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The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations

H. Matthew Horlacher*

Introduction

On April 1, 1991, the Convention on the Law Applicable to Contractual Obligations, commonly known as the 1980 Rome Convention, came into force. Its purpose is to establish uniform European Community conflict of laws rules for contractual obligations. This European Community (E.C.) agreement has generated a great deal of controversy both within and without the Community. These controversies include, among other things, the necessity and desirability of such a Convention; the Convention's effect on international law, E.C. law and domestic law; and the Con-

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1. 1980 O.J. (L 266) [hereinafter Rome Convention].
3. The preamble to the Convention reads:
THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,
ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,
WISHING to establish uniform rules concerning the law applicable to contractual obligations,
HAVE AGREED AS FOLLOWS: . . . .

vention’s impact on the international commercial community. 4

Part I of this Note traces the history, purposes, and structure of the Rome Convention, paying special attention to the history of the Convention in, and its relation to, Germany. Part II identifies beneficial Convention provisions, but Part III argues that the Rome Convention is a flawed document that aims for lofty goals through ineffective means, and that the commotion caused by the Rome Convention is therefore both unnecessary and unwarranted. Part IV utilizes the incorporation of the Rome Convention into the German Civil Code as a model for forecasting the Rome Convention’s ineffectiveness in the European Community. Part V proposes modifications designed to strengthen Convention provisions and to help achieve its stated goals through alternative means. This Note concludes that, in its present form, the Rome Convention is destined to fail.

I. Background

A. History and Purpose of the Convention

1. Inception

On September 8, 1967, the governments of the Benelux countries 5 submitted a proposal to the Commission of the European Communities to consider the unification of private international law and the codification of rules concerning the conflict of laws within the European Community. 6 The Commission subsequently formed the “Brussels Working Group” to investigate the proposal. In his opening address, Mr. T. Vogelaar, chairman of the Group, stated the Group’s goals:

This proposal should bring about a complete unification of the rules of conflict . . . . The great advantage of this proposal is undoubtedly that the level of legal certainty would be raised, confidence in the stability of legal relationships fortified, agreements on jurisdiction according to the applicable law facilitated, and the protection of rights acquired over the whole field of private law augmented. 7

Although several articles in the Treaty of Rome declared as an objective the desire to raise legal certainty, the proposed harmonization was not specifically linked to the Treaty of Rome, 8 the European Community founding document. 9 The Group, nevertheless, unanimously agreed that the legal basis of their project was to “be a natural sequel to the [Brussels] Convention on jurisdiction and enforcement of judgments.” 10

Rome Convention, supra note 1.

5. The Benelux countries include Belgium, the Netherlands, and Luxembourg.
7. Id. at 4.
8. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].
9. E.g., arts. 220 and 100.
The Brussels Convention\(^\text{11}\) both limited and eliminated restrictions on the enforcement of judgments within the European Community. It also created new opportunities to bring suit in alternative forums.\(^\text{12}\) The Rome Convention was developed largely as a response to the “forum shopping” possibilities created by the Brussels Convention.\(^\text{13}\) If uniform rules exist, it was reasoned, the motive to forum shop disappears because no advantage is gained by bringing suit in one forum over another.

2. Development

The Commission realized that legal certainty is optimally attained when Member States unify substantive laws rather than choice-of-law rules. The Commission also realized, however, that attempting such a task would be difficult, time consuming, and impractical.\(^\text{14}\)

After considering the various fields of conflict laws, the Group chose to limit their work to the law of obligations, both contractual and non-contractual. In 1972, the Group completed a draft of their proposals\(^\text{15}\) and submitted it to the Member States for consideration. These proposals formed the basis of the ensuing E.E.C. Preliminary Convention on the Law Applicable to Contractual and Non-Contractual Obligations.\(^\text{16}\)

In 1978, the Group decided to further restrict the scope of their task by eliminating non-contractual obligations from their consideration, thus resulting in a Convention on the law applicable only to contractual obligations. This structural change came largely as a result of the accession to the European Community of three new Member States: Denmark, Ireland, and the United Kingdom. The British delegation specifically requested that the non-contractual provisions be severed from the agreement and considered separately in a subsequent convention.\(^\text{17}\)

3. Ratification

The Draft Convention on the Law Applicable to Contractual Obligations was completed in February 1979 and submitted to Member States for com-

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Following submission of comments, a new working group was formed to finalize the agreement. Part of the group's task was determining the scope of European Court of Justice (E.C.J.) jurisdiction in interpreting the Convention. A general agreement concerning the substantive provisions of the agreement was reached fairly quickly. The major disagreements arose over jurisdictional questions and the number of Member States required for Convention ratification and implementation. The Ministers of Justice held a special Council in Rome on June 19, 1980, to address these concerns. Member States subsequently agreed to fix the number required for ratification of the Convention at seven. Member States temporarily deferred the question of E.C.J. interpretation and, instead, declared themselves prospectively ready "to examine the possibility of conferring jurisdiction in certain matters on the [E.C.J.] and, if necessary, to negotiate an agreement to this effect."

The Convention on the Law Applicable to Contractual Obligations was opened for signature on June 19, 1980, and nine Member States signed on to the Convention. The seven State ratification requirement was eventually fulfilled by the United Kingdom, and the Convention officially came into being on April 1, 1991. Spain and Portugal have subsequently signed, leaving Greece as the only E.C. Member yet to ratify the Convention.

B. Structure and Scope of the Convention

The Rome Convention has a broad scope with universal application. Article 1(1) states: "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries." Article 2 adds: "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State."

The Rome Convention, unlike the Brussels Convention, is applicable to all contracts, not just contracts between Member States. The Convention therefore applies to non-Member State parties when a choice-of-law dispute comes before a Member State's court. For example, if a U.S.

20. Id.
21. Id. at 8.
23. Rome Convention, supra note 1.
24. These states were Belgium, France, Denmark, Italy, Luxembourg, Germany, the United Kingdom, Ireland, and the Netherlands. EC: Rome Convention Related to Contractual Obligations Ratified, Reuter Textline, Agence Europe, Mar. 28, 1991, available in LEXIS, World Library, Arcnw File.
26. The applicability of the Brussels Convention when a non-contracting State is involved is the underlying issue in Re Harrods Buenos Aires, [1991] 3 W.L.R. 397 (Eng. C.A.), a case currently before the European Court of Justice. See Richard Fentiman, Jurisdiction, Discretion and the Brussels Convention, 26 COrnell Int'l L.J. 59 (1993).
corporation and an Australian client form a contract with an English jurisdictional clause, or if an English court otherwise obtains jurisdiction over their contractual obligation, the English court must abide by the precepts of the Rome Convention when resolving any dispute concerning the parties' choice of applicable law.

Despite the broad scope of the Rome Convention, a number of categories are excluded in articles 1(2) and 1(3). These include contractual obligations relating to wills and succession, duties arising out of family relationships, and obligations arising from promissory notes and other such instruments. There were three primary reasons for these exclusions. First, international conventions already existed which encompassed the excluded subject matter. Second, the exclusions fell within areas constituting the exercise of State authority, an area not within the scope of the European Community. Third, instruments pertaining more directly to the excluded subject matter were either being prepared or were already in force.

C. Uniform Rules

1. Party Autonomy

Article 3 is a very liberal provision which gives multinational parties the freedom and ability to specify any law they wish to govern the contract. Article 3(1) reads:

A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part of the contract.

In addition, article 3(2) allows parties to choose the applicable law after the contract has been formed. This provision, unlike analogous provisions in other countries, contains no reasonable connection test. Parties may therefore choose a governing law that has no reasonable connection to the parties or the contract.

Although choice of law is unlimited, article 3 does not allow the parties to escape a country's mandatory rules if "all the other elements relevant to the situation are connected to one country only." Thus, two English parties forming a domestic contract may not circumvent an English mandatory rule by choosing French law to govern the contract. In this

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27. E.g., infra note 79.
29. Rome Convention, supra note 1, art. 3(1).
30. Id.
31. For example, the U.S. Restatement voids choice of law provisions if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).
32. Rome Convention, supra note 1, art. 3(3).
sense, the Rome Convention also governs, or provides parameters for, domestic contracts.

If a choice of law is not express, article 3 allows a choice to be inferred from the circumstances of the case or from the contract's terms, so long as the choice is "demonstrated with reasonable certainty." Where the parties had no clear intention of making such a choice, the court is not allowed to infer one.

Article 3 also allows parties to subject different parts of a contract to different law. This practice is commonly referred to as dépeçage. Thus, parties can partition a contract according to the issues being governed and apply a separate and distinct law to each of those issues. This provision was included as an extension of party autonomy.

A choice of law meets the requirements of article 3 only if it is "express" or "demonstrated with reasonable certainty." Otherwise, the judge refers to article 4 to determine the applicable law.

2. Applicable Law in the Absence of Choice

The general rule of article 4 is: where parties to a contract have failed to specify a governing law, the law of the country most closely connected to the agreement will govern. Article 4(1) reads:

To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

Dépeçage is also allowed under article 4. Thus, if a contract fails to specify a governing law, and separate parts of that contract have closer connections to different countries, each of those country's laws may be applied to their respective parts.

In determining the "closest connection," article 4(2) furnishes a presumption to guide a judge: the habitual residence of the party effecting the characteristic performance of the contract will determine the place of closest connection. This presumption does not apply, however, if the characteristic performance cannot be determined. Also, exceptions to this presumption are made for rights concerning immovable property and

33. Id. art. 3(1).
35. Article 3(1) (third sentence) reads: "By their choice the parties can select the law applicable to the whole or a part only of the contract." Rome Convention, supra note 1 (emphasis added).
36. Dicey & Morris on the Conflict of Laws, supra note 12, at 44.
38. Rome Convention, supra note 1, art. 4(1).
for contracts concerning the carriage of goods.\textsuperscript{40}

3. Mandatory Rules

The Rome Convention includes certain “mandatory” provisions: rules considered fundamental enough to require all parties to abide by them. Article 3(3),\textsuperscript{41} which compels application of a country’s mandatory rules where “all other elements”\textsuperscript{42} except for the chosen law are connected to that country, exemplifies such a mandatory provision. Convention provisions that regulate party autonomy, however, are the exception rather than the general rule.

Articles 5 and 6 resulted from the drafters’ concern that traditionally weaker parties be protected against adverse choice of law clauses.\textsuperscript{43} Article 5 governs choice of law for consumer contracts.\textsuperscript{44} The drafters of the Convention considered buyers the traditionally weaker party\textsuperscript{45} and drafted a provision to give consumers the protection afforded by the mandatory rules of their habitual residence. Article 6, like article 5, affords employers, another traditionally weaker party, the mandatory protection of their habitual residence. Both articles 5 and 6 grant parties the freedom of choice to apply applicable law. These articles are safety provisions, included for the benefit of traditionally weaker parties, should the traditionally stronger party attempt to manipulate choice of law provisions to the stronger party’s advantage.

Article 7 compels the application of another country’s mandatory rules, other than those of the elected country, where that country has a close connection to the contract.\textsuperscript{46} The necessity of article 7 may appear questionable in light of article 3(3), which already contains provisions for applying mandatory rules of a State not governing the contract. The distinction is that article 3(3) requires “all” elements, other than the choice of law clause, to be connected to a State before its mandatory rules are applicable. Article 7, on the other hand, requires only a “close connection” for such application. The rationale of article 7 lies in an interests analysis; if a State has a strong enough interest in a contract, application of

\textsuperscript{40} Rome Convention, supra note 1, arts. 4(3), 4(4).

\textsuperscript{41} See supra text accompanying note 32.

\textsuperscript{42} Rome Convention, supra note 1, art. 3(3).

\textsuperscript{43} Convention Report, supra note 14, at 23.

\textsuperscript{44} Article 5(2) reads: “Notwithstanding the provisions of article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the country in which he has his habitual residence . . . .” Rome Convention, supra note 1.

\textsuperscript{45} Convention Report, supra note 14, at 23.

\textsuperscript{46} Article 7(1) reads:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
its laws is compelled, regardless of the governing law.\footnote{47}

4. \textit{Validity}

Article 8 provides that the law determining the material validity of a contract shall be the same law which would govern if the contract were valid.\footnote{48} For example, assume a Danish party contracts with a Belgian party, and English law is chosen to govern their contract. If either party brings an action challenging that contract's validity, a court would look to English law, not Danish or Belgian law, for rules governing the validity of contracts.

Article 9 governs determination of the formal validity of a contract.\footnote{49} Although formal validity is not defined in the Rome Convention, it is generally understood to refer to matters such as the requirements that a contract be notarized, in writing, or registered with a government office.\footnote{50} Formal validity is determined either by the law applied in the contract or by the law of the place where the contract was concluded. This choice illustrates the principle of \textit{favor negotii}, which holds that the rule in favor of validating the contract shall apply.\footnote{51} Consequently, situations in which a contract may be rescinded due to formal invalidity are greatly reduced.

5. \textit{Other Significant Provisions}

Article 15 excludes the application of renvoi, a doctrine which allows a court to adopt a foreign country's conflict of laws rules, instead of its own, in determining proper law.\footnote{52} A court will often use renvoi to refer back to its own forum law.\footnote{53} For example, if a German and a French company form a contract with a U.S. choice of law clause, or even if the contract simply has a close connection to the United States, a Member State's court is forbidden to apply U.S. conflict of laws rules to determine the governing law, regardless of the forum determined by U.S. rules.

Article 16 reserves the right of a forum court to refuse application of a rule of law, as directed by the Rome Convention, if doing so would be "manifestly incompatible" with its public policy.\footnote{54} Included in these policy considerations is "Community public policy."\footnote{55}

Article 18 petitions courts to consider uniformity concerns when interpreting and applying Convention provisions. This article states: "In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of

\begin{footnotesize}
\footnote{Rome Convention, \textit{supra} note 1.}
\footnote{Williams, \textit{supra} note 16, at 22.}
\footnote{Rome Convention, \textit{supra} note 1, art. 8.}
\footnote{Id.}
\footnote{Williams, \textit{supra} note 16, at 19.}
\footnote{Jayme, \textit{supra} note 13, at 45.}
\footnote{Black's \textit{LAW DICTIONARY} 1298 (6th ed. 1990).}
\footnote{Id.}
\footnote{Rome Convention, \textit{supra} note 1, art. 16.}
\footnote{Convention Report, \textit{supra} note 14, at 38.}
\end{footnotesize}
achieving uniformity in their interpretation and application. 56

The Rome Convention contains a total of 33 articles, a relatively short document considering the broad spectrum it attempts to encompass. Although the Convention is not overburdened with technical details and complex provisions, its ecumenical structure is also its principal flaw.

D. The Rome Convention and the German Civil Code

Although Germany is home to some of the most renowned scholars on conflict of laws,57 the German Civil Code contained no conflict of laws rules until only recently.58 Earlier German conflicts rules were developed largely in a case-by-case, common-law manner, a concept foreign to the German legal system.59 This was apparently a principal catalyst in the decision of the German legislature to incorporate the Rome Convention into German law on September 1, 1986.60

Rather than incorporating the Convention as a statutory appendix to the Civil Code,61 Germany chose instead to assimilate the Convention62 into the Introductory Law of the German Code (E.G.B.G.B.).63 In so doing, Germany acted contrary to the advice of many experts64 and the E.C. Commission.65 These experts maintained that Germany's alteration of the original Convention, which included adjusting Convention wording to German legal terminology,66 deleting certain Convention provisions, and dividing the Convention into different parts, undermined the uniformity which the Convention strove to achieve.67

Despite these criticisms, at least one commentator believed that article 36 of the E.G.B.G.B., the German incorporation of the Convention's

56. Rome Convention, supra note 1, art. 18.
57. These German scholars include Frederic Karl von Savigny and Otto von Gieke.
59. Id. at 936.
62. Id.
63. Einführungsgesetz zum Bürgerliches Gesetzbuch. For a text of the Convention provisions following their incorporation into the German Code, see 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RABELS) 673-78 (1986).
66. Triebel, supra note 58, at 936.
67. Lando, supra note 61, at 162-63.
article 18,68 could neutralize both the negative effects and the advantages of Convention integration.69 This Convention article "makes no mention of an option available to the German judge, rather it imposes the duty to proceed, in case of doubt, as if the Convention were authoritative in Germany."70 A German judge is accordingly bound to interpret the provision with regard to "the desirability of achieving uniformity . . . ."71 Theoretically, therefore, Convention adoption in Germany will bear uniform results despite the alteration of some provisions.72

II. Beneficial Provisions

The Convention drafters' first commendable act was to exclude non-contractual obligations. The Convention's present scope is already very broad, and including non-contractual obligations would only have further diluted an already weak agreement. The British delegation recognized this weakness and convinced other Member States to further limit the agreement's scope.

The drafters also properly excluded matters covered under other international conventions in article 1(2) and article 21.73 Those conventions were designed to govern specific matters in specialized areas and were drafted by authorities in the respective fields. The drafters wisely chose to defer to the experts' acumen and to the stability that many of these conventions already had achieved.

Articles 5 and 6 are beneficial provions because they recognize the need to provide traditionally weaker parties with the protection afforded them by the laws of their habitual residence. Including such provisions in international agreements is relatively innovative, and their inclusion in the Rome Convention is a constructive sign for labor and consumer advocates.74

Another benefit, which is not so obvious, is the process involved in forming the Rome Convention. If a true "community" is the ultimate goal of the Europeans, an act which facilitates Community interaction is highly desirable. The process of bringing together distinguished jurists from throughout the European Community to forge agreements should provide an improved environment for future conventions and other attempts at further cooperation and understanding.

68. For the text of article 18, see supra text accompanying note 56.
70. Id.
71. Rome Convention, supra note 1, art. 18.
72. Junker maintains, however, that a truly uniform interpretation of the Rome Convention will never occur until the European Court of Justice has sole jurisdiction over such matters. Junker, supra note 69, at 696.
73. Article 1(2) excludes specific areas such as wills and succession. Article 21 excludes conventions not included in article 1(2) and future conventions. See infra text accompanying notes 78-85.
III. Deficiencies

A. Scope

1. Universality

The Rome Convention is an endeavor of the European Community. As such, only Community members were involved in its formation. The Convention, however, is intended to have universal scope; by its terms, the Convention applies to all contracts, not just to contracts between Member States. For example, article 2 states: “Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.” This raises a question: why were non-Member States not given the opportunity to participate in the development of the Convention since it was apparent they were to be affected by it? Such an approach would have been comparable to the approach taken in the formation of other international Conventions, such as the Geneva Conventions.

The probable but unstated response to this proposition is that such broad participation would have been unproductive, increasing only the amount of time necessary to complete the agreement, not to mention the decreased likelihood that additional states would agree to such an arrangement. Yet a broader participation might have prompted Convention drafters to scale down the scope of their plans. This was illustrated with the entry of Great Britain into the Community which, after entering Convention negotiations, ultimately persuaded Member States to reduce the Convention’s scope. Wider international community involvement might have resulted in a narrower, better drafted Convention, or a series of narrow and specific Conventions; either result would be more effective than the existing Convention. The Convention admittedly establishes some limitations to its scope. These provisions, however, are defective and leave sizable gaps in the Convention.

2. Restrictive Measures

Article 1(2) excludes from the Rome Convention issues covered by other international conventions. Such provisions are desirable, but only when properly drafted. Although the Convention apportions previously addressed topics to their respective agreements, it fails to provide direction to Member States who are not parties to these excluded conventions. Ironically, the Convention thereby effectively forces these Member States to refer back to their original conflicts rules, the same rules that the Convention seeks to eliminate.

An example helps illustrate this Convention loophole. Article 1(2)(c) excludes obligations arising under bills of exchange, cheques and promissory notes, and other negotiable instruments. This exception arose due to

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75. Rome Convention, supra note 1, art. 2.
76. E.g., infra note 79.
77. For example, the amount of time needed to accomplish this task among Member States—from conceptualization to ratification—was almost fourteen years.
78. See supra text accompanying note 73.
two existing Geneva Conventions\(^7\) governing these areas.\(^8\) Ireland and Great Britain, however, are not members of these two Conventions. Thus, when an Irish judge faces an obligation arising under a promissory note, a category excluded from the Rome Convention, the judge must resort to Irish conflicts rules to resolve this dispute, instead of looking to the Convention for assistance. This loophole and others result in a deficient Convention, leaving voids in many important areas of conflict law.\(^9\)

Article 21, another provision that limits the Convention's scope, states: "This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party."\(^10\) The repercussions of this provision could be devastating to the Convention because it establishes the Rome Convention's subordination to other international conventions. The Hague Convention on the Law Applicable to International Sales of Goods\(^11\) is such a convention. States that are members of both the Hague Convention and the Rome Convention face a dilemma when the two conventions overlap.\(^12\) The Hague Convention, like the Rome Convention, contains provisions for ascertaining the applicable law for a sale-of-goods contract where the parties have neglected to designate such law. According to article 21 of the Rome Convention, Member States subscribing to the Hague Sale of Goods Convention\(^13\) should continue to apply its choice of law rules instead of those advanced by the Rome Convention. By allowing the Hague Convention to dictate choice of law for its Member States but not for non-Member States, the Rome Convention directly undermines its original purpose—to provide uniform choice of law rules.

B. Structure

1. Certainty Versus Flexibility

The structure of the Rome Convention is comparable to the structure of many of the world's conflicts systems.\(^14\) The Convention's provisions attempt to delineate system selecting rules, with result de-selection on pub-

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82. Rome Convention, supra note 1.
85. These states are Belgium, Germany, the Netherlands, and the United Kingdom. Peter Winship, Private International Law and the U.N. Sales Convention, 21 CORNELL INT'L L.J. 487, 490 n.14 (1988).
86. See generally PLENDER, supra note 84, at 87-102 (discussing, for example, the conflict of laws system in Australia, Great Britain, and France).
lic policy grounds. In other words, the rules of the Rome Convention first designate the proper governing forum and then prescribe exceptions to that forum which are typically based on fairness or other public policy concerns.

When developing such a system, the mutually exclusive objectives of flexibility and certainty must be balanced against each other; flexibility is attained only at the expense of certainty and vice versa. A principal flaw of Convention articles is their heavy tilt towards flexibility, thereby leaving certainty to suffer. The majority of Convention articles exhibit the following structure: a maxim is stated in an introductory provision of the rule and then undermined in a succeeding provision. The subsequent provision is not intended to frustrate the original rule, but rather to provide needed policy exceptions. While exceptions are necessary, it is nevertheless possible to structure them narrowly with strict operational guidelines. Unfortunately, exceptions in the Rome Convention are left largely to the decision-maker's discretion. The net result is a very flexible document which provides almost no certainty.

2. Vagueness

The vagueness of the Convention's articles demonstrates their inclination towards flexibility. However, such vagueness "reduces [the Convention] to a restatement of broad principles. As such, it is incapable of providing effective guidance either to the judge faced with problems of conflict solution or to the draftsman of a contract engaged in techniques of conflict avoidance." An analysis of the most important Convention articles illustrates the numerous problems generated by such equivocal and indeterminate provisions.

The Convention's opening provision, article 1(1), states: "The rules of this Convention shall apply to contractual obligations . . ." Since the legal standards for a contract differ from State to State, the question necessarily arises as to what constitutes a contractual obligation under the Convention.

Article 10(1) includes provisions that attempt to define the scope of contract law for Convention purposes, but the list is far from comprehensive and fails to explicitly define a contractual obligation. The history and structure of article 10 reveal that this ambiguity was intentional. The Convention Report, for example, shows that the drafters deliberately avoided defining the "manner of performance" standard in article 10(2). Even the very structure of article 10 acknowledges the existence

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88. Delaume, supra note 81, at 107.
89. Rome Convention, supra note 1, art. 1(1).
90. For example, article 10 does not indicate whether the Convention covers quasi-contractual obligations.
of issues outside its scope.\textsuperscript{92}

Convention drafters understood that the interpretation and determination of such issues would necessarily fall to the judges applying the \textit{lex fori}.\textsuperscript{93} Instead of providing a uniform application standard among all Member States, however, the Convention’s purposes were once again frustrated by acquiescing to flexibility concerns.

Article 3, an integral Convention provision, also falls victim to the nebulous construction which plagues so many articles. Where the parties’ choice of law is not express, article 3 requires that their intent be demonstrated with “reasonable certainty.” The Convention does not, however, define the reasonable certainty standard. The result is an article—originally intended to guide a judge in determining the intention of the parties—that provides essentially no guidance. Without the restraints of a narrow definition, judges are left to their complete and unfettered discretion.\textsuperscript{94} For all practical purposes, judges will probably rely on methods or standards with which they are familiar—the standards of their jurisdiction. Thus is illustrated why the Convention is often its own worst enemy.

3. \textit{Ex Post Facto Choice of Law}

Article 3(2) allows parties to agree on a law after a contract has been concluded. Although a very flexible provision, this article is essentially a loophole that encourages litigation. Circumstances calling for the application of this article will typically only arise if one party is disadvantaged by the application of article 4,\textsuperscript{95} the article governing the determination of applicable law in the absence of a choice of law. In other words, the party disadvantaged by article 4 will wish to choose a different law according to article 3(2), while the advantaged party will contend that article 4 should govern. Suppose, for example, that a dispute arises between a French and a Danish party over a contract with no choice-of-law clause, and article 4 dictates that Danish law should govern because Denmark is the place of the characteristic performance. Instead of the analysis ending there, article 3(2) allows the French party to protract the dispute by pressing for an ex post facto choice of French law.

4. \textit{Dépeçage}

Articles 3 and 4 permit \textit{dépeçage}, the application of a different governing law to separate parts of a contract, despite the experience of other countries showing that such provisions create uncertainty.\textsuperscript{96} The Convention Report indicates that many delegates were opposed to any mention of

\textsuperscript{92} “[T]he words ‘in particular’ indicate that [article 10(1)] is not exhaustive.” Delaune, \textit{supra} note 81, at 111.

\textsuperscript{93} The law of the forum. \textit{Id.}

\textsuperscript{94} Delaune suggests that this is nothing more than a manipulation of the connecting factors standard by Convention drafters. \textit{Id.} at 107.

\textsuperscript{95} See Williams, \textit{supra} note 16, at 17.

\textsuperscript{96} Switzerland and the United States are two of these countries. Lando, \textit{supra} note 61, at 169.
dépeçage, but were eventually outvoted. This provision was included despite the infrequency of split contracts in practice. Even adamant Convention proponents admit that this weak provision should be deleted because of the uncertainty it creates.

5. Characteristic Performance

Where parties fail to choose a governing law, article 4(1) directs a judge to select the law of the forum most closely connected to the contract. To determine the close connection, article 4(2) requires that the "characteristic performance" of the contract first be identified. Once the judge makes this determination, the judge applies the law of forum where the party effecting the characteristic performance has its habitual residence.

Evidence of article 4's circular structure arises when "characteristic performance" becomes undeterminable. In such a scenario, article 4(5) stipulates that article 4(2) shall not apply. Article 4(5) further directs that the governing law of the contract shall be determined by the closest connection, which according to article 4(2) cannot be found. Consequently, a judge referring to article 4 is no better off after applying its provisions than before. Finding no assistance in the Convention, a forum judge must once again determine applicable law by referring to any standard the judge prefers.

6. Closest Connection Standard

Even if a judge can determine characteristic performance, article 4(5) directs this presumption to be disregarded "if it appears from the circumstances as a whole that the contract is more closely connected with another country." This "closest connection standard" is frequently criticized as a directionless requirement which "means nothing except, perhaps, that the answer is not ready at hand." Offering this standard, it is claimed, "is only to state the problem rather than to offer a solution." The Convention provision governing the finding of the close connection merely states a few presumptions without providing any substantive gui-

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98. Williams, supra note 16, at 12.
99. "Splitting [contracts] should be completely avoided. The harmony between the obligations of the parties to a bilateral contract is disturbed if different laws are to be applied to the two obligations." Lando, supra note 61, at 169.
100. See supra text accompanying notes 38-40.
101. Rome Convention, supra note 1, art. 4(5).
104. Article 4(2) states:
[I]t shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that
dance. Without such guidance, judges are once again left only to their discretion to determine applicable law. Some experts suggest that judges will determine the closest connection through the common, but outmoded, method of counting relevant connecting factors.\(^{105}\) This standard essentially allows a judge to apply any Member State's law, and to justify it by reference to the closest connection test. It should therefore be no surprise that article 4 has been called "almost bizarre."\(^{106}\)

7. Protection Clauses

While the inclusion of consumer and employee protection clauses in articles 5 and 6 is commendable, these articles also contain serious flaws. First, the provisions are not broad enough. There are many other traditionally weaker parties\(^ {107} \) besides employees and consumers who do not receive special considerations and who remain vulnerable despite the Convention.\(^ {108} \) Second, although these regulations grant consumers and employees the benefit of mandatory rules of their habitual residence, "mandatory rule" is never defined. This problem is compounded because the task of determining these laws will always fall to a foreign court. In other words, the only time articles 5 and 6 apply is when the weaker party has submitted to a choice of law other than that of its habitual residence. For example, in a suit between an Italian employer and a Danish employee, an Italian judge must determine Danish mandatory employment laws. Since the Convention does not define "mandatory," a judge has enormous discretion in determining a foreign State's compulsory rules. The employee, despite article 6, is left in a vulnerable position, in a foreign forum, with no guarantee of certainty.

8. Interests Analysis

For this European Community agreement to succeed, it must compel Member States to place Community interests ahead of their own short-term interests. The interests analysis codified in article 7\(^ {109} \) places State interests ahead of Convention interests by granting application of a Member State's laws where that State has a close connection to the contract. Such a provision is fundamentally inconsistent with the goal of uniform

\[^{105}\] Rome Convention, supra note 1.

\[^{106}\] Delaume, supra note 81, at 109.


\[^{108}\] For instance, farmers, small businessmen, and fishermen also may deserve protection.

\[^{109}\] One commentator suggested that a general distinction between weak and strong parties should have been created, rather than two piecemeal provisions. See Lando, supra note 61, at 185.

\[^{109}\] See supra text accompanying notes 46-47.
and stable rules, and of conflicts avoidance.\textsuperscript{110} Article 7 has been called "the most controversial conflicts rule of the Rome Convention,"\textsuperscript{111} despite the drafters' contention that it "merely embodies principles which already exist in the laws of the Member States of the Community."\textsuperscript{112}

The controversy surrounding article 7 is nevertheless difficult to understand since the Convention provides several ways to excuse mandatory rule application. Article 7, like so many other Convention articles, is governed by a very flexible standard. In determining whether to exercise a State's mandatory rules, a court is to give due regard to "their nature and purpose and to the consequences of their application or non-application."\textsuperscript{113} One commentator remarked cynically about article 7, "P.S.: mandatory rules of the forum can be applied at any time, regardless of anything in the Convention."\textsuperscript{114} Likewise, a court can easily justify non-application of mandatory rules.

In addition to the ambiguous standard governing article 7, the Convention also provides an escape clause in article 22(1)(a),\textsuperscript{115} giving a State the right to abstain from applying article 7(1). Germany has already exercised this option,\textsuperscript{116} and the United Kingdom has clearly manifested its intention to do so.\textsuperscript{117}

9. Public Policy

Article 16 is the Convention's public policy exception. It allows a court to refuse application of the rules of an otherwise applicable law where to do so would be "manifestly incompatible" with the forum's public policy. Just what constitutes this public policy is again a matter of discretion. Some academics contend that the words "manifestly incompatible" indicate that the rule is only applicable in unique circumstances.\textsuperscript{118} The Convention fails to make this distinction, however, once again leaving the determination to forum judges. Article 16 also undermines the certainty of other Convention articles. For example, a country may use article 16 to justify its refusal to apply article 7,\textsuperscript{119} thus providing another avenue to circumvent application of this controversial provision.

The Convention is poorly constructed and contains many flaws. Although some fear that these defects could keep foreigners from submit-
ting their contracts to European law, these fears are unfounded. The defects that these practitioners fear are the same defects which cause the Convention's ineffectiveness. Some commentators even consider the Convention's indeterminate composition an asset. Professor Russell J. Weintraub, a recognized expert in the conflict of laws field, wrote of the Convention's articles: "[B]etter amorphous rules that permit a wise judge to reach a proper result than clear and certain rules that compel undesirable outcomes." Professor Weintraub went on to conclude: "When one considers the functional blindness evidenced by the Convention, its ambiguities are its saving grace."

C. Jurisdiction

Since the Rome Convention is not officially subordinate to the E.C. Treaty, the European Court of Justice is not automatically empowered with jurisdiction to interpret its provisions, as is the case under the 1968 Brussels Convention. Thus, instead of a unified body giving a single interpretation, Member States are able to construe the Convention as their judges see fit. This poses a great problem for the Convention because "[i]f cross-fertilization of judicial decision does not happen in the Community . . . the hope for unification of law suggested by the attempt to write a conflict of laws convention will be unfulfilled."

Article 18 attempts to confront and remedy this situation. It states: "In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application." Article 18 acknowledges the Convention's inability to attain uniformity without an autonomous E.C.J. jurisdiction. Without a single judicial body to interpret its provisions, the Convention must appeal to Member States to achieve a uniform interpretation on their own. The implication, or perhaps hope, embedded in article 18 is that Community courts will manifest greater deference to fellow Member State decisions than they previously have. This view, however, is unrealistic given the immense discretion granted to forum judges.

A number of high ranking judicial officials have already stated their opposition to the Rome Convention. Lord Wilberforce of the English House of Lords has criticized the Convention as "unfortunate and unnecessary." He believes "[i]t brings into English law the effect of a European Convention in an area which in English law is perfectly satisfactory,

120. Mann, supra note 106, at 354 (regarding English courts).
122. Id.
123. EEC Treaty, supra note 8.
124. Lowenfeld, supra note 114, at 107-08.
125. See supra text accompanying note 56.
126. Rome Convention, supra note 1, art. 18.
has been controlled by the judges and is now to be set into the cement of statutory legislation." Such a pre-formed critical attitude towards the Rome Convention is bound to influence a judge when interpreting its provisions. One would accordingly expect a Lord Wilberforce to construe the Convention's provisions to maintain the status quo. The fault for such an interpretation lies not with Lord Wilberforce, but with the Convention because it virtually invites such manipulation with its discretionary provisions. Indeed, the Convention's indeterminate provisions force even impartial judges to resort to pre-Convention techniques.

The European Community has attempted to rectify this situation through a series of protocols. The Member States of the Rome Convention signed two such protocols on December 19, 1988. The stated purpose of these combined protocols is eventually to confer on the European Court of Justice the power to interpret the Rome Convention. It is still unclear whether the Protocols will actually achieve this end.

Seven States must ratify the Protocols before they enter into force. Experience with the Rome Convention shows that this process can, and often does, take many years to complete. While some commentators believe that ratification of the Protocols is not foreseeable in the near future, most assume that they will eventually be implemented.

The Protocols, however, may not necessarily solve the jurisdictional problem. A Dutch legal expert declared: "Even if the E.E.C. member states will ratify the First and Second Protocol[s] . . ., the Convention's wording leaves the construction of most of its key concepts to the discretion of the (national) courts: 'effect may be given,' 'more closely connected,' 'deprives of protection,' etc." Ironically, these concepts are among the Convention's vaguest provisions and, consequently, are provisions whose right of interpretation should be removed from forum courts, not left to their discretion. Even assuming that the Protocols will solve the jurisdictional dilemma, there are experts who assert that some countries, such as the United Kingdom, will nonetheless refuse to submit to such provisions and will continue to refer interpretation to their own courts.

128. Id.
130. Id.
132. Id. at 15.
133. See supra note 77.
134. Lando, supra note 61, at 208.
135. See Rogerson, supra note 127, at 282; Mann, supra note 106, at 354.
137. See, e.g., Mann, supra note 106, at 354 (referring specifically to the probability that the English House of Lords would not refer many Convention matters to the European Court of Justice if this protocol were to be implemented).
Recent difficulties encountered with European Community proposals\textsuperscript{138} attest that Member States are increasingly hesitant to relinquish sovereignty, and the Protocols are not immune to this fear.

If jurisdiction is eventually conferred on the E.C.J., there is no guarantee that it would interpret the Convention according to the drafters' intentions; indeed, there is persuasive evidence to the contrary. In a decision of January 15, 1987,\textsuperscript{139} the E.C.J., in its interpretation of article 5(1) of the Brussels Convention,\textsuperscript{140} criticized the characteristic performance test, a core standard of the Rome Convention. The Court stated, perhaps discerningly, that such "criterion might . . . create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the [Brussels] Convention is designed to reduce."\textsuperscript{141} The Court seemed to overlook that their own uniform interpretation of this provision was the only remedy to their declared predicament. In other words, the only way to keep the characteristic performance test from creating uncertainty is for the E.C.J. to interpret the test in a consistent and uniform manner, thereby providing the stability and certainty which the provision itself lacks. The Court in this case resorted to a national conflicts rule for its result instead of relying on the guidelines provided by the Brussels Convention provision. Because the characteristic performance test is fundamental to the Rome Convention, one can extrapolate that the same reasoning used by the E.C.J. in this case could also be applied to the characteristic performance test in article 4, and to other indeterminate Rome Convention provisions.\textsuperscript{142}

D. Status Quo

The Rome Convention is often compared to, and is said to have been influenced by, the United States Restatement of Conflict of Laws.\textsuperscript{143} The purpose of a Restatement is not to suggest prospective rules that might make a particular system better or more efficient; rather, a Restatement attempts to state precedent in a condensed form. The Convention, like the U.S. Restatement, is fundamentally an excessively simplified compilation of the status quo of European Community conflict of laws rules.

The Convention admittedly contains some changes in a number of Member States' conflict laws. However, where changes have occurred, the

\textsuperscript{138} The Maastricht Treaty is indicative of an E.C. proposal which faced intense opposition. Denmark rejected the original treaty, and other E.C. countries have indicated their resistance to enter into restrictive agreements. \textit{See} Alan Riding, \textit{European Chiefs Stem Threats to Unity}, N.Y. \textsc{TImes}, Dec. 13, 1992, at A26. Other ancillary problems, such as economic recession and the crisis in Bosnia and Herzegovina, have also contributed to a general European Community aversion to expedited unity. \textit{See} Alan Riding, \textit{Europeans Try to Revive a Faded Dream of Unity}, N.Y. \textsc{TImes}, June 20, 1993, at A8.


\textsuperscript{140} Brussels Convention, \textit{supra} note 11.

\textsuperscript{141} \textit{Shenavai}, 1987 \textit{E.C.R.} at 256, 3 \textit{C.M.L.R.} at 792.

\textsuperscript{142} Professor Jayme considered this case to be a major turning point for European conflicts law. Prior to this case, he believed that the Rome and Brussels Conventions would form the core of European conflicts law. Jayme, \textit{supra} note 13, at 39.

\textsuperscript{143} Juenger, \textit{supra} note 103, at 131.
Convention's nebulous construction often allows forum judges to retain the status quo of the particular State's conflict laws without breaching the provisions of the Convention.

Article 3's proviso on party autonomy\textsuperscript{144} exemplifies a rule that does not change the current legal standard of any Member State. Prior to the Convention, every Member State allowed contractual parties to specify the law they desired to govern the contract. Most experts agree that party autonomy "belongs to the common core of... legal systems,"\textsuperscript{145} a fact that even the official Convention Report acknowledges.\textsuperscript{146} One might counter that although the concept behind article 3 is not original, the amount of freedom the article allows the parties is. For example, article 3 does not require a correlation or a reasonable relationship\textsuperscript{147} between the law chosen and the contract, as many Community countries do. But this argument fails in the real world. Common legal practice shows that parties do not assign meaningless choice of law clauses to govern their contractual relationships.\textsuperscript{148}

The Restatement analogy works well for the Convention. Like the Restatement, much of the Convention only codifies what already exists. Additionally, the Convention, like the Restatement, attempts to unify the law, but both are powerless to do so: the Restatement because it lacks statutory codification, and the Convention because it lacks a uniform, autonomous interpreting body.

IV. The German Paradigm

A. Germany and the European Community

The ultimate effect of the Rome Convention will not be determined for many years. Article 17 prohibits retrospective application of the Convention.\textsuperscript{149} Thus, in most Member States, the Convention will apply only to contracts formed after April 1, 1991, the day the Convention was enacted. Consequently, litigation involving Convention articles will not reach the Member States' high courts for quite some time. Even the effects of the 1968 Brussels Convention\textsuperscript{150} are still being determined today.\textsuperscript{151} Nevertheless, by using the German incorporation of the Convention as a paradigm, it is possible to reliably predict the Convention's impact on the European Community without awaiting results.

\begin{itemize}
\item \textsuperscript{144} Rome Convention, \textit{supra} note 1, art. 3.
\item \textsuperscript{145} Lando, \textit{supra} note 61, at 169.
\item \textsuperscript{146} Convention Report, \textit{supra} note 14, at 6.
\item \textsuperscript{147} \textit{See supra} text accompanying note 31.
\item \textsuperscript{149} Article 17 states: "This Convention shall apply in a Contracting State to contacts made after the date on which this Convention has entered into force with respect to that State." Rome Convention, \textit{supra} note 1.
\item \textsuperscript{150} Brussels Convention, \textit{supra} note 11.
\item \textsuperscript{151} \textit{See}, \textit{e.g.}, Fentiman, \textit{supra} note 26.
\end{itemize}
Four Community members, Belgium, Denmark, Luxembourg, and Germany, chose to enact the Rome Convention before the seven state ratification requirement was fulfilled.\textsuperscript{152} Although the Convention was enacted, in the case of Denmark, as early as July 1, 1984,\textsuperscript{153} it remains relatively recent law because it only applies to contracts formed after ratification. Consequently, only a small number of meaningful decisions currently exist upon which to judge its effects.

Of the four implementing countries, Germany has by far the largest economy.\textsuperscript{154} Germany is also widely recognized as one of the world's largest traders.\textsuperscript{155} Accordingly, German citizens and corporations are involved in an extensive amount of international contracts. The German courts, consequently, must adjudicate a fair amount of disputes arising out of these contracts. Germany, therefore, is a fertile testing ground for the effects of Rome Convention provisions.

Due to its economic power, Germany wields substantial influence both in the international arena\textsuperscript{156} and the European Community.\textsuperscript{157} The effects of any E.C. agreement or legislation in Germany are thus critical to the legislation's ultimate success or failure. Also, Germany's interpretation of the Rome Convention will greatly effect the Convention's ultimate effectiveness. Thus, the outcome of the Rome Convention in Germany can serve as a useful paradigm or microcosm of the eventual consequences of the Convention in the European Community.

B. Rulings

German rulings that directly interpret Convention provisions are still relatively scant. Yet, although few in number, these decisions exhibit the consequences of Convention deficiencies. These rulings demonstrate the unpredictability and indeterminacy of many Convention provisions and their consequent inconsistent or incorrect application. These rulings also illustrate the self-defeating construction of many Convention articles.\textsuperscript{158}

1. The Steel Wool Case

Some of the difficulties accompanying vague Convention provisions, in this case article 4,\textsuperscript{159} were illustrated in a decision of the Dortmund Lan-
The case involved a contract between plaintiff, a German steel wool manufacturer, and defendant, a Dutch scouring sponge manufacturer. Plaintiff agreed to buy sponges exclusively from defendant and sell them in Germany. Defendant agreed, in turn, to distribute plaintiff's steel wool pads under an exclusive agreement. Plaintiff claimed breach of contract by defendant and sought a remedy before the court.

A major point addressed by the court was the ascertainment of applicable law. The court first referred to article 27 of the Introductory Law of the German Civil Code (E.G.B.G.B.), the German codification of the Rome Convention's article 3. Finding that the parties had not chosen an applicable law, the court then turned to article 28, Germany's codification of article 4. Article 28 directs a court to apply the law of the country with which it is most closely connected. In finding this close connection, a court is instructed to look to the party effecting the characteristic performance of the contract and apply the law of that party's habitual residence.

In its examination of the contract, the court established that both parties affected the characteristic performance equally. The analysis promulgated by the Convention standard thus revealed that neither party, and consequently neither Holland nor Germany, had a closer connection to the contract. Faced with this dilemma, the court determined not to apply dépeçage, the ostensibly diplomatic approach; such a strategy would have allowed both German and Dutch law to govern the portions of contract performed in their respective countries. Instead, the court reverted to the traditional method of counting relevant factors to determine proper law. Important considerations in the court's determination of proper law were the place and language of the contract. Because the contract was concluded in Germany and drafted in the German language, the court naturally concluded that German law should govern the contract.

This case exhibits the unpredictable, and consequently unreliable, results of inexplicit Convention provisions. Without the confines of definitive guidelines, the German court in this case simply reverted back to its outmoded and manipulable "counting contacts" standard, thus maintaining the German conflict of laws status quo.

2. The Lankya Abhaya Case

The German Supreme Court (Bundesgerichtshof), in one of its first deci-
sions applying the newly incorporated Convention,170 illustrated the benefits of specificity in Convention provisions while also demonstrating the articles’ vulnerability to arbitrary application. The plaintiff in the case had insured the carriage of a consignment of carpets from Bombay, India to the recipient in Hamburg, Germany with the insurer “Lankya Abhaya.”171 Upon delivery, it was discovered that a number of the carpets were severely damaged. Plaintiff remunerated the recipient and subsequently sought reimbursement from the carrier. The Sri Lankan carrier relied on a choice of law clause, contained in the bill of lading, designating Sri Lankan law and courts as governing. Plaintiff contended that the clause was invalid because it was illegible.

The Court referred to the newly enacted article 31(1) of the E.G.B.G.B., Germany’s incorporation of Convention article 8(1),172 and directed the lower court to determine the validity of the clause by referring to the law that would apply if the clause were valid.173 In other words, the lower court was to determine the state of Sri Lankan law on enforcing clauses in small print, alleged to be illegible. This determination would govern the validity of the choice of law clause.

This case appears to be a straightforward application of an explicit Convention provision. The Court apparently had no other option than to apply Sri Lankan law because to do otherwise would have directly violated the German Code. Indeed, this case marked a divergence from previous German decisions.174 But the cut-and-dried appearance of this case is deceiving. In its analysis, the Court conspicuously ignored article 31(2), the German version of article 8(2), despite its clear application to the facts of the case.

Article 8(2) reads:

Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.175

The plaintiff in this case seemed to be arguing the very substance of article 8(2); since the choice-of-law clause—and consequently the choice of Sri

171. Id.
172. See supra text accompanying note 48.
174. German courts had formerly applied German standards to foreign provisions instead of looking to the foreign forum, in this case Sri Lanka, for its standard of interpretation. Since German law invalidates illegible contract clauses, a German court not relying on the Convention would automatically have invalidated the Sri Lankan choice of law clause without any reference to Sri Lankan law on the matter. Since the Rome Convention governed this clause, however, the German court was directed to Sri Lankan law before a determination could be made. Jürgen Basedow, Das Statut der Gerichtsstandsvereinbarung nach der IPR-Reform, 8 IPRAX 15, 16 (1988). While not bound by stare decisis, German courts are nevertheless influenced by precedent. Id.
175. Rome Convention, supra note 1.
Lankan law—was illegible, there was no meeting of the minds and no consent to Sri Lankan law. To determine the party's conduct in accordance with Sri Lankan law would not be reasonable and, therefore, the law of the plaintiff's habitual residence should apply to determine whether or not there was consent to Sri Lankan law. Yet the Bundesgerichtshof inexplicably overlooked article 8(2) in its analysis.

The structure of article 8 is characteristic of many Convention provisions; flexibility and policy concerns undermine the article's certainty and predictability.\(^{176}\) This case is symptomatic of the problems which arise as a result of these provisions. The Bundesgerichtshof arbitrarily applied one article provision and completely ignored the other. A primary reason for establishing uniform rules is to obtain uniform results. With standards such as the amorphous "if it appears from the circumstances that it would not be reasonable"\(^{177}\) clause in article 8(2) guiding judges, the Convention will continually produce such unpredictable results as the Lankya Abhaya case.

3. German-Italian Cases

German courts have also shown how the Rome Convention undermines its stated goals with its own provisions. In three separate cases, one decided in the Munich Landgericht,\(^{178}\) another in the Stuttgart Landgericht,\(^{179}\) and the third in the Frankfurt am Main Arbeitsgericht,\(^{180}\) each German court individually preferred a separate international Convention over the provisions of the Rome Convention. Each of these cases involved a sales contract between German and Italian parties. The courts in each case utilized the guidelines in article 28, the German codification of Convention article 4, and in each case Italian law was found applicable because of its "closest connection" to the contract.

But the analysis did not stop there. The courts subsequently referred to the 1980 Vienna Sale of Goods Convention,\(^{181}\) an agreement to which both Italy and Germany are parties. They determined that the Vienna Convention should apply because, according to article 21,\(^{182}\) the Rome Convention does not prejudice the application of international conventions to which a contracting State is or becomes a party.\(^{183}\) The Vienna Convention\(^{184}\) consequently neutralized the effects of Italian law on the

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176. See supra text accompanying note 87.
177. Rome Convention, supra note 1.
182. See supra text accompanying note 82.
183. See supra text accompanying note 82.
contract by referring the German courts back to the law of their forum, or
in these cases, to the provisions of the Vienna Sale of Goods Convention.
The application of the Vienna Convention is not necessarily wrong or even
undesirable; nevertheless, it is unclear that, according to Italian law,
employing the Vienna Convention was the appropriate solution.185

Article 21 encourages this form of judicial activism by automatically
preferencing other conventions over the Rome Convention, regardless of
their nature, scope, or credibility. The goals of the Rome Convention
would be better served if a court were, at a minimum, compelled to weigh
additional factors when applying overlapping conventions. For example,
the Convention could add a provision, similar to article 18,186 requiring
courts to balance the goals of the Rome Convention against those of the
competing convention before determining which one should govern.187

4. The Spanish Consumer Contract Case

Indeterminate and flexible provisions also frustrate the goals of the Rome
Convention. In a 1989 decision of the Frankfurt Oberlandesgericht,188 the
court refused to apply a Spanish choice of law clause to a consumer con-
tract because it violated the consumer protection clause in article 29(1) (2)
of the E.G.B.G.B., the German codification of Convention article 5(2).
The court, demonstrating the ease with which precise provisions are
applied, was not forced to rely on article 6, the German public policy pro-
vision.189 Although the court’s reasoning and conclusions were relatively
straightforward, a subsequent case commentary190 by Professor Alexander
Lüderitz inadvertently demonstrated the deficiencies of Convention arti-
cle 18, the provision charging Member States to interpret Convention arti-
cles with an eye to uniformity.191

In an observation on the court’s interpretation of E.G.B.G.B. article
29(1) (Convention article 5(2)),192 Professor Lüderitz proposed a manip-
ulation of E.G.B.G.B. article 36 (Convention article 18). At the time of the
Lüderitz commentary, the Convention had not yet been enacted in the
entire Community. Professor Lüderitz therefore suggested that German
courts had a duty to interpret Convention provisions, including article
29(1) and article 7, in a manner acceptable to future German courts.193

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185. Gert Reinhart, Zum Inkrafttreten des UN-Kaufrechts für die Bundesrepublik Deutsch-
186. See supra text accompanying note 56.
187. For a general discussion of the problems of overlap in international agreements
and the difficulties accompanying cases which both agreements wish to govern, see Erik
Jayme & Christian Kohler, Das Internationale Privat- und Verfahrensrecht der EG—Stand
188. OLG Frankfurt, June 1, 1989, 10 IPRAx 236 (1990).
189. The lower court incorrectly applied article 6. AG Lichtenfels, May 24, 1989, 10
IPRAx 235 (1990).
190. Alexander Lüderitz, Internationaler Verbraucherschutz in Nützen, 10 IPRAx 216
191. See supra text accompanying note 56.
192. See supra note 44.
193. Lüderitz, supra note 190, at 219.
Because article 18 calls for a uniform interpretation of the Convention, Lüderitz reasoned, other Member countries would be compelled to adhere to Germany's existing interpretation upon enactment of the Convention in the Community. In other words, Lüderitz believed that the initial interpretation of a Convention provision, regardless of the forum, should stand as stare decisis for other Member States.

Professor Lüderitz illustrates how easily one State's avaricious motives can undermine the overall purposes of the Convention. His analysis also demonstrates the ease with which vague Convention provisions may be manipulated. Lüderitz equates uniform rules with reliance on precedent; the method of decision and validity of reasoning are secondary to the importance of being the first State to decide an issue. Lüderitz's reasoning thus transforms article 18, a provision originally intended to produce uniform results, into a self-serving "race to interpret."

Lüderitz, however, forgets that article 18, like other Convention articles, has no power of enforcement. It is doubtful that Member States will adhere to a precedent they oppose simply because another Member State resolved the issue first. Indeed, the Lüderitz approach would probably have the opposite effect: States would be more inclined to ignore precedent for the sake of uniformity if they felt that the process had been manipulated. Such an approach would undoubtedly lead to an accelerated collapse of the Convention. Instead of one uniform standard, this approach could result in twelve separate Conventions: a different interpretation and standard for each Member State.

These illustrations from the German courts are far from comprehensive. Nevertheless, they expose some major weaknesses of the Rome Convention and indicate what may lie ahead for the European Community. Those wishing to salvage the Rome Convention from eventual collapse would be wise to heed the warning signals of the German paradigm.

V. Recommendations

Some prominent commentators believe that the European Community should, and eventually will, eliminate efforts to unify conflict of laws rules and concentrate instead on unifying substantive laws. This approach was successfully implemented with E.C. products liability law. This success, coupled with the difficulties encountered in the establishment of the Rome Convention, seems to support the proposition that substantive uniformity should be both a present and an ultimate goal of the European

194. Id.
Community.198 Recent events,199 however, indicate an increasing reluctance to enter into agreements that relinquish State sovereignty. The likelihood of such a transformation in the near future is consequently more unlikely now than at any time in the recent past.

Although substantive changes should be a long-term goal of the Community, temporary steps can increase the Rome Convention's effectiveness in the interim. What steps will further this goal? The short answer is that no one can be certain. Past experience, however, provides some suggestions for refinement of the Rome Convention and for future attempts at such agreements.

First, the drafters need to work towards greater specificity within a smaller scope. A number of experts agree: "The road to progress . . . lies in a pragmatic approach that focuses attention . . . on specific contracts within a given category."200 The Convention attempts to accomplish too much and gives only general guidance on achieving its ends. The Convention could be broken up into sub-groups where specific rules would be formulated for specific areas. Exceptions would be specific and allowed only in rare circumstances. A number of international conventions have achieved impressive results through such an approach.201

Second, a unified judicial body must have exclusive jurisdiction over interpretation of the Convention. As a German commentator observed: "[T]ruly uniform interpretation will be achieved only after the European Court [of Justice] is given jurisdiction to interpret the Convention on Contractual Obligations."202 The Community is currently attempting to achieve this end by assigning unitary jurisdiction to the E.CJ. through a series of protocols.203 The effectiveness of these protocols is frequently questioned,204 however, and their ultimate success depends on Member States' willingness to yield a portion of their sovereignty. If unwillingness prevails, other alternative measures must be considered.

One such alternative is the formation of a separate commercial court. Much criticism of the E.CJ. is directed towards its composition. Critics point out that the E.CJ. is comprised of academics and constitutional lawyers who, though knowledgeable, are frequently incognizant of commercial realities. The formation of a separate commercial court might provide an intermediate solution to this problem. Such a court would ideally be composed of members with previous experience in the commercial community, much like the Commercial Courts in the United Kingdom. States that traditionally oppose an exclusive E.C.J. jurisdiction, such as the United Kingdom,205 would certainly be more sympathetic to such an

199. See supra note 138.
200. Delaume, supra note 81, at 120.
201. E.g., supra note 79.
203. See supra text accompanying note 129.
204. Mann, supra note 106, at 354. See also supra text accompanying note 139.
205. See Mann, supra note 106, at 354.
arrangement.

Notwithstanding the number or strength of the proposed remedies or solutions, their ultimate effectiveness will depend on the willingness of Member States to submit to the proposed changes. In other words, the Rome Convention can only be as effective as Member States allow it to be.

Conclusion

The Rome Convention is an inconsistent and flawed agreement. Discretionary provisions prevent the Convention from achieving its intended purpose: to establish uniform conflict of laws rules in the European Community. The German paradigm forecasts the demise of the present Rome Convention by illustrating the practical consequences of these flawed provisions.

Material changes could alter the Convention’s fate despite the dismal outlook. If Community courts were constrained by precise rules with strict exceptions, certainty and uniformity would undoubtedly result. Granting the E.C.J. unitary jurisdiction to interpret the Convention would also further the goal of uniform Community laws. Unless the needed changes occur, however, the Rome Convention will cease to have any practical significance in the European Community. If, on the other hand, fundamental changes are made, the Rome Convention can serve as a stepping stone to additional Community agreements and further European unity.