# Cross-border Commercial Litigation – Do We Need a Permanent European Commercial Court?

# Litigii comerciale transfrontaliere – avem nevoie de o Curte comercialã europeanã permanentã?

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***Abstract***

*September 2018 a European Parliament study titled 'Building Competence in Commercial Law in the Member States' inter alia launched the initiative to install a brand new 'European' Commercial Court (ECC). This ECC aims at adjudicating cross-border commercial disputes as 'optional' court operating complementary to court proceedings in EU Member State courts. This contribution attempts to analyse versatile issues in respect of the institutional legal basis of a future ECC under the TFEU as well as its main characteristics, and, furthermore, matters concerning conflict of laws (choice of forum, proper law of the contract, national laws and Contract Principles, recognition and enforcement of ECC judgments) and substantive law related questions. Any draft proposal text for an ECC Regulation so far missing, 'impressions' rather than conclusions can be drawn from this inquiry.*

***Keywords:*** *Cross-border commercial conflict adjudication; European Commercial Court; Institutional EU Framework; Conflict of laws*

***Rezumat***

*În septembrie 2018, un studiu al Parlamentului European intitulat „Dezvoltarea competenţelor statelor membre în domeniul dreptului comercial" a lansat, printre altele, iniţiativa creării unei noi curţi comerciale „europene" (CCE). Această CCE ar urma să soluţioneze litigii comerciale transfrontaliere ca instanţă „opţională", ce funcţionează în completarea procedurilor judiciare derulate în faţa instanţelor statelor membre ale U.E. Prezentul studiu îşi propune să analizeze aspecte versatile privitoare la baza instituţională a unei viitoare CCE în cadrul TFEU, principalele caractere ale acesteia, precum şi aspecte legate de conflictul de legi (alegerea forului, legea aplicabilă contractelor, legile naţionale şi principiile contractuale, recunoaşterea şi executarea hotărârilor CCE) sau probleme de drept material. În*

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*absenţa unui proiect de text de regulament CCE, până la această oră, vom formula mai degrabă câteva „impresii" decât să tragem concluzii pe marginea analizei întreprinse.*

***Cuvinte-cheie**: soluţionarea litigiilor comerciale transfrontaliere; Curtea Comercială Europeană; cadrul instituţional al UE; conflict de legi.*

## 1. Introduction

September 2018 research conducted under the auspice of European Parliament, titled 'Building Competence in Commercial Law in the Member States' first saw the light[1]. The preponderant aim of this EP inquiry is to commence a debate on the existing 'patchwork of legal rules and regulations' cross-border commerce is confronted with, both 'internationally and within the EU'[2]. This study seeks 'to contribute to this debate by taking a closer look at cross-border commercial contracts and their operation in theory and practice.' In altogether four chapters, it mainly 'describes the applicable legal framework and analyses commercial practice as regards choice of law and choice of forum clauses'[3] at Member State level.

In particular Chapter 4.4 draws the attention. This section can be looked upon as a challenging specimen of 'outside the box' thinking: in no more than five pages, it poses the question whether, alongside the option to initiate civil and commercial court proceedings in any of the EU Member States under the reign of EU Regulation 1215/2012 ('the 'Recast'), the instalment of a permanent 'European Commercial Court' (ECC) for in particular voluntary jurisdiction (*id est* in a court commonly opted for by the litigating parties) deserves to be contemplated.

Any (pre)draft Regulation text in this stage not yet being available, this contribution attempts to analyse, hypothetically speaking, the ramifications of enriching the current EU cross-border procedural law framework with such an 'optional' brand-new 'European' Court. To that end, first the existing legal landscape of voluntary cross-border commercial litigation at EU Member State level will be given notice briefly. Thereafter, the attention shifts from national to Community level, starting with various (potential) push and pull oriented factors favouring the concept of a permanent European Commercial Court. Subsequently, versatile issues (legislative competence under the TFEU allowing for such a Court, its position within the existent European Private International law framework, the recognition and enforcement of 'ECC' judgments, as well as some miscellaneous practical and organizational matters related to court proceedings etc., will be held against the light. The contribution ends

[1] 'Building Competence in Commercial Law in the Member States' (Legal and Parliamentary Affairs), Study for the JURI Committee, PE 604.980, author G. Rühl, September 2018 (further referred to as 'EP Study'), available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf. Cf. further Idem, Towards a European Commercial Court?, Oxford Law Blog November 20, 2018, https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/towards-european-commercial-court.

[2] EP Study, under the heading Executive Summary, p. 7.

[3] *Idem*.

with overall conclusions.

## 2. Cross-border Commercial Conflicts – Court Proceedings in EU Member States

### *2.1. Original Position – Starting Point for Further Inquiry*

'Cross border commercial contracts are subject to a patchwork of legal rules and regulations.

To overcome or at least mitigate the resulting uncertainty, commercial parties, internationally and within in the EU, frequently choose the applicable law and the competent court. When they do, English and Swiss law as well as English and Swiss courts turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States. The European Parliament has, therefore, called for a debate about how commercial law competence in the EU can be increased. Commissioned by the Committee on Legal Affairs of the European Parliament, the following study seeks to contribute to this debate by taking a closer look at cross-border commercial contracts and their operation in theory and practice'[4].

Central aim of the EP Study is to investigate how 'the European legislature should adopt a bundle of measures to make the settlement of cross-border commercial disputes in the EU more attractive (…). These measures should relate to choice of law on the one hand and dispute resolution on the other[5]. As set out in the introductory lines, this contribution will focus in particular on the question whether the instalment of a Permanent European Commercial Court would be feasible, and, inasmuch this question is answered in the affirmative, desirable.

### *2.2. Facilitating Cross-border Commercial Proceedings – Stage 1: Endorsing Voluntary Jurisdiction*

Adjudicating cross-border commercial conflicts supposedly serves the interest of litigating parties. However, over the past decades an extra dimension increasingly showed. National prestige (reputational expertise of judicial organisations, neutrality, swift procedures, linguistic skills, *favor executionis*, i.e. swift recognition and enforcement tools etc.) increasingly play an important role.

Way before the formal (geographical) scope of article 25 of today's Recast regime[6]

[4] *Idem*.

[5] *Idem*, p. 7. At p. 11, briefly summarized here, the EP study is organized in four parts: the first part analyses the current **legal landscape** in which cross-border commercial contracts operate. The second part explores current **commercial practices** as regards choice of law and choice of forum clauses. The third part discusses some **implications** that follow from the current legal landscape and current legal practice including the implications of Brexit. The fourth part submits a number of **recommendations** that will improve the framework for the settlement of international disputes both at the level of the Member States and at the level of the EU (*infra* 4.).

[6] The Recast must be taken into account in conjunction with article 23 on the choice of forum of the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2007, L 339/3., cf. more in detail EP Study, 2.1.3.2.

was widened – from 2012 onwards neither party was requested to reside in the Member State of the forum seized by the plaintiff – the concept whereby courts were attributed jurisdiction even though no ties with the forum showed gained force. Nowadays choice of court is facilitated by most legal orders, if not even stimulated, despite the costs and case load placed upon national judiciaries involved, be it that hitherto cross-border commercial contracts were mainly adjudicated by traditional courts and tribunals.

### *2.3. Facilitating Cross-border Commercial Proceedings – Stage 2: Commercial Court Chambers*

Meanwhile, the question came up to which extent at presence the aforementioned 'traditional' courts and tribunals are sufficiently equipped to deal with often more complicated, therefore expertise and time consuming cross-border commercial conflicts. Over the past few years several EU Member States felt the urge to further optimize cross-border court proceedings by installing specialized court chambers, if not even distinct 'commercial' courts[7]. While reading explanatory memoranda that accompany (draft) bills one may even get the impression of a gold rush Member States are after[8].

## 3. Future Cross-border Commercial Proceedings – a Permanent European Commercial Court (ECC)?

### *3.1. Centralization of Cross-border Commercial Dispute Adjudication – Push & Pull Factors*

Hypothetically speaking, in a (future) third 'stage' cross-border commercial court proceedings in a Permanent European Commercial Court might well be materialized. The following impetus can be taken from the EP Study: 'First, a European Commercial Court could be equipped with experienced commercial law judges from all Member State. Those would ensure that the Court has the necessary legal expertise and experience. Second, as a

[7] For Belgium, the Brussels International Business Court, EP Study, p. 42, and furthermore http://www.lachambre.be/FLWB/PDF/54/3072/54K3072001.pdf; for France: EP Study, p. 40 and D. Fairgrieve & S. le Tutour, Doors open for First Hearing of International Chamber at Paris Court of Appeal, Conflictoflaws.net, 5 June 2018, available at <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamberat-paris-court-of-appeal/>.; for Germany, EP Study, p. 38 and 39, and M. Weller, The justice initiative Frankfurt am Main, http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/.; for the Netherlands, EP Study, p. 41 and X. Kramer, http://conflictoflaws.net/ 2018/no-fake-news-the-netherlands-commercial-court-proposal-approved/., G. Antonopoulou, Defining international disputes – Reflections on the Netherlands Commercial Court proposal, NiPR 2018, p. 741. From EU angle, E. Themeli, Civil Justice system competition in the European Union – The great race of courts, Eleven Law, 2018.

[8] Quite illustrative is an observation, out of many others, taken from 'Law & Courts in Europe – McGill PoliSci students blog, https://lawandcourtsblog.wordpress.com/tag/netherlands-commercial-court/.: 'Another reason why the establishment of the NCC is convenient is that the court will be applying Dutch procedural law, which is known to be efficient and predictable, allowing parties to save on legal costs, and the fact that legal proceedings will occur in English (unless Dutch is preferred), saving foreign parties the cost of translation. It should be noted that a trial run having proceedings in English is currently being held at the District Court of Rotterdam for proceedings in maritime and transport law, as well as the sale of international goods.'

Court with judges from different legal and cultural backgrounds a European Commercial Court would be a truly international court. It could credibly – and probably better than any national court – signal that it is neutral and impartial. Third and finally, a European Commercial Court could also – and, again, probably better than any national court – take part in the global competition for international commercial disputes that has gained momentum over recent years and triggered the establishment of international commercial courts around the world. It could make the EU a globally attractive place for settling international disputes which, in turn, would benefit European companies both in their dealings with other European companies and in their dealings with parties from third states'[9].

In a still enlarging, furthermore intensifying Single Market it makes sense to question whether not perhaps such Permanent 'European' Commercial Court (ECC) would be more efficient and proficient in dealing with cross-border commercial disputes[10]. Factors that allegedly are susceptible of pulling litigants out of 'national fora' are the following: the UK, being a reputed stand[11] is far too costly, moreover leaving the European Union at short notice[12]; a proper functioning of the Single Market requires the improvement of court proceedings for notably SME's that are not capable of enforcing their rights properly – deterrent effects of civil procedural law should be removed; a lack of confidence in 'domestic' courts is outspoken by residents from certain EU Member States. Understandably, push factors play a role as well: the added value of a permanent and voluntary European 'forum' yet without relinquishing the existing framework of Member States courts would enhance regulatory competition resulting in higher standards; an ECC is believed to be well-equipped thanks to the cooperation of specialist lawyers from all Member States; an ECC would fit into the phenomenon of 'regional' courts (China, Qatar, Singapore, Abu Dhabi) in a further globalizing world; an ECC may be expected to provide for more legal certainty, swift proceedings, high quality standards, and, last but not least, neutrality. It goes without saying, to finish this section with, that central and digitalized access to ECC jurisprudence would be indispensible, but conceivably also more feasible, practically speaking, than translating numerous court judgments from each Member State[13].

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[9] EP Study, p. 9.

[10] The EP Study, p. 65 and ff. contains a flood of academic comments. With a view to the restrictions set these writings will be referred to in the following only to the extent that they are relevant from the perspective of a future ECC.

[11] Cf. Rühl Footn. 1, Blog): 'In any case, it is doubtful whether the withdrawal of London from the European judicial area can be compensated through national initiatives.'

[12] For a flood of comments as to the civil procedural law prospects, cf. Antonopoulou, p. 742, footn. 9. Further, the EP Study, notably the referral to the UK 2018 Position Papers at p. 37, and further to academic writings in footn. 184: Richard Aikens & Andrew Dinsmore, Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit? Eur. Bus. L. Rev. 27 (2016) 903, at 904 f.; Guillaume Croisant, Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international, J.T. 2017, 24, at 26; Andrew Dickinson, Back to the future: The UK's EU exit and the conflict of laws, J. Priv. Int'l L. 12 (2016) 195, at 197 f.; Sara Masters & Belinda McRae, What Does Brexit Mean for the Brussels Regime? J. Int'l Arb. 2016, 483, at 483 f.

[13] In the past decades on the occasion PIL conferences were devoted to attempts to create a D-base

### *3.2. EU Legislative Competence – Legal Fundaments ECC under the T(F)EU*

Before commencing an inquiry into the 'substantive' pros and cons of a permanent ECC as set out above, inevitably the question arises whether the EU does have legislative competence to establish such an ECC.

According to the EP Study Article 5 TEU allows the EU only to become active if the Treaties expressly so provide. With regard to the establishment of a European Commercial Court an express provision allowing the EU to step in could be Article 257 TFEU. According to this provision the EU may establish 'specialized courts' attached to the General Court within the CJEU to hear and determine at first instance certain classes of actions or proceedings brought in specific areas. But, as the EP observes, such specialized courts are meant to lessen the case load of the General Court and the CJEU, whereas an ECC, in contrast, would not primarily be responsible for the *interpretation of EU* law, but for the settlement of international disputes and hence, *the application of national law*. An ECC would thus not complement the CJEU, but the courts of the Member States. Neither does Article 81 TFEU *prima facie* provide for a solid legislative basis, as even though this proviso allows for adopting measures *improving access to justice* (Article 81(2) lit. e) TFEU) and measures that *eliminate obstacles to the proper functioning of civil proceedings*, an ECC does not just improve *judicial cooperation amongst Member States*, it *replaces* Member States courts. However, in view of the EP, there is 'broad agreement that Article 81 TFEU does not limit the EU's competence to measures that merely approximate the laws of the Member States or to measures that merely foster the compatibility of the rules of civil procedure of the Member States.' Article 81 TFEU would enshrine the adoption of self-standing European procedures that replace national procedures[14].

### *3.3. ECC – 'Scope', Organisation and Procedure*

Like for any other court the jurisdiction of a permanent 'European' Commercial Court has to be properly demarcated by the legislator and, what is more, this demarcation should be ascertainable in practice with full legal certainty beforehand. Only those conflicts that do not fall outside the 'scope' of an ECC Regulation may be adjudicated by the ECC. As pointed out in the introductory lines already, any future ECC is supposed to be attributed competence exclusively for '*commercial*' ('b2b') conflicts[15] being of a cross-border nature[16], such conflicts moreover explicitly being attributed by the litigating

containing the multi-translation of national case law from the source language (i.e. the court judgment) in all official EU languages. Understandably, this highly ambitious goal would be extremely time and money consuming, not even to speak of substantive 'alterations' creeping in, in translations.

[14] EP Study, Section 4.4.4.1.

[15] More, in particular, the EP Study, Section 1.2. speaks of 'relationships between commercial parties, i.e. b2b relationships and 'equal bargaining power'. Not to be excluded beforehand though ought to be those commercial relationships where protective needs still show to be relevant, cf. the sales agent in CJEU C-381/98 *Ingmar-Eaton*.

[16] The EP study, 4.4.2, further clarifies '…i.e. cases relating to commercial parties from different states (…), however not necessarily from different Member States (…),The jurisdiction of the European Commercial Court could and should, therefore, include disputes between commercial parties irrespective of whether they are domiciled in or outside the EU.'

parties to the ECC on the basis of a contractual *choice of court* agreement ('voluntary' jurisdiction[17]). This implicates that the ECC has no 'monopoly' withdrawing parties from national judicature against their will. The ECC is supposed to take its place amidst 'national' Member State courts: for contentious but even also for voluntary court proceedings commercial litigants may still decide to initiate proceedings in Member State courts[18].

Not being given notice with as such by the EP Study is the 'formal' scope of an ECC Regulation: inevitably may a future ECC be overwhelmed with cases lodged by parties either or perhaps even neither of both (or more!) residing in 'third' (non-EU) legal orders[19]. Likewise inevitably is the occurrence of cross-border conflicts involving two – or, of course, more – litigants globally operating[20]. It may be expected that the latter circumstance may lead to clashes with another voluntary forum, namely the 2005 Hague Convention on Choice of Courts to which the EU as a REIO is a Contracting Party[21].

As regards its organization and procedural matters, the 'overall design'[22] of the ECC, 'details should (…) be set out after consultation with academics and practitioners taking into account *commercial parties' needs, international best practice* as well as existing *soft law instruments* relating to transnational dispute resolution, notably the ALI/ UNIDROIT Principles of Transnational Civil Procedure and the ELI/UNIDROIT European Rules of Civil Procedure (…). In addition, inspiration might be sought from the Unified Patent Court as well as from other international commercial courts that have recently been established around the world'[23]. Procedures should 'of course' be in English, by a Court equipped with judges from different Member States, 'ideally representing different legal traditions. Judges should be professional judges or experienced practitioners and, of course, be experts in commercial law, well versed in the English language and in the communication with parties from different (legal and cultural) backgrounds. The Court should apply flexible rules of procedure allowing for an active and efficient case management in response to businesses' needs. Finally, the Court should have appropriate staff, appropriate buildings, appropriate resources and a good IT-infrastructure. That infrastructure should allow electronic filing of claims, electronic communication with the Court, electronic submission of documents and witness statements as well as electronic

[17] It must be noted, for the purpose of using proper terminology, that whereas under Common Law this is often characterized as 'exclusive jurisdiction', differing though from the autonomous meaning of 'exclusive jurisdiction' under the regime of article 24 of EU Regulation 1215/2012 (further referred to as 'Recast').

[18] EP study 4.4.1.3. Future will demonstrate parameters, 'turning points' and cost-benefit analyses.

[19] Parallels exists between article 25 Recast ('irrespective where parties are domiciled' and article 1 of the globally functioning Hague 2005 Convention on the Choice of Courts.

[20] Multi-party relationships, litigants residing in- and outside the EU, may benefit from the 'levying' force of voluntary jurisdiction from point of view of recognition and enforcement.

[21] Cf. for in depth treatment, M. Weller, Choice of court agreements under Brussels Ia and under the Hague Convention: coherences and clashes, J. Priv. Int'l L. (2017), p. 91; S. Rammeloo, New Cross-border Civil and Commercial Procedural Law on Prorogation: EU Regulation 1215/2012 (the 'Recast') and the 2005 Hague Convention on Choice of Court Agreements – A Rubik Cube?, in: Recent developments in Private International Law/Dezvotari recente in Dreptul International Privat (ed. M. Buruiană), Chisinau 2017, p. 344.

[22] *Idem*.

[23] *Idem*.

payment of court fees. Ideally, the Court should offer two instances'.[24]

### *3.4. Choice of Forum: ECC – Substantive and Formal Requirements; Complications*

With regard to clauses designating the ECC as competent court, substantive and formal requirements require concise formulation. As an indirect consequence of what has been observed about any future ECC Regulation's formal scope – should an ECC serve the interests of litigants established both in- and outside EU territory? – it is important to favour international harmony by aligning as much as possible[25] the ECC premises with article 25 of the already mentioned Recast on one hand and the 2005 Hague Convention on the Choice of Courts on the other[26].

Even so, once parties, as underscored in this stage still hypothetically speaking, commonly and unequivocally opted for the adjudication of their conflict by the ECC, preferably via a template text[27], any such choice will not all by itself be capable of avoiding a series of well-known complications: how must courts deal with e.g., the contestation of parties' consent[28], or with-exclusive choice of court clauses, asymmetrical clauses offering different options to either party, alternative clauses allowing for both the ECC or adjudication in private via arbitration, potentially involving anti-suit conflicts[29], *lis pendens* fact constellations etc.? It goes without saying that an extra-dimension is created in case either or perhaps neither litigating party is residing in EU territory, and, certainly not least, in case of plurality of plaintiffs or defendants[30].

### *3.5. Proper law in a Proper ('Truly International') Forum*

As the ECC is positioned by the EP Study as 'fully integrated into the European Judicial Area'[31], at the same time, however, being 'a truly *international* forum', there is no sense in asking whether or not the *Gleichlauf* principle – the EU Member State court seized

[24] *Idem*.

[25] So far there is no interpretative judicature of CJEU.

[26] Troublesome may appear to be various loopholes and escapes enshrined in the 2005 Hague Convention (cf. footn. 21, above).

[27] The clause which was elaborated for the Netherlands Commercial Court may provide for some guidance: 'All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English under that Court's Rules of Procedure of the Chamber for International commercial Matters („Netherlands Commercial Court" or „NCC"). Application for provisional measures, including protective measures, available under Dutch law may be made to the NCC's Preliminary Relief Judge in proceedings in English in accordance with the Rules of Procedure of the NCC.'

[28] This question unequivocally has to be solved on the basis of article 10.1 of EU Reg. 593/2008 ('Rome I') on the basis of the law that would apply if the parties' consent to the contract would not have been not contested.

[29] Illustrative, following the turmoil after the CJEU still under the reign of EU Regulation 44/2001 ruled in its judgment C-185/07 'Allianz v. West Tankers' is Recital 12 of the Recast, giving up on any autonomously decisive demarcation line between arbitration on one hand, and litigation in court on the other.

[30] Cf. the observation made above, under 3.3. and footn. 21.

[31] EP Study, 4.4.2., p. 63.

applying the *lex fori* (national laws of the forum) – applies. In ECC court proceedings, this *lex fori* would logically speaking stand for *European* and not national substantive commercial laws: apart from numerous Directives[32], understandably not being directly applicable, however, one must observe that there is no 'European Commercial (Contract) Law Code'[33]. Consequently, the Court must establish – either *ex officio* and *sua sponte*, or at the request of parties[34] – the proper 'commercial' law to be applied. To that end, the court must assess first whether any other uniform (commercial law) applies.

Apart from the 1980 Convention on the International Sales of Goods (CISG), initiatives reaching beyond did not result in hard law. In case the CISG does not claim application under the scope as defined in article 1 (a) and (b), as may for commercial relationships other than the sale of movable goods recourse must be had to the EU Private International Law framework, that is, to start, EU Regulation 593/2008 on the Law Applicable to Contractual Obligations ('Rome I'). This set of conflict of law rules, which likely applies mandatorily not only in national Member State court proceedings but also in ECC proceedings, has given rise to contemplations and questioning whether not perhaps article 3 on party autonomy, the freedom to choose the applicable law, ought to be narrowed to a choice pertaining to law systems 'objectively' showing certain (minimum) ties with the cross-border contract[35]. Understandably, that concept is rejected: apart from the 'liberal European tradition' parties should be, as they already are, free to opt for a 'third', therefore 'unconnected' and 'neutral' law. It would not make sense to restrict party autonomy to a connected law only, as non-EU courts would ignore such a restriction under their conflict of law regime anyway[36]. Theoretically speaking, one could argue that due to aspects of 'procedural economy' (costs and time consuming proceedings) only the choice of a system of law of an EU Member State and not of any 'remote' foreign state law should be honoured, but any such position would harm court proceedings where either, or even neither of the conflicting parties is an EU 'resident'.

Noteworthy, however, still with regard to the freedom of choice, are two recommendations launched with a view to 'Rome I'. As these recommendations are taken

[32] EP Study, 2.1.1.1., with referral to (footn. 5) Henri Capitant, La construction européenne en droit des affairs: Acquis et perspectives (2016); Hopt, supra note 4, at 254 f.; Lehmann, supra note 4, at 42 ff.; Matthias Lehmann, Jessica Schmidt & Reiner Schulze, Das Projekt eines Europäischen Wirtschaftsgesetzbuches, ZRP 2017, 225, 226, as well as versatile EU Directives in the fields of company law and commercial law.

[33] A French-German initiative for a 'European Business Code' was taken in 2017, whereas the initiative for a 'Uniform Commercial European Sales Law', P. Lagarde: 'Common European sales law (COM(2011) 635 final) to be adopted, e-book 2013, p. 662, was withdrawn in 2018, http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law.

[34] Cf. The observation made in 3.3. 'in the communication with parties from different (legal and cultural) backgrounds.'

[35] EP Study, 4.2.1.1., p. 45 and ff.: 'According to § 187 (2) (a) Restatement (Second) of Conflict of Laws and § 1-105 (1) Uniform Commercial Code (UCC) the law of the state chosen by the parties will only be applied if the chosen state has a substantial or reasonable relationship to the parties or the transaction', with referral to Giesela Rühl, Party Autonomy in the Private International Law of Contracts, in Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein (eds), Conflict of Laws in a Globalized World (2007) 153, at 160 ff.

[36] EP Study, p. 46, with referral to e.g. article 116 of the Swiss Private International Law Code.

up in Section 4.2.1 preceding Sections 4.3 ('Improving dispute settlement in the Member States') and 4.4 ('Establishing a European Commercial Court') they are supposed to apply in both national Member States' court proceedings and ECC proceedings. This is in itself not incomprehensible as it would not make sense to create two different 'Rome I 'regimes', substantively speaking. As to the substance of the recommendations made, the EP Study *inter alia* advocates widening party autonomy under the conflict rule of article 3 to the extent that parties should be allowed to opt for *non-state* laws, as this would render court proceedings more attractive for commercial litigants, placing them on the same footing as in arbitration 'traditionally not hesitating to apply non-state laws'[37]. Any such Reform of article 3 might well be redundant though: although admittedly the wording of article 3 does not explicitly allow for the choice of non-state laws, neither does it prohibit any such possibility. A confusing factor that may however not be overlooked is that the final Regulation text 593/2008 as it is in force currently was preceded by a pre-draft dating back to the year 2005, in article 3 subsection 2 still explicitly allowing for the choice of non-state laws, the removal of this possibility from the final text perhaps having been an uncontemplated error[38].

Apart from the foregoing, the EP Study proposes yet another reform of article 3: the effects of a choice should no longer be limited in case the contract, except for the law chosen, has connections to one (and another) state only, in which case under the present concept of Rome I such a choice does not exclude the application of mandatory laws of either the latter state (art. 3.3) or of mandatory EU laws (article 3.4)[39]. While acknowledging the interest of parties evading the 'objectively' applicable law, the view is advocated that the restrictions laid down in article 3, subsections 4 and 5 only will apply in case the commercial litigants start court proceedings in a *European* Member State court, or in a future ECC. As a consequence of curtailing 'their' autonomy, contracting parties might well opt out of court proceedings anywhere in 'Europe' and, instead, opt for court proceedings in a third (non-EU) country, not applying any EU conflict of law Regulations anyway[40]. If however article 3 (3) and 3 (4) would indeed be abolished, parties thus being allowed to choose a 'foreign' law even for purely 'domestic' contracts, thus putting out of force mandatory laws without any restriction, it would be most likely that with the help of article 9 Rome I concerning mandatory laws courts would override certain 'choices' just the same, when and where needed. While making use of article 9 they would experience another complication, namely that this proviso only provides

[37] EP Study, p. 48, with the authority of the Queen Mary International Arbitration Survey 2010, stating that 14% of the respondents said that they had often chosen „commercial law rules contained in codifications" such as the UNIDROIT Principles on International Commercial Contracts.

[38] S. Rammeloo, *Via Romana*. Van EVO naar Rome I – Nieuw Europees IPR dat van toepassing is op verbintenissen uit overeenkomst, NIPR 2006, p. 239 and ff. Via interpretative reasoning attempts were made to re-introduce the freedom of choice in favour of non-state laws, notably in an era that 'Principles' more and more became of interest to e.g. EU law Expert Groups (PECL, Principles of European Contract Law, cf. EP Study Section 4.4.2., referred to above).

[39] EP Study, p. 48.

[40] The EP Study (p. 48) speaks of a 'worst case scenario'.

for a legal basis of those mandatory laws that are in force in the Member State of the *forum*, or of the Member State *where contractual performances were or had to be carried out*.

Concluding, the proposal to 'delete article 3 (3) and 3(4)' for no other reason than that 'this would further increase the attractiveness of Member State courts'[41] and, consequently, of a European Commercial Court, does not deserve approval.

Quite daringly, however, the EP Study is even prepared to go even further, by seeking parallels with the proper law of a *tort* (cf. competition related contracts) relinquishing restrictions to the law chosen, not in respect of a contractual, but even, by virtue of article 14, for a tort relationship under the regime of EU Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations 'Rome II')[42]. Likewise, parties should be allowed to opt for non-state laws like Principles of European Tort Law (PETL). It goes without saying, however, that the conflict category of tort – which appears to be of a so called *non*-voluntary nature – cannot be treated on the same footing as the conflict category of contracts.

And this is not yet where the story ends. The EP Study criticizes the divergences in wording of article 3 Rome I Regulation and article 14 Rome II, the former provision requiring a choice of the applicable contract law to be 'made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case', the latter providing that it must be 'expressed or demonstrated with reasonable certainty by the circumstances of the case'. In addition, an ex-ante choice of law must be 'freely negotiated'. In the end, however, as is stated in the EP Study, it is unclear why a choice of tort law and a choice of contract law should be subject to different requirements. It only increases the risk that the parties draft a choice of law clause which is valid as regards the contract law and invalid as regards tort law. Therefore, the European legislature should align Article 14(1) Rome II Regulation with Article 3 Rome I Regulation and delete any requirement that an ex ante choice has to be „freely negotiated". In addition, the requirements for an implied choice of law should be adjusted to match the requirements established by Article 3 Rome I Regulation[43]. Once again, it must be noted that any 'alignment' of article 3 Rome I and article 14 Rome II in respect of a choice made by the parties may not ignore fundamental differences between contractual and non-contractual (tort) relationships, the latter category being heavily influenced by public policy notions. Just to mention a few differences: unlike for contractual relationships, in tort, except perhaps for the area of competition law, any choice of law tends to be of a posterior nature (i.e. after the tort has taken place). Besides, it must be borne in mind that any choice of a proper law of the tort may engender considerable differences in outcome as regards e.g. punitive damages.

## 4. Interplay – ECC, CJEU, and Member State (Commercial) Courts

[41] EP Study, p. 48.

[42] *Idem*.

[43] EP Study, p. 49.

### *4.1. Institutional Framework*

The foregoing sufficiently demonstrates that, in national court proceedings and ECC proceedings alike, versatile questions, be it of a substantive or interpretative nature, may arise. As is shown in the preceding lines such questions may vary from e.g. jurisdiction to conflict of law rules, the range of substantive law sources available (or not, cf. what has been said about the demarcation lines between state laws, *lex mercatoria*, principles, etc.). Another category, and this is important to note now that there is a shift from national courts to a permanent ECC, is the 'correct' application of the *lex contractus*[44], occasionally (also) involving tort law. But one might well have to conclude that this point would never even be reached.

Notwithstanding the premise that under the TEU and TFEU the European *legislator* is indeed competent to install a Permanent European Commercial Court[45], the EP Study daringly starts by inquiring whether another EU institution, namely the CJEU, would be 'willing to accept and to tolerate another (Permanent) European court. 'Doubts are in order, for two reasons: first, according to TEU and TFEU, it is the CJEU that is entrusted with the final interpretation of EU law. And, second, the CJEU has recently – and repeatedly – emphasized that it does not want to leave the interpretation of EU law to other courts. In its *Achmea* judgment of 6 March 2018', as the EP Study continues, 'the CJEU held that an arbitration clause in a bilateral investment treaty between two Member States was incompatible with EU law because such clause allowed arbitral tribunals to apply and interpret EU law without being part of the EU judicial system'[46].

But unlike the Community clash underlying the CJEU's 'Achmea' ruling, the ECC is supposed to do nothing more than 'settling international disputes between commercial parties (…) like any national court or any arbitral tribunal primarily apply national law.' In that respect, the ECC would join e.g. the Benelux Court also being entitled to raise preliminary questions in CJEU proceedings. 'A European Commercial Court would, therefore, not call the CJEU's function and role within the European judicial system into question. On the contrary, it would accept and defer to the jurisdiction of the CJEU'[47].

### *4.2. European and Global Private International Law Framework*

Potential EU Community law clashes between ECC and CJEU thus having been tackled convincingly, the focus may shift to solving cross-border commercial disputes in everyday practice. The opening lines of this section commence by referring to the Private

[44] The same type of problem of course arises when a national (Member State) court is not required to apply its 'own' *lex fori*. The difference is that in ECC proceedings the European Commercial Court in the absence of 'European' substantive commercial law shall not be able to apply a *lex fori* ever. Cf. M. Lehmann, Braucht Europa ein Handelsgesetzbuch? ZHR 181 (2017) 9, p. 28 ff.

[45] Cf. supra, 3.2.

[46] EP Study 4.4.1.2, with referral to Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, para. 38 ff., 43 ff.

[47] *Idem*, p. 61.

International Law Framework comprising the three main questions, namely competence, proper law and recognition and enforcement of court judgments throughout the EU.

The ECC is supposed to serve *voluntary* cross-border court proceedings only, operating alongside, not replacing national court proceedings in the EU Member States. Consequently, the wide range of potential jurisdiction conflicts, involving not only voluntary but also *contentious* judicature, may be expected to diminish considerably[48].

Still, while adjudicating versatile issues, an ECC first and for all will have to investigate, to the extent that the EU as a REIO is bound by the 2005 Hague Convention on Choice of Courts[49], moreover in cases where any of the parties is residing in a non-EU but Hague Contracting State, which legal framework should apply: that of the Hague Convention, the purported ECC Regulation, or, on the basis of either legislative referral in such an ECC Regulation or pursuant to analogous reasoning, the Recast regime[50]. Accordingly, either of the instruments mentioned will apply in view of solving conflicts concerning, e.g., *lis pendens*, 'torpedo's', plurality of plaintiffs and/or defendants, residing in different EU and/or third states, asymmetrical or non-exclusive choice of court clauses, clauses allowing for parties to initiate either litigation in court, or arbitration, etc. It goes without saying that the process of ascertaining which PIL instrument applies is even more important against the background of preliminary rulings, affecting EU instruments like the Recast and/or ECC Regulation, not, of course, the Hague Convention.

In view of the applicable law, the quest in most cases will be less cumbersome: once not falling outside uniform Sales Law (VSC), and not falling outside the substantive scope of article 1, or the temporal scope of article 28 of the already mentioned EU Regulation 593/2008 on the Law Applicable to Contractual Obligations ('Rome I')[51], the bulk of commercial relationships an ECC will be submitted to the conflict of law regime of the latter Regulation, regardless whether or not the conflicting parties reside in- or outside 'Europe'[52]. For more than just one reason it is important not to overlook when and how Regulation 864/2007 ('Rome II') will come into play, as first, voluntary jurisdiction carries the risk of too narrowed choice of court clauses (a clause governing parties' contractual relationship, implicitly excluding tort actions?), and, second, the consequences in view of the already mentioned phenomenon of punitive damages.

The third main PIL question concerns the recognition and enforcement of (foreign, here, however, ECC) court judgments. Inasmuch not autonomously dealt with by a purported ECC Regulation, the question once again may come up whether any such

[48] As parties voluntarily submit their commercial dispute to the ECC there will be hardly any debate on e.g. exorbitant *forum actoris* jurisdiction (cf. articles 4 and 5 Recast).

[49] Cf. what has been said in Sections 3.3. and 4.2.

[50] In respect of the parties' residence and the interplay as regards formal scopes of the Hague 2005 Convention and the Recast S. Rammeloo, New Cross-border Civil and Commercial Procedural Law on Prorogation: EU Regulation 1215/2012 (the 'Recast') and the 2005 Hague Convention on Choice of Court Agreements – A Rubik Cube?, in: Recent developments in Private International Law/Dezvotări recente în Dreptul Internațional Privat (ed. M. Buruiană), Chișinău 2017, p. 344.

[51] In forecoming cases the temporal scope may however be hard to define, cf. CJEU Case C-135/15 *Greek Republic v. Grigorios Nikiforidis,* EU:C:2016:774.

[52] Art. 2 unequivocally ensures the universal formal scope of 'Rome I'.

recognition and enforcement falls within the scope of the 2005 Hague Choice of Court Convention, or whether (directly, or pursuant to legislative referral or analogous reasoning) the Recast regime applies. The relevance lies in the way 'Europe' regards enforcement rights (cf. abolition of *exequatur* or not?; *favor executionis* or not?)[53].

### *4.3. Substantive Law Framework*

Once the proper law of the contract has been ascertained, the ECC has to apply that law. It is asked 'how a European Commercial Court would relate to the courts of the Member States. Would a European Commercial Court not undermine their authority if it were to decide disputes that have so far come within their jurisdiction? Would it not undermine their competence to apply and interpret national law?'[54] The answer before hand to that question, at least the answer provided for by the EP Study, is negative, as, once again, it is underscored that any dispute settlement by the ECC is of a voluntary nature, alongside the remaining option to go to national Member State courts on the basis of article 25 Recast and opt for the law to be applied to their contractual relationship under article 3 of ' Rome I'[55].

How would a Permanent ECC (have to) function in practice? When speaking about adjudication of cross-border commercial conflicts, the starting point for further reasoning must be, as pointed out already, that unlike in national Member State court proceedings it will be impossible for a European Commercial Court to apply the *lex fori* ever *(Gleichlauf)* for the simple reason that hitherto there is no 'European' substantive Commercial Law[56]. This means that, to a certain percentage of cases, the advantage of a 'neutral' stand to both (or more) conflicting litigants may be outweighed by the loss of expertise of a 'national' court being better equipped to apply its own laws. This loss may be felt particularly in certain law areas (cf. finance, shipping, or other). It is hard to predict whether, and if so, to which extent precisely, there will be shift of court proceedings from the courts of e.g. two, hitherto reputed non-EU Member States (Switzerland and, as the prospects are, the UK)[57] to a Permanent ECC.

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[53] EP Study, p. 63. Notably the concept of favor executionis may at first sight continue to apply once Brexit has been accomplished, as both an EU and a UK based plaintif would still be able to invoke this principle, the UK, untill Brexit being a REIO Contracting State, after all planning to remain or become a Contracting State to the Hague Convention – or perhaps even a 2007 Lugano Convention Contracting State. But one must realize that a risk exists that a UK based plaintif no longer can enforce without exequatur (assuming that a future ECC Regulation will build further on the Recast concept).

[54] EP Study, p. 61.

[55] *Idem*.

[56] With the exception of global commercial law, notably the Vienna Sales Convention. A quite interesting side-effect could be that this instrument, so far being applied on a global scale yet without uniform interpretation, may nevertheless after a series of judgments be endowed with a certain level of uniformation in Europe, pursuant to ECC rulings. The same effect may show in respect of Contract Principles.

[57] It is important to underscore that also after a Brexit the UK will remain an important cross-border commercial dispute adjudication stand for the simple reason that the 2005 Hague Convention on the Choice of Court to which the UK intends to remain a Contracting State endorses the *traité double* concept (i.e. not only dealing with the court's competence but also governing the recognition and enforcement of court judgments from other Contracting States).

Against the background of the foregoing, the question deserves to be raised whether it would not be advisable to create a structure whereby cross-border commercial conflicts will be adjudicated upon in two stages: the first stage, establishing the ECC's competence and the proper law of the contract to be applied[58], whereafter in a second stage 'in flight' judges from the Member States[59] of which the *lex contractus* is held applicable adjudicate the conflict. This concept would, nevertheless, not be capable of solving all questions exhaustively, due to many factors falling outside the scope of the proper law: one may think of, in the very first place, the applicability of a *non*-EU state law, or, further, claims based not only on contract but also on tort law, even with the possible outcome of another proper law of the tort, mandatory laws of another legal order, the applicability of Contract Principles, etc.)[60]. All these factors, not even to mention the CJEU called upon to give preliminary rulings, may engender considerable delays.

Another question is how successfully an ECC may be expected to function. For a future which is still behind the horizon, inevitably leading to highly tentative reasoning[61], an ECC may build up authority: notably the combination of centralized court proceedings, these proceedings being conducted in English, this creates the possibility to store and build up digital access. After a series of probably many years, if not even decades, ECC judicature may, even without top down legislative action by the EU, have a unifying, uniforming effect, if not (yet) for contentious, than at least for *voluntary* court proceedings.

## 5. Towards a Permanent European Commercial Court? Impressions Following a Brainstorming Exercise

A Permanent European Commercial Court (ECC), as contemplated by the EP Study, purportedly will be endowed with the competence to adjudicate cross-border commercial ('b2b') disputes on voluntary basis (i.e. only when explicitly and commonly opted for by the litigating parties). So, ultimately, the ECC's prospects ultimately depend on its

[58] Cf. the EP Study, p. 62: 'the Court should only be competent to hear a case if the parties have agreed on the jurisdiction of the Court before or after a dispute has arisen.'

[59] About training judges, cf., EU portal website https://e-justice.europa.eu/content_european_judicial_training-120-en.do. And EP Study, p. 66, the referral to John Coughlan, Jaroslav Opravil & Wolfgang Heusel, Judicial training in the European Union Member States (2011), https://rd.springer.com/content/pdf/10.1007%2Fs12027-012-0257-9.pdf.

[60] The EP Study rather daringly even states, p. 62, that 'where the Regulations do not offer choice of law rules, which is, for example, the case with regard 'agency or corporate law, the Court should apply general principles of European private international law to be determined through a comparative analysis of the Member States' laws.' It is highly doubtful though to apply general and vague principles to usually quite detailed and technical legal questions.

[61] Numerous factors may have effects or side effects, swift court proceedings, clustering of expertise, and, last but not least the procedural costs. As an example, the fees under the reign of the Netherlands Commercial Court (€15000/7500 for substantive/summary peroceedings) are still less costly than arbitration, with a bottom line though that the NCC does not have jusrisdiction with claims falling below €25.000. Cf. Raad voor de Rechtspraak, Plan tot oprichting van de Netherlands Commercial Court, inclusief kosten-baten analyse, www.rechtspraak.nl/SiteCollectionDocuments/plan-Netherlands-commercial-court.pdf. For a recent comparative analysis, cf. J. Rutgers, Choice of Law in 'b2b' contracts: The law of the jungle, Sept 2018, European Review of Contract Law, pp. 241-268.

'acceptance by the business community'[62]. As set out in the introductory lines, this contribution attempts to analyse, hypothetically speaking, the ramifications of introducing such an 'optional' brand-new 'European' Court as an extra commercial procedural layer. In the absence, so far, of any draft proposal text for a European Commercial Court Regulation, 'conclusions' cannot be drawn. It rather seems appropriate to speak of 'impressions', emanating from what can – and must – merely be seen as a 'brainstorm session'.

As explained, the ECC's purported jurisdictional power will be on a *voluntary* basis only. As a consequence, the ECC is supposed to take its own institutional stand complementing currently existing paths of both contentious and voluntary court proceedings in EU Member State courts under the 'Recast' regime (and, as a fully alternative means of dispute adjudication in private, arbitration).

The instalment of a new permanent 'European' Court for the adjudication of cross-border 'b2b' disputes does not seem to infringe upon the institutional Community law framework. *Prima facie*, there seem to be no unbridgeable competence frictions between an ECC and the CJEU either.

Legal practice will tell whether or not, after a certain period, an ECC can be expected to have added value in a Single Market and, even more, a globalising world. This added value component may result from higher regulatory competition resulting in higher 'standards', as well as from a bundling of expertise in a Permanent Court, swift proceedings, provided that these advantages will not be outweighed by procedural expenses or delays (CJEU preliminary stayings; proceedings in two instances).

Like national Member State courts, however, an ECC must be well-prepared to face 'traditional' PIL-related complications (jurisdiction, clashes and overlaps with the 2005 Hague Convention on Choice of Courts; characterization of conflict – contract or tort?; asymmetrical or non-exclusive jurisdiction clauses; *lis pendens* and torpedo's, the ascertainment of the proper law of the contract in the absence of a law chosen by the litigants under the reign of the 'Rome I' Regulation 593/2008, concurrence of proper law of the contract and, under 'Rome II', the proper law of a tort). As regards the latter source, some proposed revisions (freedom to choose the law in purely domestic conflicts without restrictions) do not deserve approval. Last but not least, easy access to centralized digital ECC judicature in exclusively English as working language, without the need to fall back on time and money consuming (and possibly often erroneous) cross-over translations may further increase the reputation of an ECC.

[62] G. Rühl (footn. 1, OxfordLaw Blog).