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Comment on “Tacit Choice of Law in International Commercial Contracts”

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I. Some general considerations about Article 3 Rome I Regulation

In his paper, Bouwers analyses the conditions for a tacit choice of law under the South African rules of private international law. In addition, he compares South African law with the standards set forth by the Rome I Regulation, i.e. the rules of European private international law which apply in all EU countries except Denmark.

Under EU law, the freedom of the parties to choose the law that shall apply to their contractual relationship is laid down in Article 3(1) Rome I Regulation. According to this provision, a “contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”. A tacit choice of law is a real (not hypothetical) choice of law requiring a meeting of minds of the parties even though the parties have not expressly stated that choice in their contract, as Bouwers correctly points out.¹ The

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1 Garth Bouwers, p. 72 in this publication.

1980 report of Giuliano and Lagarde on the Rome Convention on the law applicable to contractual obligations² (i.e. the forerunner of the Rome I Regulation) stated that the rule on tacit choice of law “does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice.”³

It is thus not allowed under Article 3 Rome I Regulation to make recourse to the “hypothetical will” of the contracting parties, as assumed by German courts under the German rules of private international law before the implementation of the Rome Convention.⁴ It seems that similar attempts as made by German courts under the old rules of private international law can be traced in the case law of South African courts. Bouwers states that courts sometimes refer to the hypothetical will of the contracting parties and apply the law that the parties may have presumably chosen.⁵

Reliance on the presumed will of the parties is not allowed under EU law and this approach makes sense. Courts cannot know, and do not need to know, what reasonable parties would have done. Where the parties have not chosen the applicable law expressly or tacitly, the Rome I Regulation contains a full set of statutory rules for the determination of the law applicable in the absence of a choice of law (Articles 4 et seq. Rome I Regulation). These rules mirror the expectations of reasonable parties as the European approach to private international law is largely based on the concept of predictability.⁶

II. Level of strictness

In his paper, Bouwers devotes much attention to the level of strictness that is required to assume tacit choice of law by the parties. He correctly observes that the criterion of European law was altered when the Rome Convention was transferred into the Rome I Regulation. Under the Rome Con-

2 O.J. C 282, 31.10.1980, 1.

3 Report of Mario Giuliano and Paul Lagarde, Art. 3 para. 3, O.J. C 282, 31.10.1980, 17.

4 BGH 22.11.1955 – I ZR 218/53 – NJW 1956, 377; BGH 7.3.1962 – VIII ZR 9/61 – NJW 1962, 1005. Also BGH 30.9.1987 – IV a ZR 22/86 – NJW-RR 1988, 159 (160), refers to this maxim but in the end assumes a tacit choice of law.

5 Garth Bouwers, p. 74 in this publication.

6 Cf. Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Recital 6.

vention, a treaty between the Member States of the then European Community, the various language versions were not congruent. Under the English, German and Italian versions, a tacit choice had to be demonstrated “with reasonable certainty” (“mit hinreichender Sicherheit”, “in modo ragionevolmente certo”). The French and the Spanish versions contained a stricter criterion as the choice had to be “certain” (“de façon certaine”, “de manera cierta”).

When drafting the Rome I Regulation the European legislature aligned these different versions and used the French and Spanish versions as a yardstick. The Rome I Regulation, therefore, states in the English version that a tacit choice must be “clearly demonstrated”. Correspondingly, the German and Italian language versions demand that the choice must be “eindeutig” or “chiaramente”. The French version uses the same wording as the Rome Convention (“de façon certaine”), whereas the Spanish version reads “de manera inequívoca” (instead of “de manera cierta”) which is a purely linguistic change.

There is a dispute among commentators in Europe whether the alignment of the English, German and Italian versions with the French version means that the legislature intended to set forth a stricter standard for the determination of a tacit choice of law to avoid an unwarranted “Heimwärtsstreben”.⁷ Bouwers takes the view that this change “ensures a far

7 That the European legislature imposed a stricter standard is advocated by Ole Lando and Peter Arnt Nielsen, *Common Market Law Review (CML Rev.)* 45 (2008), 1687 (1698); Gerhard Hohloch in Harm Peter Westermann, Barbara Grunewald and Georg Maier-Reimer (eds) *Erman, BGB* (14th Edition 2014), Art. 3 Rom I-VO, para. 11; Kathrin Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht* (2013), 49; Stefan Leible and Matthias Lehmann, *Recht der Internationalen Wirtschaft (RIW)* 2008, 528 (532); Ulrich Magnus, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2010, 27 (33); Dieter Martiny in Franz Säcker, Roland Rixecker, Hartmut Oetker et al (eds) *Münchener Kommentar zum BGB, Vol. 10* (6th Edition 2015), Art. 3 Rom I-VO, para. 47; Thomas Pfeiffer, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2008, 622 (624); Giesela Rühl, *Statut und Effizienz* (2011), 470; Ringe in Martin Herberger, Michael Martinek, Helmut Rießmann et al (eds) *juris PraxisKommentar-BGB* (7th Edition 2014), Art. 3 Rom I-VO, para. 17; Sandra Wandt, *Rechtswahlregelungen im Europäischen Kollisionsrecht* (2014), 125–126; Matthias Wendland in Beate Gsell, Wolfgang Krüger, Stephan Lorenz et al (eds) *beck-online Großkommentar zum Zivilrecht* (15.2.2016), Art. 3 Rom I-VO, para. 132; contra (no changes): Dorothee Einsele, *Wertpapier-Mitteilungen (WM)* 2009, 289 (290); Franco Ferrari in Franco Ferrari, Eva-Maria Kieninger and Peter Mankowski et al (eds), *Internationales Verfahrensrecht* (2nd Edition, 2012), Art. 3 Rom I-VO, para.

greater measure of legal certainty and predictability of decision”.⁸ If this also means that under the Rome I Regulation there is a more demanding test than under the German and English versions of the Rome Convention, I agree. In my point of view, there can be no doubt that the legislature wanted to avoid courts assuming too readily a tacit choice of law. A choice of law to be “clearly demonstrated”, requires more than a choice of law “demonstrated with reasonable certainty”, and one cannot qualify this change as being solely of an editorial nature.⁹ Also, the genesis of Article 3 Rome I Regulation implies that the legislature intended to impose a stricter standard on the courts.¹⁰

III. Indicators of a tacit choice of law

Bouwers moves on to analyse the indicators from which a tacit choice of law can be inferred. Under European law, the choice can be either inferred from the contractual stipulations or of the circumstances of the case. A court has to look at the case as a whole and weigh all relevant indications. There is no “closed catalogue” of factors that can be taken into account by a court to infer the will of the parties. The wording of Article 3 Rome I Regulation, however, does give some indications. The court must first examine the contract and identify whether the contractual stipulations indicate a choice of law. It must then look at other factors surrounding the contract to see whether they give evidence of a tacit choice of law.¹¹

27; Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (4th Edition, 2015), para. 6-026; Thomas Tiede, ‘Die Rechtswahl in den Römischen Verordnungen’ in Bea Verschraegen (ed), *Rechtswahl – Grenzen und Chancen* (2010), 51 (52–53).

8 Garth Bouwers, p. 75 in this publication.

9 Jan v. Hein in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Vol. 3* (4th Edition, 2015), Art. 3 Rom I-VO, para. 14; contra: Francisco Garcimartín Alférez, *European Law Forum (EuLF)* 2008, I-61 (I-66); Thomas Thiede, ‘Die Rechtswahl in den Römischen Verordnungen’ in Bea Verschraegen (ed), *Rechtswahl – Grenzen und Chancen* (2010), 51 (53).

10 Jan v. Hein in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Vol. 3* (4th Edition, 2015), Art. 3 Rom I-VO, para. 14; Ole Lando and Peter Arnt Nielsen, *Common Market Law Review (CML Rev.)* 45 (2008), 1687 (1698).

11 Jan v. Hein in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Vol. 3* (4th Edition, 2015), Art. 3 Rom I-VO, para. 14.

Bouwers reports the practice of South African courts. I would like to add some thoughts on German case law. Looking at more recent cases, it appears that the tighter standard imposed by the Rome I Regulation does not prevent German courts from pursuing their liberal approach, which often leads to the application of German law. For example, the Amtsgericht Frankfurt, in a case involving a contract for the carriage of passengers, inferred a tacit choice in favour of German law from the fact that the plaintiff had purchased the flight ticket from the defendant in Germany and that the flight to (presumably) South America left from a German airport.¹² These factors are, in my point of view, not very strong to indicate the will of the parties to choose German law.¹³

Another example concerns the tendency of German courts to infer a choice of German law from parties' communications on the dispute during or before the court proceedings. Often parties analyse a claim based on German law in their communications between each other. German courts tend to assume a tacit choice of German law from such communications. For example, the Oberlandesgericht Stuttgart assumed that the parties to an international contract for the carriage of goods had chosen German law simply by the fact that both parties had discussed the conclusion of the carriage contract based on German legal provisions.¹⁴ Such practice by courts was common under the Rome Convention¹⁵ (and prior to that convention under the German conflict rules) and was criticised by many commentators.¹⁶ In my opinion, this critique is correct. Inferring a choice of the *lex*

12 AG Frankfurt 25.10.2013 – 30 C 1377/13 (47) – BeckRS 2014, 12196.

13 Despite the weak basis for a tacit choice of law, the application of German law was correct. The Amtsgericht pointed out that even if no choice of law is assumed German law applies by virtue of Article 5(1)sentence 2 Rome I Regulation. According to this provision the law applicable to a contract for the carriage of passengers "shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country." As the passenger had her habitual residence in Germany and the place of departure was an airport in Germany, it was proper to apply German law.

14 OLG Stuttgart 24.4.2013 – 3 U 184/12 – BeckRS 2014, 19218 para. 46.

15 BGH 12.12.1990 – VIII ZR 332/89 – NJW 1991, 1292 (1293); BGH 19.1.2000 – VIII ZR 275/98 – NJW-RR 2000, 1002 (1004); BGH 26.7.2004 – VIII ZR 273/03 – NJW-RR 2005, 206 (208); OLG Düsseldorf 29.12.2009 – 6 U 9/09 – NJW-RR 2009, 1380 (1381).

16 Peter Mankowski, 'Stillschweigende Rechtswahl und wählbares Recht' in: Stefan Leible (ed), *Das Grünbuch zum Internationalen Vertragsrecht* (2004), 63

fori from the communications between parties before or during a court trial presupposes that the parties were aware of the fact that the contract might be governed by foreign law. Otherwise, the parties did not act with the necessary will to choose the applicable law. In situations involving a conflict of laws it is, therefore, not proper, in my eyes, to infer a tacit choice of the lex fori from the simple fact that the parties basing their legal arguments on the lex fori. This holds true even if these arguments are voiced by legal representatives, as many legal representatives do not possess sufficient knowledge of private international law matters.¹⁷ The situation is different if the parties realise that their contract is governed by a foreign law – for example, after the judge has indicated so – but still continue to rely on the lex fori.¹⁸ In such a case, the assumption of a choice of law is proper.

IV. Choice of forum and choice of law

In the last part of his paper, Bouwers analyses the disputed relationship between the choice of forum and a tacit choice of law. He points out that German and English courts have been rather liberal in inferring a tacit choice of law from an exclusive jurisdiction agreement in the past, whereas French courts separate the two issues strictly. The European Commission included a presumption in its proposal to the Rome I Regulation according to which the choice of a court in the EU Member State presumes that the parties have also chosen the law of that Member State (Article 3(1) sentence 3 Commission Proposal 2005).¹⁹ This proposal was not adopted for good reasons. Parties choose a court for a variety of reasons (for example, its geographic location, neutrality or expertise in certain matters) and not necessarily for the application of the lex fori. Consequently, the “soft” Recital 12 was included in the Regulation which states that clauses conferring exclusive jurisdiction on courts of an EU Member State to determine disputes under the contract

(71); Haimo Schack, *Neue Juristische Wochenschrift (NJW)* 1984, 2736 (2737 et seq).

17 Ulrich Magnus, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2010, 27 (33).

18 Stefan Leible and Matthias Lehmann, *Recht der internationalen Wirtschaft (RIW)* 2008, 528 (532); Ulrich Magnus, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2010, 27 (33).

19 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final.

can be taken into account in determining whether a choice of law has been established.²⁰

I agree with Bouwers that this recital does not add much clarity. The recital is, however, of help for the courts, as they are reminded that they should have a closer look at the issue of choice of law.²¹ In this context, it has to be noted that only an exclusive jurisdiction agreement, i.e. an agreement that confers jurisdiction upon one court (or courts in one country), can be used as indicator to assume a tacit choice of law. Agreements conferring jurisdiction on a court in addition to the courts that have otherwise jurisdiction to hear the case (“*fakultative Gerichtsstandsvereinbarungen*”)²² or agreements that confer jurisdictions to courts at the respective seat of the defendant are not proper indicators from which a court may infer a tacit choice of law.

Moreover, it must be emphasised that even German courts do not automatically infer a choice of law from an exclusive jurisdiction agreement and have not done so in the past. Rather, they look at the contract as a whole to evaluate whether a tacit choice of law can be assumed. Usually, German courts do not rely on the jurisdiction agreement alone but assume a choice of the *lex fori* only if other factors also point towards German law – for example, the domicile or seat of the parties, references to statutory provisions of German law in the contract or the language of the contract.²³ This interpretation makes sense and should be maintained under the Rome I Regulation.

20 The fact that the parties confer exclusive jurisdiction on a court in a third state is also relevant to the analysis. In such a case the court in the third state would, however, decide the question whether the parties have tacitly chosen the law of the third state according to the *lex fori* and not the Rome I Regulation, see Ulrich Magnus, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2010, 27 (33 fn 81).

21 Thomas Pfeiffer, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2008, 622 (624) (“Merkposten”).

22 Peter Mankowski, *Internationales Handelsrecht (IHR)* 2008, 133 (135).

23 BGH 26.10.1989 – VII ZR 153/88 – NJW-RR 1990, 183–184 (exclusive jurisdiction clause in favour of German courts, both parties had their seat in Germany, building contract to be performed in Switzerland, payment in Swiss currency); BGH, 13.9.2004 – II ZR 276/02 – NJW 2004, 3706 (3708) (exclusive jurisdiction clause in favour of German courts, contract was written in German language and references to legal terms of German corporation law) (both judgments interpret the German implementation rule of the Rome Convention).

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