different legal systems can only be minimized if "a slice of life" -a concrete sequence of real or hypothetical facts - was chosen as the center and starting element of discussion. Cf. Schlesinger (Rudolf B) et Bonassies (Pierre) « Le fond commun des systèmes juridiques. Observations sur un nouveau projet de recherches », RIDC 1963, p. 509.
[35] Industrie Tessili Italiana Como v. Dunlop AG, (judgment of 6. 10. 1976, case 12/76), ECR pp 1473, 1486.
[36] Tessilli, dec. cit, pp1484,1485, paras. 9-11

laws of the court before which the matter is first brought". The Court acknowledged that "neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective(…)." However the Court immediately expresses its preference for the autonomous interpretation[37].

The next problem for the Court was to determine the technique to be used in finding the autonomous meaning/ characterization of terms of Convention.

The answer was formulated in case LTU[38]vs Eurocontrol, where Court opted for autonomous meaning of 'civil and commercial matters' in relation to article 1[39]. It affirmed that: "As article 1 serves to indicate the area of application of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned"[40].

The option for autonomous meaning of the term was inevitable, and was supported by reasoning from effects[41]. The assumption of non autonomous meaning of material sphere of Convention (where each State would consider it according to own 'lex fori') would produce unequal and different rights and obligations among Signatory States. Such a result would contradict a fundamental principle of reciprocity and equality of the rights and obligation of parties to a treaty and would be, for this reason, intolerable. In conclusion, the other alternative, the autonomous meaning, should prevail.

The Court continued by underlining the technique for determining the autonomous meaning: "The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the *general principles* which stem from the corpus of the national legal systems" [42].

Hence, the Court explicitly stated, subsequently to- classical interpretative methods of treaties[43], a role of comparison in finding 'general principles' of national laws of Contracting

[37] That was quite remarkable because the Court did not choose an autonomous interpretation in the case at hand.

[38] LTU Lufttransport - untennehmen GmbH & Co. KG vs Eurocontrol, (JUDGMENT OF 14. 10. 1976 — CASE 29/76), Rec 1976, pp 1541, 1553.

[39] Article 1: "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal (...)".

[40] LTU Lufttransport , dec cit, pp 150, para 3.

[41]There were two fundamental theses in interpreting the meaning of 'civil and commercial matters', namely: a) an interpretation by exclusive reference to law of a national state; b) a uniform, autonomous interpretation, without reference to national law.

[42] LTU Lufttransport , op cit, pp 150, para 3.

[43] One can see that Court considered a role for classical interpretative techniques of the treaties: (system and purpose) in determining autonomous meanings. Since Brussels Convention is an international treaty, the Court may use the Vienna Convention on the Law of Treaties of 23 May 1969. It codifies in its art 31 to 33 well known principles of interpretation where the system and purpose are a subsystem of interpretative methods.

Parties. Such use of comparison is continuing in IP Law, a practice that existed already in International Public Law.

Comparison in search of 'common principles' as continuation of an interpretative practice in international treaties

Comparative researches for interpretation have been conducted by mixed Arbitrage tribunals constituted by Peace Treaties, after World War I. These tribunals had been confronted with difficult task of developing detailed rules for legal institutions mentioned in treaties and common to Signatory States. During Arbitrage proceedings under the Treaty of Versailles, for example, the referees had to identify the 'common core' of an English "partnership» and a "Offene German Handelsgesellschaft"; they also had to find exact meanings of terms such as "bankruptcy", "failure" and "formal indication of insolvency"[44].

Similar problems were encountered after World War II by Conciliation Commissions established by the Peace Treaty with Italy of 1947. These Commissions were composed of members designated by each State concerned. Therefore were established French-Italian, American-Italian, etc, Conciliation Commissions. If two members did not agree on a solution, it was added a third member from a third state, who had the deciding vote. In fact, despite their names, these Commissions were real Arbitrage courts[45].

These courts had to examine the content of a "pactum de contrahendo", the meaning of a stipulation in favor of a third person, or whether a bilateral contract may be canceled unilaterally by revocation (waiver) [46].

The 'bi-lateral' comparative research was an international requirement since such treaties were not developed by national legislative procedure (hence were not based on legal concepts and principles of a single state) and resulted from international negotiations leading to agreement of States. Usually, under international law, in case of an interpretative disputes, each party maintained and defended the meaning of own national law (which normally was to its advantage). We must underline also the essential role of principle of equality between (sovereign) states in international law which implies an identity of rights and obligations within their mutual agreements.

[44]These examples are provided by Ernst Rabel in «Rechtsvergleichung vor den Gemischten Schiedsgerichtshofen» (1923) as reproduced by Lorenz (Werner) in «General Principles of Law: Their Elaboration in the Court of Justice of the European Communities», AJCL, Vol. 13, 1964, p. 4-5.

[45] Cf. Lorenz, op.cit, p. 4.

[46]Seidl-Hohenveldern (I) «General Principles of Law as Applied by the Conciliation Commissions Established under the Peace Treaty with Italy of 1947», AJIL 53 (1959), p. 853 cited by Lorenz, op.cit. p. 4-5.

The above situations were in relation to peace treaties, where respect of the will of contracting parties was imperative, while preparatory proceedings might have reduced importance insofar as such treaties were imposed to the vanquished[47]. Since the comparative research was also bilateral, thist fact alone facilitated equally the task of the judge (arbiter).

In the case of multilateral treaties, the plurality of States and the sovereign equality among them would justify multilateral comparative researches for the meaning of indeterminate concepts. The interpreter would confront national understandings to discover the scope of a term based on legal systems of all Signatory States[48].

Coming back to Brussels Convention I, which is a multilateral treaty too, it is clear that such reasons would apply 'mutatis mutandis' and comparison would become multilateral too.

Brussels Convention I is a treaty with unified interpretation mechanisms and institutions (one judge, the ECJ, is centralizing the interpretation), and as a law-treaty, must be interpreted with accent to objective methods. From a different perspective, the ECJ is a judge using, within European Union, mostly objective methods of interpretation. Such 'objectification' of interpretation would extend, accordingly, to Convention of Brussels I.

Thus, in the context of Convention, one would no longer seek the interpretation consistent with original intention of the parties but consistent with actual legal situations. From a methodological perspective, one might say that such comparison would be a special sort of literal-grammatical interpretation of a treaty, based on 'common core-common principles' shared by Signatory States *at the moment of interpretation*.

Phenomenology of comparison as search of 'common principles' (clarifying the subject matters of Convention)

[47] For Rabel [RabelsZ I, 1927, 14, quoted by Constantinesco (L-J) in *Traité de droit comparé*, Vol 2, Librairie générale de droit et de jurisprudence, 1974, no. 124], one must «search by comparison all the meanings intended by the contracting parties "[our translation]. Therefore one must always look to reconstruct the 'common core' of concepts, considered as corresponding to original intention (Gedanken des Vertrags) of contracting parties. For certain treaties, like those considered by Rabel (peace treaties with civil law clauses after the 1st World War), the 'common core' means the narrowest sphere of reciprocal obligations of contracting parties. In other words, it corresponds to a restrictive interpretation of obligations of States, which is quite natural for classical, political treaties.

[48] Thus it is clear that circle of references can include, for this use of comparison, only Signatory States. Besides, within in a subjective approach characterizing peace treaties, the comparison would try to establish elements on which contracting parties have agreed (the original intention of the parties).

The doctrine of using comparison for interpreting terms of article 1[49] of Convention, formulated in case LTUvs. Eurocontrol, has been quite effectively implemented by Court.
That provided as a first implementation of the autonomous characterization according to program of Rabel. This comparison concerned, only a problem of borders, by assessing wheather legal relationships belong (or not) within the material sphere of Convention. The inspiration for such comparison was always taken of general public/ private law concepts in Member States.

Determining the meaning of 'civil and commercial matters'; overcoming difficulties of determining a 'common core' by redefining the initial question

In LTU v. Eurocontrol case[50], Eurocontrol, a body grounded in public law, obtained a judgment in Belgium against a German company for payment of various charges. Eurocontrol required the enforcement of judgment in Germany and the German court referred the question to ECJ, to decide whether the definition of 'civil and commercial matters' was to be determined according to German or Belgian law.
After formulating, as seen above[51], the doctrine of means to be used in autonomous interpretation/characterization, the Court considered that Eurocontrol acted in agreement with public law powers, despite charges appearing to be of private law: "actions between a public authority and a person governed by private law may fall [out of] (…) the area of application of the Convention (…) where the public authority acts in the exercise of its powers".
The public law nature of relationship was considered because "the use of equipment and services, provided by such body ... [was] obligatory and exclusive"[52] and because of its unilateral nature.
A 'silent' use of comparison helped determining this solution. The drafters of Convention did not provide a definition of 'civil and commercial matters' and a new comparative effort of Court in the same direction would have been useless.
The Court tried an escape strategy, by defining, with comparison, in a more narrow way, a criterion for domains excluded of subject matters.

[49]Article 1: "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to: 1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; 3. social security; 4. arbitration".
[50] LTU Lufttransport - untennehmen GmbH & Co. KG vs Eurocontrol, (JUDGMENT OF 14. 10. 1976 — CASE 29/76), Rec 1976, pp 1541, 1553.
[51] See supra, pp 12.
[52] LTU, dec, para4., pp 1551.

Certain traces of this process are visible in opinion of advocate general, which identified the essential distinction of public/private law in "a relationship of super ordination and subordination, which was the distinguishing feature of public law relations (…)*"* by refereeing to "…Germany and France where at the moment the distinction made between public law and private law is carried furthest"[53].

Such a definition could not originate in Belgium, since Belgian courts qualified the action as commercial. The Court found, without acknowledging it, the criteria of public matters, (exclusive of 'civil or commercial' topics), by borrowing it from the most advanced legal systems (France and, especially, Germany[54]).

When a direct question addressed to comparison was unable to find an answer, the 'indirect or reversed' question provided it. In this way, the Court 'picked' the most advanced solution (the German one) and borrowed it as autonomous solution[55].

Answering a narrower question (for subject matters of Convention)

In other 2 cases Court used a narrower question to determine wheather a situation was outside or inside the material sphere of Convention.

In case Netherlands State v. Rüffer[56,] the action of an agent of Netherlands for recovering a wreck in international waterway and seeking payment (pursued in performance of an international obligation and under Netherlands national law) was considered outside of the ambit of Brussels Convention.

The Court recognized that"…in keeping with the general principles which stem from the corpus of the national legal systems of the Member States whose provisions on the administration of public waterways precisely show that the agent administering those waterways does so, when removing wrecks, in the exercise of public authority"[57].

Comparative details were apparent in opinion of advocate general, which, after examining the removal of river wrecks in the 6 Member States, concluded that only in Netherlands law such an action was seen as a civil matter (in torts)[58].

[53]Opinion of Mr Advocate-general Reischl delivered on 15 September 1976, CASE 29/76, pp 1558.
[54] At least the German solutions were largely examined since a German court sent the case to ECJ.
[55] This was possible because the article 1 pgf 2 was written also by using exceptions.
[56]Netherlands State v. Reinhold Rüffer, (Case 814/79) [judgment of 16. 12. 1980], ECR, pp 3807 et ss
[57] Para 11 of decision, pp. 3820.
[58] Opinion of Mr advocate general Warner delivered on 8 October 1980, pp 3828-3830.

In an ulterior case, Sonntag v. Waidmann[59] , an Italian judgment against a teacher of a German public school, found negligently liable for death of a pupil on a school trip. was held by the ECJ to belong to civil and commercial matters.

Even though the teacher had been employed in a public school and could be considered as acting on behalf of the state, the right to compensation for criminally culpable conduct was "generally recognized as being a civil law right".[60] In addition, the teacher's exercise of the powers were only those "existing under the rules applicable to relations between private individuals", which would be the same whether the school was a state-funded or private school.[61]

The Court used comparison recognizing that "(…) in the majority of the legal systems of the Member States the conduct of a teacher in a State school, in his function as a person in charge of pupils during a school trip, does not constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals".[62].

Determining a textual excluded matter of Convention (the case of bankruptcy)

Certain matters were excluded by drafters from material sphere of Convention. It was, for example, the case of bankruptcy[63].

In a relevant case, Gourdain vs.Nadler[64], a French court ordered, a *de facto* German manager of a French company, previously declared insolvent, to bear part of company's debts pursuant to the French Law on bankruptcy. The trustee of bankruptcy procedure tried to enforce the order in Germany as a civil liability falling within 'civil and commercial matters' of Convention. The German Courts refused the enforcement considering the order as part of proceedings for ,"bankruptcy", which were excluded from Convention.

[59] Volker Sonntag v. Hans Waidmann, (Case C-172/91), judgment of 21, 4, 1993, ECR, pp I-1990

[60] Volker Sonntag , dec cit, para 19.

[61] Volker Sonntag , dec cit, paras. 22-23.

[62] More details of comparison are visible in the opinion of advocate general which found that a majority of the 11 signatory states in the moment of interpretation (with the exception of common law countries which did not recognize the private/ public law distinction) were embracing a civil or a predominantly private law character of such action in redress. For example, in Denmark, Spain, Portugal, Netherlands, France, Luxembourg this sort of claim had mostly a civil law character. The only special situation was in Germany, where the doctrine was split on the public or private character of such an action, and in Greece, where such a liability had a purely public-administrative character. Cf opinion of advocate general Darmon delivered on 2 December 1992, ECR, pp I – 1977 et ss.

[63] According to article 1(2): "The Convention shall not apply to: (…) 2. Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;".

[64] Henri Gourdain v. Franz Nadler, (Case 133/78) [judgment of 22. 2. 1979] ECR, pp 733.

The ECJ decided that the order of French court was within the excluded matters since "(…) according to the various laws of the Contracting Parties (…) it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings".

The comparison can be traced to opinion of advocate general[65] which identified principles applicable to bankruptcy in international instruments, such as Benelux, Franco-Belgian or Belgo - Netherlands treaties on bankruptcy[66]. The majority of national laws dealing with the problem (excluding the law of France)[67] or the majority of international conventions provided the final answer adopted by the Court.

Conclusions: limits of comparison for determining 'common principles' and strategies of Court to overcome them

The essential threshold in a comparative research for 'common principles' consists in its limited ability to determine such 'common principles' when national solutions are highly divergent. And the Court used a number of techniques to overcome such limitation.

Most of the time, the finding of 'common (general) principles' was based on a quantitative theory of W. Wengler[68] who considered a sort of poll followed by a decision based on majority of laws of Member States[69].

Another method for finding 'common (general) principles' was the qualitative, or 'critical comparison', developed by K. Zweigert[70] as a ' weighted study of comparative law'. For him[71] it was not the quantitative degree of concordance between principles that mattered, but the quality of solution. This weighted study of national laws should discover "a most judicious national regulation", "a most progressive solution", "the best legal order". The solution would be the one towards which each legal system is heading, at least unconsciously.

This method was used, rarely however, by ECJ[72] or advocate generals.

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[65] Opinion of Mr. Reischl, Case 133/78, pp 746.

[66] Opinion of Mr. Reischl, cit, pp753 et ss.

[67] Idem, pp 749.

[68] Wengler (Wilhelm) «Les conflits de lois et le principe d'égalité », RCDIP, 1963, p. 506 et suiv.

[69] For example in Netherlands State v. Rüffer supra, Volker Sonntag v. Hans Waidmann, supra, Henri Gourdain v. Franz Nadler supra.

[70] Zweigert (Konrad), «Der Einfluss des europaïschen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten », Rabels Z 1964, p. 601.

[71] K. Zweigert en «Le droit des Communautés européennes », op. cit. p. 445.

[72] For example in case LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol supra, the ECJ adopted implicitly the solution of the most advance legal system in relation to criterion for public law relations.

The last method used by Court in finding 'common principles' was a redefinition of the starting question altogether. The Court replied to a different question (such as a negative one), to determine an answer to a (sub-problem). For example it tried to determine the meaning of commercial matters by examining situations exiting outside of subject maters of Convention (in LTU case).

Comparison as search of 'common principles` was a strong instrument in solving complex and novel cases. However, besides the 4 decisions analyzed above, the Court solved cases at hand (in relation to subject matter of Convention), with the other alternative, the classical interpretative methods of system and purpose. Since more and more States became part of Convention the comparative effort required from the Court grew accordingly while the possibility of finding 'common principles' was attaining its limits.

From a certain moment on, the Court was unable to maintain a balance among two grounds of autonomous interpretation and used just the objectives or system of Convention without any consideration for national solutions and comparison.

B. Comparison in interpretation of ordinary terms of Convention

We have seen that in "Tessili vs Dunlop" decision[73], the Court has formulated an 'obiter dicta' of the general policy it would follow in interpretation of Convention (considering a balance between autonomous and non autonomous characterizations of each disposition).

We have also seen that, for terms of article 1 (the subject matter of Convention), such a balance did not really exist. The subject matter of Convention had always an autonomous meaning since choosing national meanings (*lex fori*) would heart a fundamental principle of equality of rights and obligations of States and private parties of a treaty. We have equally seen, that autonomous meaning/characterization was determined, in certain situations, by a comparison searching for 'common' principles'. In all other cases, the autonomous meaning were determined by classical interpretative means of treaties (system and purpose).

The situation for other articles of Convention is quite different.

The Court should determine, in a first step, whether an autonomous characterization is required or not. Interestingly enough, a preliminary, new sort of comparison emerged at this level.

If the Court chose an autonomous meaning, it must determine it, in a second step. In many, but not all cases, this autonomous meaning was discovered by comparison supporting an

[73] Industrie Tessili Italiana Como v. Dunlop AG, (judgment of 6. 10. 1976, case 12/76), ECR pp 1484,1485, paras. 9-11.

autonomous characterization with mechanism more sophisticated than a search of 'common/ general principles'.

Since no general methodological program about these two comparative processes was ever formulated by the Court, the mechanisms and strategies used in relation to them will be exposed bellow, following relevant decisions.

B1. A preliminary, 'informing comparison', acknowledging the national characterizations (lex fori) of terms of Convention

Emergence of a preliminary stage: the 'informing comparison' and the rejection of autonomous characterization

Under article 5.1 of Convention (a *special jurisdiction*), a defendant domiciled in a Contracting State may be sued in another Contracting State "in contractual matters, before the court of the place where the obligation was or should be performed."

In Tessili case[74] the dispute was between a German company (Dunlop) and an Italian company (Tessili) for a defective performance of selling obligation by Italian side, which delivered substandard goods at German company's siege. According to German company the judge of delivery place (in Germany) was competent for an action on annulment, while according to Italian company the competence belonged to the court of domicile (or social siege) of the vendor (in Italy).

Despite adopting, as seen above, a favorable doctrine for autonomous meaning of terms of Convention, the Court chose, for article 5.1 ('lex loci contractus'), a national characterization based on *lex fori* of seized court: "…It is for the court before which the matter is brought to establish under the Convention whether the place of performance is situated within its territorial jurisdiction".

The Court developed a rule of conflict: "For this purpose…[the national court] must determine, in accordance with own rules of conflict of laws, the law applicable to the legal relations in question and identify as a result the place of performance for the contractual obligation".

ECJ discovered, by comparison, a large divergence of national laws of Member States regarding the problem and was unable to settle a uniform solution: "Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to

[74]Industrie Tessili Italiana Como v. Dunlop AG, (judgment of 6. 10. 1976, case 12/76), ECR, pp 1473, 1486.

give any more substantial guide to the interpretation of the reference made by Article 5 (1) to the 'place of performance' of contractual obligations"[75].

The same solution was embraced, with a more clear motivation, in one of the alternative opinions of the plaintiff (Dunlop company)[76], in the opinion presented by Government of the Federal Republic of Germany[77] and in the opinion of Government of the United Kingdom[78].

One can reconstruct the thinking of Court as a reasoning from effects.

On one branch of the reasoning, the Court verify, through comparison, the way national legal systems would deal with the problem at hand and evaluate their outcome.

First of all, the Court examine, by comparison, the way in which judges in Member States would deal with the problem (a *lex fori characterization*). The ECJ do not restrain to conflicting meanings in the case and is imagining that interpretative disputes would exist simultaneously between all legal systems.

In fact, the Court is trying to answer a (metaphorically speaking) question: *How would national judges in all Member States characterize the problematic term?* Based on results of comparison the Court identifies the level of divergence of national solutions[79]. Since such comparison informs the Court about national solutions it may be called 'informing comparison'[80].

In Tessili case, the Court envisioned that each national judge would employ own characterization (*lex fori*) based on national law of contracts (whereas no material unification of contracts and obligations existed at that moment), and would apply national rules of conflicts for the international performance of contracts (whereas no unification of such rules existed either).

Obviously, the result would have been a greater divergences of national systems, on all these levels. and that would have created an even higher divergence of the outcome (determination of jurisdiction).

On the other branch of the alternative, the Court envision an autonomous characterization, picture it and evaluates its outcome (as being or not able to reach uniformity and/or legal security in application of the article).

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[75] Tessili, dec.cit, para 13-14, pp 1485.
[76] Idem, pp 1476, 1477.
[77] Idem, pp 1477, 1478.
[78] Idem, 1479, 1480
[79] There is always a (minimal) divergence, since at least 2 national systems/judges must qualify a term differently, and hence require an interpretation by ECJ.
[80] We preferred this name to 'divergence comparison' which would have focus on results of comparison (the determination of divergence-diversity among national interpretations).

In Tessili case, this second branch of reasoning imply for the Court to act as 'unifier' on all the levels explored above (unifying. for example, the national laws of contracts and obligations, the national laws of conflicts, etc).

The result for Court would be to 'overstretch itself' beyond the sphere of procedural law and open the door for case-law creation of a substantive European law of obligations. Such an autonomous characterization would produce an upheaval of national laws and would require from the Court to answer more and more interpretative questions of national judges, in matters far outside of the object and purpose of Convention[81].

In a final step of reasoning, the Court balances the two outcomes (effects) corresponding to the two initial choices (*lex fori* characterization vs. autonomous characterization) and evaluates which is more practicable (easily adopted, without upheaval, by national systems), and favor security (do not create long period of uncertainty about meaning).

Obviously, in Tessili case, the Court chose a first alternative, the '*lex fori*' characterization for 'place of performance' of obligation. The '*lex fori*' characterization was chosen since autonomous characterization would have required other interventions of Court (future decisions) creating, for a while, uncertainty and legal insecurity. In addition an autonomous characterization would have been impracticable since it would interfere with right of obligations, contracts and rules of conflict in Member States (creating and upheaval in such sensitive matters) and impose substantial solutions in domains outside the object of Convention (which is specifically the international conflicts of jurisdictions).

Opting for characterization 'lex fori' in case of small divergence among national solutions

At the opposite end of the spectrum. there was a situation when the Court opted for a 'lex fori' characterization, even if the divergence among national solutions was quite insignificant, since the autonomous solution was impracticable.

In case Siegfried Zelger v Sebastiano Salinitri[82], the question addressed to ECJ was whether a *lis pendens* (situations when 2 litigations among same parties and with same cause of action were considered by 2 different national judges) come into being upon the receipt by a national

[81] "Seeing that national laws at present differ on where performance is to take place, the ruling given by the Court would result in a change of the law of some, perhaps all, of the Member States; the effect of the ruling would extend to all aspects of performance of contracts of the type in question and would have repercussions even beyond the performance of the contract to other aspects of the law which are directly or indirectly linked with performance. Moreover, the question where performance is to take place would call for a separate answer for every different type of contractual relationship, and would in every instance ultimately be a matter to be referred to the Court of Justice. Serious uncertainty would be introduced into the law." Cf. Opinion of Government of the United Kingdom, dec. cit, pp 1480.

[82] Siegfried Zeiger v Sebastiano Salinitri (Judgement of 7. 6. 1984, Case 129/83) ECR, pp 2397.

court of the application or upon service or notification of application to the party concerned (the defendant)[83].

The ECJ examined solutions in the 6 Member States and found that only Belgian law considered such action as pending from moment of its registration to a court[84]. In all other 5 Member States the action was pending from notification of action to defender.

While that seemed to be a minor divergence, the ECJ considered that "…a common concept of *lis pendens* cannot be arrived at by a rapprochement of the various relevant national provisions"[85] and rejected autonomous characterization altogether, by choosing a *lex fori* characterization : "*Since the object of the Convention is not to unify those formalities, which are closely linked to the organization of judicial procedure in the various State* [italics by us], the question as to the moment at which the conditions for definitive seizing for the purposes of Article 21 are met must be appraised and resolved, in the case of each court, according to the rules of its own national law" [86].

On one branch of reasoning from effects, the Court assessed the outcome for interpretation made by judge seized, according to national procedural law (characterization *lex fori*). The divergence seemed quite small (only 1 'dissident' -the Belgian law- among the 6 Member States)[87]. Also preliminary proceedings were clear of the desire of drafters to maintain national characterization of the term[88].

On the other branch of reasoning, the Court considered the outcome for an eventual adoption of autonomous characterization for starting moment of *lis pendens*. The autonomous characterization of such a small detail would impose, for the Court, changes in national civil procedure of all States, and would create an upheaval in a highly technical matter.

In a balance between the two alternatives the outcome of a characterization 'lex fori' was preferred as being the more practical (satisfying the requirement of practicability and security).

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[83] The article 21 of the Convention is enunciating that: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested."

[84] Siegfried Zeiger, dec. cit, para 11,12.

[85] Idem, para 13.

[86] Idem, para 15.

[87] Even if the Court considered that "a common concept of *lis pendens* cannot be arrived at by a rapprochement of the various relevant national provisions" in fact, given the small divergence, a use of comparison in search of 'common principles' (in form of a majority rule) would have been easily accomplished-by adopting the common rules of 5 states (Belgium being the only exception).

[88] The Jenard Report decided that there was "no need to specify in the text [of Article 21] the point in time from which the proceedings should be considered to be pending" and decided therefore to leave "this question to be settled by the internal law of each Contracting State", Cf citation in the opinion of advocate general Mancini delivered on 11 April 1984, in Case 129/83, ECR, pp 2414-2415.

The two cases, Tessili and Zelger, were the only ones where the Court opted for 'lex fori' characterizations.

In the case to be presented bellow, the *'informing comparison'* was used as complementary argument, supporting the practicability of an autonomous characterization (determined by the classical means of interpretation-system and purpose).

Using 'informing comparison' to assess and support the acceptability of an autonomous characterization

Article 5(3) of the Convention provides that: "a person domiciled in a contracting state may be sued, in another contracting state: ..(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred".

The text was clarified by ECJ in case *Bier* v *Mines de Potasse d'Alsace*[89]. A French undertaking has discharged daily chloride into Rhine River, and allegedly created damage to a Netherlands undertaking in Rotterdam. The fact occasioning the damage occurred in France whereas the damage was recorded in the Netherlands. The ECJ was asked to determine if linking point of special competence of 'place where the harmful event occurred' in Article 5 (3) of Convention means "the place where the damage occurred" or "the place where the action having the damage as its sequel was undertaken"?'

Neither the court submitting the question, nor the parties, has expressed reservations about autonomous characterization of expression, and the Court chose it, without notice.

As about the text of the disposition, its drafters were aware of its obscurity[90].

The Court acknowledged, by a literal interpretation, 3 alternatives of connecting factors: the place of the event giving rise to the damage, the place where damage occurred, or the idea that plaintiff has an option between the one and the other of the two connecting factors[91].

The Court opted for the last cumulative solution"…the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it"[92].

It supported this solution with a reason by effects developed on three levels.

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[89]Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA, (Judgment of the Court of 30 November 1976, Case 21/76), ECR 1735, 1749.

[90]As seen in the following passage of Jenard Report: 'The Committee did not consider it appropriate to specify expressly whether account should be taken of the place in which the act causing the damage was effected or on the other hand of the place in which the damage had occurred; instead the Committee considered it preferable to employ wording adopted by various national legal systems (Germany and France)'. Cf mention in opinion of Mr advocate-general Capotorti, delivered on 10 November 1976, Case 21/76, ECR, pp 1751.

[91] Handelskwekerij G.J. Bier BV, dec.cit, para 14, pp 1747.

[92] This, so called 'principle of ubiquity', was confirmed ever since by the ECJ.

First of all, based on legal definition of "liability in tort, delict or quasi-delict" where "a causal connection can be established between the damage and the event in which that damage originates", the Court considered that each of the first two alternative can, depending on circumstances, be particularly helpful from point of view of evidence and conduct of proceedings.

In a second step the Court used a reason from 'effects' to reject the first alternative, which would make article 5(3) to overlap with article 2(1) (the common jurisdiction based on domicile of defendant) and therefore to become useless (producing no useful effect)[93].

Then the Court rejected also the second alternative: "the place where the damage occurred would, in cases where the place for the event giving rise to the damage does not coincide with the domicile of the person liable, have the effect of excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage".

In the third and last step, the Court used 'informing comparison' to acknowledge that in "national legislative provisions and national case-law on the distribution of jurisdiction ... and in international relationships…albeit by differing legal techniques, a place is found for both of the two connecting factors…and that in several States they are accepted concurrently"[94].

Here the 'informing comparison'[95] was not part of a reasoning from effects, in choosing or not an autonomous characterization. In fact the autonomous characterization was already decided by the Court.

The 'informing comparison' was used at a later stage, to enlighten the Court about the acceptance of an autonomous characterization (cumulative solution) determined by classical means of interpretation. In this case, the cumulative solution has the advantage of avoiding the upheaval of solutions worked out in various national systems, which were, in great majority, familiar with the autonomous solution.

Conclusions about using 'informing comparison' in the reasoning from effects

[93]Handelskwekerij G.J. Bier BV, dec.cit, para 20: "This conclusion is supported by the consideration that a decision only in favour place of event giving rise to the damage would create, in a great number of cases, confusion between the heads of jurisdiction laid down by article 2 (domicile of defender) and article 5 (3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness".

[94]Idem, para22.

[95]Details of comparison are visible in opinion of advocate general which realized a highly comprehensive research. He examined civil procedures in the Member States, for internal and international litigation on non-contractual liability, to discover that they agreed, in majority, with a choice between 2 attachment points. Such cumulative solutions were embraced in France, Germany, Belgium and Italy. While Netherlands did not recognize such an attachment point for jurisdictions in the case of Luxembourg is was not even mentioned as such. Similar cumulative solutions were found in England, Scotland and Denmark (which were not yet parties of the Convention). Cf opinion of Mr advocate-general Capotorti delivered on 10 November 1976, Case 21/76, ECR, pp 1752- 1755.

We have seen in the last decision (Mine de Potasse…), that autonomous characterization was supported, in last instance, by ‘informing comparison’ delivering the ‘state‘ of national legal system (*lex fori*) which, in great majority, embraced the cumulative solution.
Such an autonomous characterization was supported since its adoption would not create an upheaval of national systems. The solution satisfies the criteria of practicability-adaptability in a reasoning from effects where ‘informing comparison ‘played an important role, however only as a sub-argument.
In the other 2 decisions (Tessili, Zelger), the ‘informing comparison’ provided the degree of diversity of national solutions in a precedent step, before the adoption of autonomous characterization. It was again in reasoning from effects, where 'informing comparison' was just a sub-argument.
On itself, ‘informing comparison’ does not provide the autonomous characterization but play a role in relation to determination (or not) of an autonomous characterization.
However, most of the time, the results of ‘informing comparison’ will be used by Court in constructing an autonomous characterization, through a process of reconfiguration with the help of interpreting methods of system and purpose. The following part will explore such mechanisms.

B.2. A 'focused comparison' used in autonomous characterization of terms of Convention

In the following decisions comparison was effectively used to build autonomous characterizations of common terms of Convention. And this autonomous characterization will empoy a third form of comparison. Strangely enough, this third form of comparison will use the results provided by ‘informing comparison’.
The mechanisms of this third form of comparison will be different of the first kind of comparison (search of ‘common principles’). It is obvious that, if the degree of divergence of national solutions is very important (requiring, in first instance, an autonomous characterization of the term), the escape strategies for finding ‘common principles’ among divergent national solutions (specific majority rules, negative comparison, etc) would be ineffective. New mechanism will be at play here, mechanisms to be explored and reconstructed from relevant decisions.

Inductive approach in using results of 'informing comparison' for autonomous characterization in the light of system and purpose of relevant articles

The term "ordinary appeal" was defined by the ECJ in Industrial Diamond Supplies v. Luigi Riva[96] case.

Based on divergences resulting of 'informing comparison', the Court elaborated an autonomous meaning in the light of system and purpose of relevant articles (art 30 and 38)[97].

Since "the specific purpose of Articles 30 and 38 is to prevent the compulsory recognition or enforcement of judgments in other Contracting States when the possibility that they might be annulled or amended in the State in which they were given still exists" the Court, based on this criterion alone, would qualify as ordinary appeal the one "*which may lead to the annulment or amendment of the judgment in question"*.

Then the Court went further by taking in consideration Article 38 of the Convention which would impose "*in addition*, *all the relevant considerations arising from the nature and conditions for the application of the judicial remedies in question"*[italics from us].

In the end the Court determined positive[98] and negative[99] criteria for ordinary appeals.

In fact the Court followed, silently, the comparative reasoning of the advocate general[100].

In a first stage the advocate general inspected ordinary appeals in each Member State, according to national definitions. Then it took in account ordinary appeals which were in agreement with function and structure of articles 30 and 38 (appeals creating an annulment of a decision). The characteristics of such appeals were at the origin of positive criteria later adopted by the Court.

In a second stage the advocate general identified in each Member State, the extraordinary appeals, according to national definitions. The characteristics relevant of each extraordinary appeal were added together in a final definition which inspired the negative criteria of the Court.

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[96] Industrial Diamond Supplies vs Luigi Riva (judgment of 22. 11. 1977, case 43/77), ECR, pp 2176.

[97]Under Article 30 of the Convention: 'A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged'. Under the first paragraph of Article 38: 'The court with which the appeal under the first paragraph of Article 37 is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged'.

[98]Idem, para 37.

[99] Are excluded those based "either upon events which were unforeseeable at the date of the original judgment or upon the action taken by persons who are extraneous to the case, and who are not bound by the period for entering an appeal which starts to run from the date of the original judgment", idem, para 39.

[100] See Opinion of Mr Advocate-general Reischl, delivered on 19 October 1977, case 43/77, pp 2198-2200.

This is an implicit, purposeful and inductive use of comparison. Such a 'piece meal' approach was only possible because the advocate general (an implicitly the Court) had to 'connect and focus' only 6 legal systems of the Member States of Convention at that time.
It is quite clear that such use of comparison is very different from the simple search of 'common principles ' of national solutions (which in fact did not exist).

Inductive approach in the light of system and purpose for comparison used for autonomous characterization

In the case Société Bertrand v. Paul Ott KG[101], the ECJ was asked to determine whether a contract of sale between a German company and a French company, where, as payment, the buyer issued two bills of exchange payable in two terms, was a 'sale of goods on installment credit terms'[102].

At first, the Court concluded to necessity of autonomous characterization of the term[103] .
Then, it determined the autonomous characterization by re-framing and restructuring the results of 'informing comparison' in the light of the purpose of article 14.
On a first step, the Court deduced the restrictive meaning ('ratione persone') of article 14 which "derogates from the general principles of the system laid down by the Convention in matters of contract such as may be derived in particular from Articles 2 (domicile of defendant) and article 5 (1) (*loci contractus*), with a 'ratio legis' "inspired solely by a desire to protect certain categories of buyers"[104].
On a second step, the Court formulated a doctrine for use of comparison based on "general principles which are apparent in this field from the body of laws of the Member States and bearing in mind the objective of the protection of a certain category of buyers"[105]. This

[101] Société Betrand v. Paul Ott KG, (Judgment of the Court of 21 June 1978, Case 150/77) ECR, pp 1431.
[102] The initial wording of Section 4 of Convention instituted an imperative jurisdiction in relation to sale of goods where the price is payable in a series of instalments, and sale of goods where the sale is contractually linked to a loan (article13). Article 14 determined that in actions against a seller or a lender, proceedings may be instituted by the buyer or borrower either in the courts of the State in which the defendant is domiciled or in the courts of the State in which the buyer or borrower is domiciled. Actions by a seller or a lender may in general be brought only in the courts for the place where the buyer or borrower is domiciled when the proceedings are instituted.
[103] Société Betrand, dec cit, para 14.
[104] Idem, para 17: "To this finding must be added the fact that the compulsory jurisdiction provided for in the second paragraph of Article 14 of the Convention must, because it derogates from the general principles of the system laid down by the Convention in matters of contract, such as may be derived in particular from Articles 2 and 5 (1), be strictly limited to the objectives proper to Section 4 of the said Convention.
Para 17: "Those objectives, as enshrined in Articles 13 and 14 of the Convention, were inspired solely by a desire to protect certain categories of buyers who, having been parties to contracts for the "sale of goods on instalment credit terms", may be sued by the seller only in the courts of the State on the territory of which the said buyers are domiciled, whereas sellers domiciled on the territory of a Contracting State may be sued either in the courts of that State or in the courts of the Contracting State in which the buyer is domiciled".
[105] Idem, para19.

doctrine is going further than a simple search of 'common principles', since comparison is used in the light of purpose of relevant dispositions (the protection of certain categories of buyers).

The Court discovered among rules of Member States for contracts of sell in installment credit, that "a restrictive interpretation of the second paragraph of Article 14, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage described above to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that *they are private final consumers and are not engaged, when buying the product acquired on installment credit terms, in trade or professional activities*"[italics of us] [106].

The 'informing comparison' provided results for autonomous characterization. Among national solutions, the Court chose (according to purpose of article) national rules which protect buyers. Then, the Court identified a common theme of these rules in relation to specific characteristics of protected persons. These characteristics provided the result, the protection of buyers *as consumers,* which was adopted by Court as the autonomous meaning.

The initial comparative reasoning was formulated by advocate general, which departed from a search of `common principles` (unable to provide results since national solutions were highly divergent) in favor of a common tendency of national laws to protect buyers, tendency focusing on buyers as consumers[107].

Once more, the legal reasoning of Court (following in the steps of its advocate general) was going further than a simple search of 'common principles', which, given the diversity of national solutions, was unable to provide a result.

One can observe that, while in Industrial Diamond case, the methodological comparative doctrine of the Court was hidden, in the decision above, the use of comparison in light of purpose and system of relevant articles was clearly assumed by ECJ.

A heuristic role for a late use of comparison in autonomous characterization

In Powell Duffryn case[108], Powell Duffryn Plc, an undertaking governed by English law maintained that a clause conferring jurisdiction to German courts, contained in statutes of a German company limited by shares, cannot constitute an agreement because statutes are normative (non contractual) by nature and thus their contents are not open to discussions by shareholders. In contrast, the German side argued, on basis of German law and in particular the

[106] Idem, para21.

[107] Cf. Opinion of advocate general Capotorti delivered on 31 may 1978, Case 140/77, ECR, pp 1451.

[108] Powell Duffryn plc vs Wolfgang Petereit.(Judgment of the Court 10 March 1992, Case 214/89), ERC, pp I-1769.

provisions of German Law on share companies, that statutes are contractual by nature and therefore a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.

The qualification as contractual or institutional of a statute of a company (limited by shares) would have the consequence of considering (or not) a specific clause as attribution of jurisdiction in agreement with article 17(1)[109].

After acknowledging, by 'informing comparison'[110] ,the diversity of national results, the Court chose, silently, an autonomous meaning for the 'agreement conferring jurisdiction'.

Then, the Court opted for contractual interpretation of relations between share holders since "company's statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up"[111].

The Court based this position on a systematic interpretation of article 17(1) correlated with an interpretation grounded on its own precedents in regard to associations[112].

However the expressions used by the Court repeat those of the advocate general which employed comparison extensively.

The advocate general discovered, at first, a diversity of national qualifications of nature of relationships between a company limited by shares and its shareholders. On the other hand, besides such divergences, it emphasized that relationships of stakeholders, or of stakeholders and a company are analogous to contractual relations[113] and must support a contractual qualification of the term.

As such, the comparison of advocate general played an heuristic role for the Court, allowing it to determine the solution, even if its final argument was different. We believe that Court `masked` a comparative reasoning, to escape the highly charged political-theoretical debate in Member States, on the legal nature of corporations (limited by shares) and their statutes, a subject clearly outside of the object of Convention.

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[109] Article 17(1) of Brussels Convention which provides that "if the parties, one or more of who is domiciled in a Contracting State, have agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court is to have *exclusive jurisdiction"*.

[110] Idem, para 10: "…it appears from a comparative examination of the different legal systems of the Contracting States that the characterization of the nature of the relationship between a company limited by shares and its shareholders is (…)in some legal systems characterized as contractual and in others it is regarded as institutional, normative or *sui generis"*.

[111] Idem, para 16.

[112] Idem, para 15.

[113] Cf Opinion of Advocate general Tesauro of 20 November 1991, Case C-214/89, para 4, pp I-1758.

Conclusions about the focused comparison' used in autonomous characterization of terms of Convention

We examined above three decision where a third kind of comparison was employed by the Court for autonomous characterization of terms of Convention.

Its mechanisms are distinct from comparison searching for 'common principles'. Obviously, if the degree of divergence of national solutions is important, any tentative to determine autonomous characterization through 'common principles' (including with escape strategies such as majority rule, negative comparison, etc) would fail.

This is third form of a 'focused' use of comparison. The systematic and purposeful meaning of interpretation were *used together with comparison* in order 'to focus' the results of 'informing comparison` for autonomous characterizations. In fact, the system and purpose were used alongside comparison in a 'synergistically' manner.

Such a purposeful use of comparison seems in agreement with a doctrine formulated by Leontin Jean Constantinesco[114].

He proposed, to start by examining whether is possible to specify for comparison a 'frame' based on common elements of national terms (a search 'common principles')[115].

Then Constantinesco proposed to surpass such a 'frame' in favor of solutions in agreement with the purposes of articles in a treaty[116].

That is exactly what the Court did through the ' focused' used of comparison, in agreement with system and purpose of articles of Convention, for determining autonomous characterizations.

In this context the surpassing of a simple research of 'common principles' become more clear.

Final conclusions

The program of Ernst Rabel for using comparison in trans-national, autonomous characterizations was too difficult to be implemented by national judges. Even in its reduced form (by-comparison) such a program would have required knowledge of analytical comparison from national judges which are mostly familiar with own legal systems.

Nevertheless, during the 40 years practice of ECJ in relation to Brussels Convention I, there were a number of decisions illustrating the first practical implementation of Rabel's program. This is a clear revival of ideas of Rabel, even if this revival was limited in scope, and was confined to a conventional - treaty domain.

[114] See Constantinesco (Leontin Jean), op.cit. no. 124

[115] This is the technique that was examined in relation to article 1 of Convention.

[116] Idem.

This breakthrough happened because ECJ and other European actors had capabilities and means to use 'state of the art' comparison in finding solution to a case[117]. Since Brussels Convention I was a treaty, with a sort of 'independent' legal order, the autonomous characterizations were implicit.

However, comparison was used by ECJ, quite scarcely (in less than 20 decisions among 400), as interpretative instrument of Convention. The intrinsic limits of comparison as interpretative instrument played a role here [118] and therefore the comparative autonomous characterization was just a subsidiary method, even if an important one.

The autonomous characterization through comparison expressed itself in 2 forms (comparison as search of 'common principles', and the 'focused' use of comparison) and as a sub-argument ('informing comparison').

First of all, a special mention must be made for terms of article 1 (the subject matter of Convention), where Court determined the autonomous meaning by applying alternatively the system and purpose vs comparison in search of 'common principles'.

This first form of comparison, established autonomous characterizations, only *horizontally* (since the possibilities of a 'lex fori' characterizations were clearly excluded)[119].

The most interesting comparison was the one used in determining an autonomous meaning of terms in ordinary articles of Convention. There was here, a real possibility to have (or not) autonomous characterizations, while the system and purpose of the articles become essential in interpretation.

The Court used a reasoning from effects to balance a 'lex fori' characterization. determined by 'informing comparison'. against the practicability or security of autonomous characterization. This form of comparison, the 'informing comparison'. was only a sub-argument and provided the Court an image of the way Member States would deal with the problem at hand.

Just in only two cases, Tessili and Zelger[120], the Court opted for a national, 'lex fori', characterizations.

Most of the time, the Court, faced with divergences of national characterizations opted for a autonomous characterization, It was achieved, many times, by a a third form of comparison,

[117] One may notice that this 'multi-comparison', while more complicated that 'bi-comparison,' might give a more relevant answer and be also more 'economical' of time and effort of the Court. For example, for a question relating to legal solutions of 6 initial Member States, the 'multilateral' comparison can replace 15 series of 'bilateral' comparisons. It can replace combinations of 6 take 2 at a time (with formula n!/(k!*(n-k)!) where n=6, k=2) or otherwise 15 decisions adopted in a step by step manner through successive 'bilateral' comparisons.

[118] See our discussion in the section about comparison as search of 'common principles'.

[119] See supra.

[120] See supra.

the 'focused' comparison. It was an employment of results provided by 'informing comparison' in the light of system and purpose (a 'teleological' use of comparison) of relevant articles.

This was a stronger technique able to achieve results even when a search of 'common principles' would fail. However, this technique has also its limits, when the high diversity of national legal solutions cannot be overcome.

One must notice that in majority of cases, the Court achieved the autonomous characterization by classical interpretative instruments (grammar, history, system, purpose). The intrinsic limitation and difficulties in using comparison has reduced its impact over the years in favor of this other methods of autonomous characterization.

During a 'golden age', from 1974 to 1981, while there were 6 Signatory States of Convention, the comparison, in all its forms, was used rather extensively.

The successive enlargements and the growing number of Signatory States made more and more difficult to determine autonomous characterization through comparison. The comparative efforts required of the Court were becoming more and more important, while the possibilities of succeeding become uncertain. The 'focused' use of comparison, or the strategies for enlarging the reach of 'common principles' were approaching their limits.

In some late cases the autonomous characterization by comparison was used only as secondary argument to system and purpose and later was replaced altogether.

This research is meant to make practitioners aware of the limits but also of the opportunities of comparison as instrument for autonomous characterization, providing a new life to the brilliant ideas formulated by Rabel in the 30s. We believe that in the near future comparison for autonomous characterization might be used successfully in relation to instruments such as Regulations Brussels I, Brussels II, Rome I[121], Rome II, Rome III[122].

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[121] See for an interesting consideration about the potential of autonomous characterization of Rabel, Fryderyk Zoll, "The Draft Common Frame of Reference as an Instrument of the Autonomous Qualification in the Context of the Rome I Regulation" in Franco Ferrari, Stefan Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Walter de Gruyter, Nov 16, 2009, pp 17, 19.

[122] Such instruments have compulsory jurisdiction of ECJ, for example, in relation to choice of jurisdiction, as Brussels II (concerning family law) or in relation to choice of law, such as Rome I (contractual obligations), Rome II (non-contractual obligations), Rome III (divorce) and do not have, to this day, an extended practice.