Future Interpretations of Article 17 of the Convention of Jurisdiction and the Enforcement of Judgements in the European Communities

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The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Convention) establishes uniform jurisdictional rules for national courts in the ten Member States of the European Economic Community\(^1\) regarding disputes between parties domiciled in different Member States.\(^2\) The Convention sets precise rules of jurisdiction binding the courts of all Member States in disputes covered by the Convention. This in turn allows Member State courts routinely to enforce judgments rendered by courts of other Member States because an enforcing court generally does not review the rendering court’s original jurisdiction.\(^3\)

Despite its overall clarity, certain key phrases in the Convention are ambiguous, necessitating judicial interpretation. Thus, the Convention’s signatories granted the Court of Justice of the European Communities (the Court) the power to answer questions from certain Member State courts regarding interpretation of the Convention.\(^4\) Interpretations by the European Court of Justice play an essential role in defining the scope and meaning of certain of the Convention’s articles.\(^5\) A number of commentators have analyzed the Court’s decisions under the Convention, attempting to find a common theme and predict future developments.\(^6\)

\(^1\) The ten member states are: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, and the United Kingdom.


\(^3\) Convention on Jurisdiction, arts. 26-49, supra note 2, ¶¶ 6030-53.


\(^5\) The Court’s review of cases under the protocol’s terms is similar to review under the terms of Article 177 of the Treaty of Rome. See Kohler, The Case Law of the European Judgments Convention, 1982 EUR. L. REV. 3, 4.

Article 17 of the Convention allows parties to a transaction to agree as to which national court shall have jurisdiction should a dispute arise out of their transaction. Parties frequently use article 17 in commercial dealings to specify jurisdiction, and it has generated a substantial amount of litigation. Recent interpretations of article 17 by the Court provide a useful focal point for evaluating commentators' analysis of the Court's decisions pertaining to other portions of the Convention and their predictions as to the Court's future actions. In particular, the Court's interpretation of article 17 illustrates the reasoning behind the alternate approaches available to the Court when construing specific terms or phrases in the Convention and in community law in general. Under the choice-of-law or national approach, the Court holds that the term or phrase in question is to be interpreted according to the existing law of each of the Member States. The Court indicates which individual Member State law should apply in a given situation. Under the independent approach, the Court establishes an independent rule or body of rules governing the interpretation of the term or phrase in question.

This Note analyzes the Court's interpretation of article 17 and speculates on possible future developments. The first part of the Note introduces the two interpretive methods the Court uses when resolving ambiguities in the Convention's language: the choice-of-law approach and the independent approach. The second part of the Note demonstrates that, despite the Court's decisions to date, the Court has not settled on an approach for interpreting article 17. The final part of the Note argues that there are strong considerations favoring the use of existing individual Member State law, rather than the creation of independent rules, to interpret the term "agreement" in article 17. Although an independent definition of agreement under the Convention would help create uniform rules of jurisdiction throughout the European Economic Community, it would also involve the Court to an unprecedented extent in creating independent rules for the interpretation of the Convention.

I

THEORIES OF INTERPRETATION

The Convention contains several terms found in the legal systems of many or all of the Member States. However, these terms rarely have identical meanings in each of the Member States. Courts then face the

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7 Convention on Jurisdiction, art. 17, supra note 2, ¶ 6021; see also infra note 39 (quoting article 17).
8 See infra note 83 and accompanying text.
9 See infra notes 15-17 and accompanying text.
10 See infra notes 12-20 and accompanying text.
question of how they should interpret such terms. In some instances, the Convention itself resolves the ambiguity by providing either an independent definition of the term or a method for determining which Member State law should apply. In the majority of instances, however, the Court must resort to other means to decide between two or more possible interpretations of the Convention’s language. In such circumstances, the Court must decide whether the article in question should be interpreted in accordance with national law or under independent court-created rules.

The national approach treats the article in question as a choice-of-law document. Under this approach, the Court need not “produce Community solutions to problems of interpretation, but instead, [need only] indicate which national law applies.” Member State courts then apply existing definitions from national legal systems to terms in the Convention. The Court thus establishes a rule governing which Member State’s substantive law should apply in a specific situation.

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11 The Court has defined the problem:

The Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Contracting State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Contracting States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought.


12 Article 25 of the Convention, for example, defines the term “judgment” independently of the definition of any of the Member States.

For the purposes of this Convention “judgment” means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Convention on Jurisdiction, art 25, supra note 2, ¶ 6029. Article 52, by contrast, provides that the term “domiciled,” as used in article 2 of the Convention, shall be defined in accordance with the domestic law of “the Contracting State whose courts are seised of a matter.” Convention on Jurisdiction, art. 52, supra note 2, ¶ 6056. Likewise, article 53 states that a national court should determine the “seat” of a company or other legal association under “its rules of private international law.” Convention on Jurisdiction, art. 53, supra note 2, ¶ 6057; see Kohler, supra note 5, at 7-8.

13 Terms that are not defined in the Convention, but that appear frequently in litigation before the Court of Justice, include article 1 (“civil and commercial matters”), Convention on Jurisdiction, supra note 2, ¶ 6005; article 5(1) (“place of performance of the obligation in question”), id. ¶ 6009; article 5(5) (“place in which the branch, agency or other establishment is situated”), id. ¶ 6009; article 13(1) (“sale of goods on installment credit terms”), id. ¶ 6017; article 16 (exclusive jurisdiction), id. ¶ 6020; article 17 (“agreement ... in writing or evidenced in writing”), id. ¶ 6021; and article 18 (“defendant enters an appearance”), id. ¶ 6022.

14 See Herzog, supra note 6, at 427; Kohler, supra note 5, at 8; see also Giardina, supra note 6, at 265.

15 Freeman, supra note 6, at 504.

16 A national court will not always apply its own substantive law in interpreting an article of the Convention. One option available to the Court of Justice is to instruct national courts to apply the “substantive” law of the Member State that would govern “under the
Whatever solution the Court adopts, national courts ultimately use the existing domestic substantive law of one of the Member States to interpret the article in question.\footnote{17}

In contrast, under the “independent” approach, the Court actively creates a body of substantive law to govern the interpretation of certain of the Convention’s articles. The Court has determined that certain terms “must be regarded as having their own independent meaning and as being thus common to all the Member States.”\footnote{18} The Court thus creates uniform Community law,\footnote{19} binding on the national courts, for the interpretation of articles to which it applies the independent approach.\footnote{20}

Court decisions have followed either the choice-of-law or the independent approach, depending on the term requiring interpretation.\footnote{21} The Court first faced the problem of choosing between the two approaches in \emph{Tessili v. Dunlop}.\footnote{22} The Court in \emph{Tessili} opted for a choice-of-

\footnote{17} The Convention was silent, for example, as to what law should be used in interpreting the phrase “place of performance of the obligation” in article 5(1). In a series of decisions, the Court held that this phrase should be interpreted under national law.

The “place of performance of the obligation in question” within the meaning of Article 5(1) of the Convention . . . is to be determined in accordance with the [substantive national] law which governs . . . according to the rules of conflict of laws of the court before which the matter is brought.

\begin{quote}
\end{quote}


\footnote{19} Freeman, supra note 6, at 505.


\footnote{21} See supra notes 16-20 and accompanying text.

law approach to define the term “place of performance of the obligation” in article 5(1). The Court ruled that the term must be interpreted “in accordance with the [Member State] law” applicable under “the rules of conflict of laws of the court before which the matter is brought.” More significantly, however, with respect to the Convention as a whole, the Court stated that it will not prefer one approach over the other; the Court will choose between the choice-of-law approach and the independent approach individually for each term that requires definition.

A number of commentators have nevertheless claimed to identify a trend in the Court’s decisions since 1976 towards the independent approach. One commentator has even suggested that the Court might abandon its holding in *Tessili* and fashion an independent definition of the article 5(1) term “place of performance of the obligation in question” if confronted with the issue today.

Christian Kohler has argued, however, that even though the Court has recently adopted the independent approach more frequently than it has the national approach, it must still choose between the two methods when interpreting a term for the first time. According to Kohler, the Court cannot apply either rule of interpretation “indiscriminantly” to all ambiguous terms in the Convention, but must “differentiate according to the nature and the position in the general structure of the Convention.”

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25 For example, Freeman stated, “[s]ince *Tessili* v. *Dunlop* . . . the Court has in a number of cases favored the approach of adopting a community solution.” Freeman, *supra* note 6, at 504. She further claimed that the Court “pursues a definite policy in its interpretation of the Convention, . . . based upon a desire for uniformity in the application of the Convention. . . . [T]he Court’s policy emphasizes its role . . . as the ultimate arbiter of the interpretation of the Convention.” Id. at 515-16.

26 “If the *Tessili* question were to be put to the Court today, there is a good chance that the Court would give a Community definition to the expression ‘place of performance’ rather than return the question to the national courts and their traditional rules of conflict of laws.” Recent Development, 10 GA. J. INT’L & COMP. L. 449, 460 (1980).

27 “[T]he Court] has . . . never ruled that the terms used in the Convention but not classified therein, must, where doubt arises, be interpreted independently and only in exceptional cases be understood as a reference to a particular national legal system.” Kohler, *supra* note 5, at 11.
vention of the provisions in which the terms are used." 28 Kohler thus implied that the Court still follows the reasoning set forth in *Tessili;* 29 and selects its approach "separately in respect of each provision and each term." 30

A recent decision supports the argument that the Court is unwilling to abandon the approach set forth in *Tessili.* In *Effer v. Kantner* 31 a patent agent in the Federal Republic of Germany attempted to invoke the jurisdiction of a court in the Federal Republic of Germany over Effer, a crane manufacturer located in Italy. Kantner, the patent agent, relied on a contract between himself and Hydraulikkrann, Effer's distributor in Germany, to invoke the court's jurisdiction over Effer under article 5(1) of the Convention. Effer contested jurisdiction on the ground that it had no contract with Kantner. The Bundesgerichtshof (Federal Court of Justice) referred the following question to the Court for a preliminary ruling: "May the plaintiff invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even when the existence of the contract on which the claim is based is in dispute between the parties?" 32 The Court ruled that the patent agent could invoke the jurisdiction of the court of the place of performance despite a dispute between the parties over the existence of the contract on which the claim was based. 33 The Court stated:

> [T]he national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself. . . . [T]he court called upon to decide a dispute arising out of a contract may examine, of its own motion even, . . . evidence . . . establishing the existence or the inexistence of the contract. 34

The Court's ruling in *Effer* did not, however, address the issue of what law Member States should apply when attempting to ascertain the existence of a contract. Neither the Convention nor the Court's decisions identify the necessary elements of a contract for the purposes of the Convention. A body of independent community law relating to contracts does not presently exist. 35 Nor did the Court in *Effer* attempt to define the necessary elements of a contract for jurisdictional purposes.

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28 *Id.*
30 Kohler, *supra* note 5, at 11.
33 *Id.* at 835-36, [1984] 2 Comm. Mkt. L.R. at 676.
34 *Id.* at 834, [1984] 2 Comm. Mkt. L.R. at 675.
35 The closest body of relevant Community law consists of the proposed Convention on the Law Applicable to Contractual Obligations, 2 COMMON MKT. REP. (CCH) ¶ 6311 (opened for signature on June 19, 1980). This convention contains choice of law provisions establishing rules as to which Member State law shall govern the interpretation of contracts.
under the Convention. Because a court "determine[s] questions relating to a contract" under national law, it follows that national law governs determination of whether a contract exists.\textsuperscript{36} This result is consistent with the proposed Convention on the Law Applicable to Contractual Obligations, under which the existence and validity of a contract are determined by Member State law.\textsuperscript{37}

The Court in \textit{Effer} did not produce a broad, clear assertion that it would use the choice-of-law approach rather than the independent approach to determine the existence of a contract under article 5(1); the Court did not explicitly state that national courts should apply national law rather than an independent body of rules promulgated by the Court in determining whether a contract exists.\textsuperscript{38} The result nevertheless proves significant as an indication that the Court has not abandoned the use of national law by Member State courts in interpreting certain provisions of the Convention. The approach outlined in \textit{Tessili v. Dunlop}, whereby the Court makes a determination of which approach to follow based on the individual article and phrase in question, appears to remain valid.

\section*{II

\textbf{Article 17—Interpretation by the Court}}

Article 17\textsuperscript{39} of the Convention on Jurisdiction allows parties to con-

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fer jurisdiction on the courts of a Member State by agreement. Agreement to confer jurisdiction override all other bases of jurisdiction, except in those matters in which a court has exclusive jurisdiction under article 16.401 If a party agrees to confer jurisdiction on a particular court, that party loses the safeguards provided in other articles of the Convention. Article 17 therefore provides certain requirements of form to protect unwary parties entering such agreements. It requires agreements conferring jurisdiction to be "in writing or evidenced in writing or . . . in a form which accords with practices in that trade or commerce."441 Article 17 contains no other formal requirements for agreements conferring jurisdiction, nor does it define the substantive elements of such agreements.

The Court has interpreted article 17 in a number of cases.424 The scope of these decisions, however, has been limited.434 In particular, the Court has had few opportunities to define the term "agreement." Despite the Court's past tendency to interpret article 17 using the independent approach,44 certain factors could cause the Court to reconsider its approach if faced with the problem of defining the term "agreement."45

A. The Requirement of a Writing

Most of the Court decisions interpreting article 17 have focused on

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If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware. Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

Convention on Jurisdiction, art. 17, infra note 2, ¶ 6021.  
40 Agreements conferring jurisdiction in matters relating to certain insurance or commercial contracts, however, must comply with the conditions set forth in articles 12 and 15 respectively. Id.  
41 Id.  
42 See infra notes 46-82 and accompanying text.  
43 See infra notes 83-95 and accompanying text.  
44 See infra note 83 and accompanying text.  
45 See infra section III.
the article's formal requirements for an agreement. The Court's opinions have particularly concentrated on the requirement that the agreement be in writing. The Court first interpreted article 17 in two decisions handed down on the same day. The opinions concerned the requirement that an agreement conferring jurisdiction be "in writing or evidenced in writing." In the first case, Colzani v. RÜWA Polsteremashinen, a German machine supplier brought suit against an Italian firm in the Landgericht Köln pursuant to a jurisdiction clause printed on the back of a signed contract. The Court addressed two questions: "[W]hether a clause conferring jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfills the requirement of a writing" under article 17, and whether an express reference "in the contract to a prior offer in writing in which reference was made to general conditions of sale including a clause conferring jurisdiction" fulfills the same writing requirement. The Court adopted an independent rather than a choice-of-law approach to answer these questions. The Court looked primarily to the writing requirement's purpose of ensuring that the clause conferring jurisdiction was the result of a true consensus between the parties in reaching its decision. The Court thus held that a clause conferring jurisdiction, printed on the back of a contract among general conditions of sale, fulfills the requirements of article 17 only if the contract itself contains an express reference to those conditions. If the contract refers to earlier offers, which in turn refer to the general conditions of sale, the requirement of a writing under article 17 is met "only if the reference is express and can therefore be checked by a party exercising reasonable

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46 The one exception is Meeth v. Glacetal, 1978 E. Comm. Ct. J. Rep. 2133, [1979] 1 Comm. Mkt. L.R. 520. Glacetal involved a suit for nonpayment for deliveries by Glacetal, a French glass supplier, against Meeth, a German window manufacturer, before the Landgericht Trier, Federal Republic of Germany. Glacetal brought suit pursuant to an agreement between the firms that either party could be sued by the other only in its place of domicile. Meeth asserted a defense of set-off, alleging damages from delay or default on Glacetal's part in deliveries due under their contract. The European Court of Justice was faced with two questions: first, whether such an agreement was valid, and second, if the agreement was valid, whether the defendant could raise a defense of set-off in a court other than the court in which it could have brought suit against the plaintiff under the agreement's terms. The Court ruled that article 17 allows an agreement "under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States." Id. at 2143, [1979] 1 Comm. Mkt. L.R. at 531. Such an agreement does not, however, prevent the court hearing the dispute "from taking into account a set-off connected with the legal relationship in dispute." Id. at 2144, [1979] 1 Comm. Mkt. L.R. at 531.

47 Convention on Jurisdiction, art. 17, supra note 2, ¶ 6021.


The Court further defined the article 17 requirement of a writing in *Segoura v. Bonakdarian.* The *Segoura* involved an oral contract between the parties for the sale of carpets. One of the parties confirmed the contract with a written "Order and Invoice" after partial performance. The "Order and Invoice" included a clause among the conditions of sale and delivery on the reverse side conferring exclusive jurisdiction on the courts of Hamburg. The Court considered whether article 17's requirement of a writing is satisfied if one party to an oral contract confirms in writing to the other party the conclusion of the contract subject to attached conditions of sale, including a clause conferring jurisdiction, and the receiving party does not object to the written confirmation. In making its decision, the Court again followed the independent approach and looked to the purpose of the writing requirement to resolve the issue. The Court held that the requirements of article 17 "as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser." Failure by the purchaser to object to the conditions in the other party's unilateral confirmation notice "does not amount to acceptance . . . of the clause conferring jurisdiction, unless the oral agreement comes within the framework of a continuing trading relationship between the parties."

The Court's decisions in *Colzani* and *Segoura* set the tone of subsequent interpretations of article 17. In both cases, the Court placed a

55 In *Segoura*, the Bundesgerichtshof referred two questions to the Court. They read:
1. Are the requirements of Article 17 of the Convention satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction?
2. Are the requirements of Article 17 of the Convention satisfied if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation?
56 *Id.* at 1860, [1977] 1 Comm. Mkt. L.R. at 368; see also supra note 51 and accompanying text (describing the purpose underlying the writing requirement).
59 The Court has applied its reasoning in *Colzani* to answer questions relating to multi-party contracts. In *Colzani*, the Court stated that the purpose of the article 17 requirement of
duty on the national court to examine "whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated." In determining whether an agreement satisfies the requirement of a writing under article 17, however, the national courts must adhere to standards created by the Court, rather than applying national law standards defining an agreement "in writing or evidenced in writing."

B. Other Requirements of Form

The Court has more recently addressed requirements of form of article 17 other than the requirement of a writing. In its recent decisions, the Court has mainly confronted questions relating to the extent to which requirements of form established by individual Member States for agreements conferring jurisdiction apply to agreements conferring jurisdiction under article 17. The Court first confronted a direct conflict between national law and article 17 in Sanicentral v. Collin. This case arose from the breach of a contract signed in October 1971 between a German firm and a French worker. The contract contained a clause...
conferring jurisdiction on the local German court, but in 1973 the French worker brought suit in the Tribunal d’Instance, Molsheim, France. The Tribunal held that it could properly assume jurisdiction, because the Convention was not in force at the time the contract was signed\(^6\) and the French Civil and Labor Codes prohibited choice of jurisdiction in employment contracts. On appeal, the Cour de Cassation referred to the Court the question whether “clauses conferring jurisdiction . . . which would have been regarded as void by the internal legislation in force at that time” should be deemed valid if the proceeding is brought after February 1, 1973.\(^6\) The Court answered the question in the affirmative.\(^6\) More important than the Court’s holding, however, was its implication that article 17 displaced national laws regulating certain types of agreements conferring jurisdiction.\(^6\)

The Court extended the implications of its Sanicentral decision in Elefanten Schuh v. Jacqmain.\(^6\) In Elefanten Schuh, the Court indicated that a Member State may not impose formal requirements for an agreement conferring jurisdiction contrary to or more rigorous than those set out in article 17.\(^6\)

The litigation in Elefanten Schuh arose from a 1970 employment contract between Mr. Jacqmain and the German firm Elefanten Schuh GmbH. Elefanten Schuh’s Belgian subsidiary employed Jacqmain as a sales agent in Belgium. The employment contract, however, conferred exclusive jurisdiction on the court at Kleve, Federal Republic of Germany. In 1975 the firm dismissed Jacqmain, and Jacqmain sued Elefanten Schuh GmbH and its Belgian subsidiary in the Arbeidsrechtbank Antwerp (Labor Tribunal, Antwerp, Belgium).\(^7\) The defendants challenged the court’s jurisdiction on the basis of the contract’s exclusive jurisdiction clause. The Arbeidsrechtbank and the Arbeidshof Antwerp,

\(^{64}\) The Convention came into force on February 1, 1973.


\(^{66}\) The Court stated:

Articles 17 and 54 of the Convention . . . must be interpreted to mean that, in judicial proceedings instituted after the coming into force of the Convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into.

\(^{67}\) Id. at 3431, [1980] 2 Comm. Mkt. L.R. at 174.

\(^{68}\) See id. at 3429, [1980] 2 Comm. Mkt. L.R. at 173; see also Kohler, supra note 5, at 109 (“Article 17 is intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet”).


\(^{70}\) See id. at 1688, [1982] 3 Comm. Mkt. L.R. at 21; Kohler, supra note 5, at 108 n.84, 109.
E.E. C CONVENTION ON JURISDICTION

To which the defendants appealed, rejected their defense. Applying Belgian law that required contracts to be written in Dutch, the Arbeidshof invalidated the German language employment contract and, thereby, invalidated its clause conferring jurisdiction. The German defendant appealed the decision to the Hof van Cassatie (Court of Cassation), which in turn referred three questions to the Court. Regarding article 17, the Hof van Cassatie posed the following question:

Does it conflict with Article 17 of the Convention to rule that an agreement conferring jurisdiction on a court is void if the document in which the agreement is contained is not drawn up in the language which is prescribed by the law of a contracting State upon a penalty of nullity and if the court of the State before which the agreement is relied upon is bound by that law to declare the document to be void of its own motion?

The advocate general argued that the Court should rule that a Member State court may declare an agreement invalid if it fails to comply with the laws of a Member State, even if the agreement conforms to the requirements set out in article 17. He argued, however, that the Member State court should not look to its own law in considering the validity of the contract, but to the law of the forum state referred to by the agreement. The advocate general reasoned that conditions specifically "prescribed in the Convention . . . must be interpreted independently of any particular national law" but, where the Convention was silent, national requirements remained valid and binding.

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75 The Court of Justice of the European Communities includes, in addition to the 11 judges, five advocates general. One advocate general is assigned to each case that comes before the Court. The advocate general issues an advisory opinion to the court following the close of argument and before the Court begins its deliberations. Although the Court frequently follows the opinion of the advocate general, the Court is by no means bound to do so. The opinion of the advocate general is published along with that of the Court. The Court does not publish dissenting opinions; in cases where the Court does not follow the opinion of the advocate general, therefore, the advocate general's opinion serves as a type of dissenting opinion. For a more detailed discussion, see L. BROWN & F. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 54-69 (1983).


article 17 did not address the issue of the language of agreements conferring jurisdiction, the question became one of "which national law decides those other requirements as to whether there is a valid agreement." He suggested that the law of the forum named in the writing should govern the solution to this problem.

The Court, however, refused to follow the advocate general's suggested approach, and looked instead to the intent of article 17's draftsmen. The Court found that the draftsmen intended the article itself to set out the "formal requirements" for agreements conferring jurisdiction and concluded that Member States "are not free to lay down formal requirements other than those contained in the Convention." Applying this principle to the issue of language requirements, the Court held that Member States could not pass legislation invalidating agreements conferring jurisdiction "solely on the ground that the language used is not that prescribed by [the national] legislation."

C. Substantive Aspects of Agreements Conferring Jurisdiction

A survey of the Court's decisions thus shows that the Court has consistently selected the independent, rather than the choice-of-law, approach when interpreting article 17. In each of the six decisions interpreting article 17's requirements of form, the Court has eschewed national law concepts and created new, uniform law. It would be pre-

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79 Id. at 1698, [1982] 3 Comm. Mkt. L.R. at 15.
mature to conclude, however, that the Court has decided that it should interpret article 17's substantive aspects independently of national law.

A more careful examination of the decisions interpreting article 17 reveals that the Court has restricted its considerations to the requirements of form article 17 places on agreements to confer jurisdiction. The Court has not spoken to the issue of what constitutes an agreement under article 17. In Colzani and Segoura v. Bonakdarian, the Court interpreted the requirement expressly stated in article 17 that an agreement conferring jurisdiction be "in writing or evidenced in writing." Although the Court's reasoning in these two cases may have wider significance, the Court has strictly limited its holdings to an interpretation of this ruling in Segoura to article 17's requirements "as to form."

The Court in Sanicentral and Elefanten Schuh confronted questions that did not implicate article 17's requirement of writing. Both opinions, nevertheless, apply solely to formal requirements and do not address the issue of substantive requirements, such as what elements an agreement to confer jurisdiction must contain. In Sanicentral the Court stated that the Convention superseded national "procedural" laws relating to jurisdiction. This reasoning suggested that national non-procedural laws remain valid, even when related to jurisdiction. In Elefanten Schuh the Court held that article 17 overruled Member State laws regarding formal requirements for agreement conferring jurisdiction. At least one expert believes that the Court intended to limit its decision in Elefanten Schuh so as not to reach the issue of whether Mem-

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86 See supra notes 48-61 and accompanying text.
90 See supra notes 62-82.
92 The Court did not define precisely what matters article 17 covers, nor did it state what matters national laws still govern. The logical inference, however, is that national substantive laws remain valid, even when applied to jurisdictional matters under the Convention.
93 1981 E. Comm. Ct. J. Rep. at 1688, [1982] 3 Comm. Mkt. L.R. at 21. In Elefanten Schuh, the Court elaborated on the matters article 17 governs. The Court was careful, however, to confine its discussion to the formal requirements for an agreement conferring jurisdiction. "Article 17 is thus intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet. . . Consequently Contracting States are not free to lay down formal requirements other than those contained in the Convention." Id. at 1688, [1982]
ber States may validly apply national substantive laws to agreements conferring jurisdiction.\textsuperscript{94}

The Court's decisions interpreting article 17 to date thus do not bear on substantive requirements for agreements conferring jurisdiction. The Court's decisions therefore do not answer the questions of how an agreement is defined under article 17 or what law the courts should apply in determining whether the parties actually formed an agreement. The Court has not addressed issues relating to the ability of a Member State to regulate nonformal aspects of agreements conferring jurisdiction.\textsuperscript{95}

Because the Court has not yet interpreted article 17's substantive aspects, the Court's past decisions, which adopt the independent approach to interpret the article's formal requirements, do not authoritatively demonstrate that the Court will adopt the independent approach when dealing with substantive problems such as the criteria governing the term "agreement" in article 17. Thus, in order to predict which approach the court will select to define the term "agreement," one must

\textsuperscript{3} Comm. Mkt. L.R. at 21 (emphasis added). The Court's discussion had no bearing on nonformal or substantive requirements of an agreement conferring jurisdiction.

\textsuperscript{94} Advocate General Sir Gordon Slynn stressed the Court's repeated emphasis on formal requirements in expressing his opinion that the Court intended to limit the reach of its decision. Interview with Sir Gordon Slynn, Advocate General of the Court of Justice of the European Communities, in Ithaca, N.Y. (Sept. 9, 1983).

\textsuperscript{95} The Court's failure to address the issues of a Member State's ability to regulate agreements conferring jurisdiction, and the extent to which they may do so, does not result from a basic assumption that article 17 prohibits Member States from regulating any aspects of such agreements. Indeed, advocates general of the Court have maintained that the Member States retain power to regulate aspects of agreements conferring jurisdiction that article 17 does not address. Mr. Capotorti, for example, has written:

\begin{quote}
[T]he question legitimately arises whether the substantive aspects of the agreement assigning jurisdiction are to be deduced from Article 17, interpreted by itself, or whether these aspects ought not rather to be left for determination under the law of the different States. . . . [I]n so far as such requirements, whether relating to substance or to form, have been laid down by the Convention as conditions precedent for the formalities required by the Convention to be fulfilled, an independent interpretation must be found on the basis of the logic and wording of the Convention. All this is, of course, without prejudice to national requirements in other respects, whether of form or of substance, which do not come within the ambit of the Convention rules subject to Community interpretation.
\end{quote}

analyze the reasons why the Court selects one approach over the other in certain situations.

III  
FUTURE INTERPRETATION OF ARTICLE 17

Although the Court has confronted the problem of selecting the independent or the choice-of-law approach in interpreting various clauses of the Convention, it has yet to identify a formula it follows to reach its results. The Court's decisions, however, reflect a number of factors that it considers in making this selection. These factors include the Convention's general policy and purposes, the degree to which the laws of individual Member States similarly define the term in question, and the role of the particular article within the Convention as a whole. The Court has not identified the manner in which it relates these factors to one another, but one commentator has suggested that the Court implicitly balances them in order to reach its decisions.96

Additional considerations, not yet expressly recognized by the Court, probably influence its selection of either the independent approach or the choice-of-law approach. These considerations include the Court's lack of authority to create new bodies of law and the practical difficulties associated with defining broad legal terms on a case by case basis.97 Because of the complexity inherent in these additional factors and the Court's limited explanation for past decisions, it is impossible to predict with certainty the approach the Court will adopt to interpret the term "agreement" in article 17.

A. Factors Expressly Considered by the Court

In its previous decisions, the Court has identified three factors it considers when selecting the independent approach or the choice-of-law approach to interpret a particular clause in the Convention. The Court first considers the Convention's general policies and purposes taken as a whole. The Court has held, for example, that article 5(1) may only be interpreted "within the framework of the system of conferment of jurisdiction" of the Convention as a whole.98 The Court concluded that arti-

96 See Kohler, supra note 5, at 12; infra note 115 and accompanying text.
97 See infra notes 136-40 and accompanying text.
cle 5(1) must be interpreted under national law. In using the independent approach to interpret article 5(5), the Court concluded that it had selected the method that would "ensure that the Convention is fully effective in achieving the objectives which it pursues."

The Court has emphasized two general purposes of the Convention: the avoidance of unnecessary procedure, and the promotion of uniform jurisdictional law among the Member States. The Court has occasionally cited the need to avoid superfluous procedure as the basis for selecting either the choice-of-law approach or the independent approach. It is rarely, however, a determinative factor.

The second purpose of the Convention, uniformity, requires that, whenever possible, jurisdictional rules under the Convention not differ among the Member States. If the Court were to interpret the term "agreement" contained in article 17 of the Convention under the choice-of-law approach, then a combination of Convention law and national law would govern jurisdiction. Discrepancies in the jurisdiction of Member State courts could result from the different interpretations Member State law might give the term. If the Court gave the term "agreement" an independent definition, however, national courts would use only community law in determining jurisdiction, and different interpretations of the term by Member States would not affect (the Convention does not apply to a French civil court decision given in the context of "bankruptcy proceedings relating to the winding up of insolvent companies . . . and analogous proceedings").


101 See infra notes 102-05 and accompanying text.

102 See, e.g., Meeth v. Glacetal, 1978 E. Comm. Ct. J. Rep. 2133, [1979] 1 Comm. Mkt. L.R. 520 (allowing a defendant to bring a counterclaim in a court other than that in which he was entitled to bring suit under the agreement, in order to avoid two separate concurrent suits). In Meeth, the Court stated that questions arising under article 17 "must be determined with regard [to] the need to avoid superfluous procedure, which forms the basis of the Convention as a whole." Id. at 2142, [1979] 1 Comm. Mkt. L.R. at 530. This consideration was a persuasive reason for the Court to adopt an independent approach to the term "a contracting state" in article 17. Id., [1979] 1 Comm. Mkt. L.R. at 530. See also supra note 46.

103 The Court's selection of the choice-of-law approach or independent approach with respect to a specific term will rarely have substantial effects on the procedure followed thereafter by national courts. See infra text accompanying notes 120-21.

The second factor the Court considers in selecting either the choice-of-law approach or the independent approach is the degree of similarity among Member States' laws on the point in question. The Court has voiced reluctance to adopt an independent approach unless the various legal systems of the Member States treat the concept at issue similarly. The Court desires to avoid imposing alien interpretations of law on the courts of Member States. The Court, furthermore, seeks to preserve consistency in the national courts' interpretation and application of terms common to the Convention and domestic law.

The third main factor the Court examines when deciding between the independent approach and the choice-of-law approach is the role and effects of the article at issue within the Convention. The Court often considers the role of the article in question in light of the Convention's more general provisions that would otherwise govern jurisdiction when choosing an interpretive approach. In selecting the independent approach to interpret the article 17 term "in writing or evidenced in writing," for example, the Court stated that it must interpret article 17 "in the light of the effect of the conferment of jurisdiction by consent.

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105 In Société Bertrand, the Court used the independent approach in interpreting articles 13 and 14 to ensure uniformity among the Member States:

[It] would not be possible to guarantee the harmonious operation of ... the Convention if the expression ["sale of goods on installment credit"] were given different meanings in the various Member States ... . It is therefore indispensable ... to give that expression a uniform substantive content


108 See Kohler, supra note 5, at 12.

109 Id.

110 See infra notes 111-12 and accompanying text.

which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.”

The Court may consider factors in addition to these three in making its decisions. These are, however, the three main factors upon which the Court has relied in past opinions when choosing between the independent approach and the choice-of-law approach to interpret ambiguous terms in the Convention.

B. The Court’s Balancing Approach as Applied to Article 17

Although the Court has identified the three factors it considers in selecting a method of interpretation, it has not described the interrelationship among these factors. The Court usually cites only one of these three factors, depending on which one the term in question most directly implicates. The Court has never discussed all three factors in one opinion, nor has it attempted to reconcile conflicting factors in a comprehensive test.

Nevertheless, at least one commentator argues that the Court implicitly balances the three factors in selecting either the independent approach of the choice-of-law approach. The results in certain decisions support this theory. The Court has, for instance, adopted an independent interpretation of certain terms despite differences in Member State law, stressing other circumstances favoring such an approach. Thus, to determine whether the Court will apply the independent ap-

113 See infra text accompanying notes 134-40.
115 Kohler contends that the Court pursues a type of balancing in which the “advantages of a uniform definition of the term” are weighed against “the disadvantages which might result from . . . encroachment . . . on national law and [the impairment of] substantive law.” Kohler, supra note 5, at 12.
proach or the choice-of-law approach to the article 17 term "agreement," we must balance the three factors as they apply to that term.

The first factor, the policies and purposes of the Convention, requires comparison of the effect on the two purposes of the Convention of the independent approach and the choice-of-law approach to interpreting the term "agreement." The Court has identified the two main purposes as the avoidance of superfluous procedure and the creation of uniform rules of Community jurisdiction.

With respect to avoiding superfluous procedure, the two methods of interpreting the term "agreement" will create identical results. Under either approach, the Member State court before which the case was brought would determine, using national law or independent convention law, whether the parties had reached an agreement to confer jurisdiction. Under both the independent approach and the choice-of-law approach, the national court would either find no agreement and dismiss the action or uphold the agreement and move to the merits of the case. Because the procedure in national courts does not differ depending on the approach applied, the avoidance of superfluous procedure will not concern the Court of Justice in selecting one method of interpretation over the other.

The Convention's second purpose, to create uniform jurisdictional rules throughout the European Economic Community, however, supports adopting the independent approach to interpret the term "agreement." The Court would promote the goal of uniformity by creating one set of requirements for agreements to confer jurisdiction that would apply in all Member States independently of national law.

A choice-of-law interpretation of the term "agreement" under article 17 might prove especially problematic because it would require parties to consider both Convention law and national law in making agreements conferring jurisdiction. This approach would defeat the goal of uniformity and create unnecessary complications by requiring the parties to consider the national law of Member States other than their own.

In contrast, the second factor, the degree of similarity in treatment of the term "agreement" by the Member States, supports adoption of the choice-of-law approach. The legal treatment of agreements varies widely among Member States, and the Court has expressly recog-

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118 See supra notes 98-105 and accompanying text.
119 See supra note 101 and accompanying text.
120 The national court would not dismiss the action, however, despite the absence of an agreement, if it could properly exercise jurisdiction under a separate article of the Convention.
121 See supra note 35.
122 See supra note 104 and accompanying text.
123 Laws of offer and acceptance essentially govern the legal treatment given to agree-
nized the differences among the national laws of contract. The Court in *Tessili v. Dunlop* refused to adopt the independent approach to interpret the term "place of performance" of contractual obligations because of the great differences of interpretation of the term among Members States' legal systems. Given the differences in national conventions by each of the various Member States. Many domestic contract laws will apply to agreements to confer jurisdiction. Among the Member States, laws of offer and acceptance, and other contract laws applicable to agreements to confer jurisdiction, often contain similar concepts and principles. Differences in treatment of these concepts, however, can lead to divergent results. A brief survey of the relevant contract law of the four largest E.E.C. members, the United Kingdom, France, Germany, and Italy, illustrates divergent results. For instance, the four legal systems define an agreement as consisting of an offer and an acceptance. Different conceptual understandings of offer and acceptance, however, lead to contrasting results.

All four states recognize the difference between an offer and an invitation to deal. *See* 1 R. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 77 (1968). The factors analyzed by each state's courts, however, in determining whether a proposal constitutes an offer or an invitation to deal, vary considerably. The courts of Germany and Italy are, for instance, willing to consider a party's reliance on a proposal as a factor determining an offer, while courts in France and the United Kingdom refuse to find an offer under such circumstances, relying on tort law to compensate the injured party. *Id.* at 347, 359-60, 370-71, 383. Where identical proposals are made to a number of parties, the courts of France and Germany are more likely to protect the relying party than are the courts of the United Kingdom. *Id.* at 347, 359, 370.

Each major Member State's legal system requires an offer to be definite and to contain the essential elements of the proposed contract. If the offer does not contain certain elements, however, the courts of the United Kingdom and Germany appear far more willing than the courts of France and Italy to "fill the gaps" and rule that a binding offer was actually made. *See* id. at 470-71, 486-88, 511-12, 528-30.

Absent a specific statement within an offer as to whether it is revocable, the laws of the four states establish three different approaches to determining the revocability of an offer. The United Kingdom allows great freedom to revoke offers; German law presumes that offers are generally irrevocable. French and Italian law allow the withdrawal of an offer, but often provide for liability in damages. 1 R. SCHLESINGER, *supra*, at 767, 770-71, 782, 788; II K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 29-34 (1977); *see also* N. HORN, H. KOTZ & H. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 76-77 (1982) (in Germany, express words, such as "subject to change" or "revocable," may protect the offeror from liability); B. NICHOLAS, FRENCH LAW OF CONTRACT 63-67 (1982) (discussing possible bases of offeror liability for revocation).

The four Member States treat acceptances similarly. The States differ, however, as to how they treat acceptances after an offer has been revoked. In the United Kingdom and France, under such circumstances no agreement is formed. K. ZWEIGERT & H. KOTZ, *supra*, at 29-33; *see also* B. NICHOLAS, *supra*, at 63-64 (justifying rule using a consensual theory of contract). Under German law, unless an offer is clearly revocable, an acceptance creates a binding agreement even following an attempted revocation. K. ZWEIGERT & H. KOTZ, *supra*, at 33-34.

If a valid offer and acceptance are found, and an actual agreement was reached, the courts of all four states will test the agreement to ensure a certain degree of fairness to each of the parties. Each state applies the doctrines of mistake, deceit, and duress, although the treatment of these concepts also varies. K. ZWEIGERT & H. KOTZ, *supra*, at 81-98. 124 *See* Kohler, *supra* note 5, at 12.


tract law as to what constitutes an agreement, the Court may have similar reservations about adopting the independent approach for defining the term "agreement" under article 17.

The second factor does not, however, require the Court to adopt the choice-of-law approach to define the term "agreement." The Court considers the degree of similarity among Member State laws when selecting an interpretive approach in order not to encroach on domestic law. The Court generally does not consider differences in Member State law to be a decisive factor favoring the choice-of-law approach, however, unless the differences could create inconsistencies in individual cases. An independent interpretation of the term "agreement" would not lead to inconsistencies within individual cases and, thus, would not constitute a decisive encroachment on domestic law. Unlike some other terms of a contract, the term "agreement" only operates in determining jurisdiction; once the national court reaches the merits of the claim, it need not interpret the term again under domestic law. With the threat of infringement on Member State law weakened by this consideration, the Convention's goal of creating uniform jurisdictional rules weighs heavily in favor of the independent approach.

The final factor, the role of article 17 within the Convention as a whole, however, weighs in favor of the choice-of-law approach to interpret the term "agreement." Article 17 is designed to provide parties with an alternative to the fori established by the Convention's more general provisions. The purpose of article 17 within the Convention is two-fold: to allow parties to select the courts on which they wish to confer jurisdiction, and to provide minimum safeguards to ensure that both parties have actually consented to such an agreement. Thus, viewed from the perspective of the Convention as a whole, the Convention's

127 See supra note 123.
128 See supra notes 106-09 and accompanying text.
130 An independent approach to the interpretation of article 17 would not create inconsistences within particular cases because the national court would interpret a clause conferring jurisdiction only under Convention law, and the remainder of the contract only under national substantive law.
131 For example, the clause designating the place of performance of the obligation is often relevant both to determining jurisdiction and the merits of the dispute.
132 "Article 17 is thus intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet; the purpose is to ensure legal certainty and that the
CORNELL LAW REVIEW

312

vol. 70:289
drafters did not intend article 17 to set forth all of the various requirements for an "agreement." This serves to distinguish the problem of defining the requirements for an agreement from the Court's past article 17 decisions interpreting formal requirements, which fell directly within the purposes of article 17. It would thus appear that article 17's drafters did not wish the Court to establish independent law governing the term "agreement" for purposes of jurisdiction. Lacking a basis in the purposes of article 17, the Court should favor a choice-of-law approach unless other factors clearly necessitate an independent interpretation of the term "agreement."

In sum, a balancing of the three factors produces ambiguous results. The Convention's goal of creating uniform jurisdictional rules strongly supports the independent approach, but the dissimilarity of Member State law and the limited purposes of article 17 provide support for a choice-of-law approach. Because of the importance of the goal of creating uniform rules of jurisdiction, the independent approach appears preferable, but the closeness of the balance precludes any definitive conclusions. Because a balancing of the factors previously identified by the Court is not decisive, other factors, not previously recognized by the Court, could prove important.

C. Authority and Practicality Concerns

Two additional factors, not previously addressed by the Court, are particularly relevant to interpreting the term "agreement": the limited authority of the Court to create new law and the practicality of each interpretive approach.

The European Court of Justice is a court of limited authority. The Court has authority to interpret ambiguous terms and clauses in the Convention; it does not, however, have authority to judicially create bodies of law in the manner of a common law court. The dividing line between merely interpreting the term "agreement" in article 17 and creating an independent body of law defining the requirements of and defenses to an agreement is unclear. At least one Court official be-

133 See supra notes 83-95 and accompanying text.
134 See infra note 136 and accompanying text.
135 See infra paragraph accompanying note 140.
136 Two recent decisions illustrate that the Court must resolve problems the Convention does not anticipate. In Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging, 1983 E. Comm. Ct. J. Rep. 987, [1984] 2 Comm. Mkt. L.R. 605, the Court ruled that the article 5(1) term "matters relating to a contract" includes obligations


Protocol on the Interpretation by the Court of Justice of the Convention of September 27, 1968, on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, supra note 4, ¶ 6082.
lieves that the Court lacks the power to create an independent definition of the term "agreement."  

The purpose of article 17 is not to set forth an independent law of agreements, but only to establish certain procedural safeguards for parties entering into agreements to confer jurisdiction. Thus, unless the Court has strong reasons favoring the creation of an independent definition of the term "agreement," it should avoid the risk of exceeding its authority and use the choice-of-law approach to interpret the term.

The Court should also weigh the practical implications associated with each approach before making its choice. A choice-of-law approach would operate under the control of national courts and would be based on existing national substantive law. Under the choice-of-law approach, the national court before which the case was brought would apply the law of the Member State named in the writing to determine whether the writing constituted a valid agreement. An independent interpretation would, however, require the Court to adopt a common law approach and define all the substantive requirements for a valid agreement, together with the possible defenses, on a case by case basis. Adoption of the independent approach would thus involve the Court in

arising out of the relationship between an association and its members. In Gerling Konzern Speziale Kreditversicherungs AG v. Amministrazione Del Tesoro dello Stato, 1983 E. Comm. Ct. J. Rep. 2503, 2517, the Court ruled that the article 17 requirement of a writing does not apply to the third party beneficiary of an insurance contract, so long as the two contracting parties fulfilled the requirement.

In each of these decisions, the Court demonstrated a willingness to rely on the policies underlying the articles in question to resolve issues the Convention did not address. In Gerling Konzern the Court dealt with issues of contract law not included in the Convention. The Court has thus indicated that it will define the scope of the article 17 writing requirement in a series of individual decisions.

A major difference exists, however, between defining the scope of a term as carefully defined as the requirement of a writing and defining a term as ambiguous as "agreement." The Convention's language and purposes provide more guidance for defining the scope of specific articles than for defining the term "agreement." Defining the term agreement would require a much longer series of decisions. Most important, an independent definition of agreement would conflict with the established law of individual Member States. Thus, although the Court has not always refused to create law, it has never strayed so far from the Convention into the realm of creating common law as it would in attempting to create an independent definition of the term "agreement."

Sir Gordon Slynn has expressed doubts as to whether the Court has authority under the Convention to create, in a common law fashion, an independent definition of a term as complex and as rooted in the individual domestic legal systems of the Member States as the term "agreement." Interview with Sir Gordon Slynn, Advocate General of the Court of Justice of the European Communities, in Ithaca, New York (Sept. 9, 1983).

See supra notes 83-95, 132 and accompanying text.

This is not the only possible choice-of-law rule that would work, but it appears to be the method most likely to uphold the purposes of article 17. See Opinion of Sir Gordon Slynn, Elefanten Schuh v. Jacqmain, 1981 E. Comm. Ct. J. Rep. 1671, 1697-99, [1982] 3 Comm. Mkt. L.R. 1, 14-15 (considering and rejecting the possibility of following either the national law of the forum in which the proceeding was brought, or that forum's private international law).
a long and complex exercise. The Court could no doubt create an independent definition of "agreement" but only at the cost of much effort, an increase in its backlog of cases pending, and the diversion of attention from other issues.

D. Summary of Factors Considered by the Court

It appears that arguments for procedural uniformity within the European Economic Community, when balanced against the interest of uniformity within national legal systems and article 17's purposes within the Convention as a whole, slightly favor the creation of an independent definition of the term "agreement." These arguments are counterbalanced, however, by concerns that the Court lacks the authority to create an independent definition of the term "agreement." An attempt by the Court to create a universal concept of agreement would also involve serious practical difficulties. Because the Court has never addressed these latter two concerns, nor explained its balancing approach, it is impossible to predict how the Court will resolve these conflicting factors. The path the Court chooses to take will depend on the Court's evaluations of each of the factors in the balance, and in particular, the relative importance it attaches to the creation of uniform jurisdictional rules.

CONCLUSION

The Court's decisions interpreting article 17 have so far addressed only the formal requirements of an agreement conferring jurisdiction. The Court has not established the approach it will use to promulgate the substantive requirements of such agreements. Although the Court has adopted the independent approach to interpret article 17's requirements of form, it is unclear whether the Court will use the same approach to interpret article 17's substantive requirements. Recent decisions show the Court's continued willingness to use the choice-of-law approach. The factors the Court relies on in selecting the interpretive approach it will use for a particular term indicate that the Court has ample grounds to adopt the choice-of-law approach to interpret the term "agreement."

The Court has not provided sufficient explanation of the factors it analyzes in selecting a method of interpretation, and the manner in which it balances these factors, to support authoritative predictions of which method the Court will adopt to interpret the term "agreement." Certain conclusions, however, may be drawn.

The Court could find support for the selection of either the in-
dependent approach or the choice-of-law approach in the principles governing earlier decisions. Consistency with the Convention’s general aim to create uniform jurisdictional rules may prompt the Court to select the independent approach. Although consistent with the goal of uniformity, the independent approach might fall outside the purposes of article 17 by involving the Court in an elaborate and unprecedented exercise of defining a broad, fundamental term of law on a case by case basis. Although the Court may stress the goal of creating uniform jurisdictional rules and adopt an independent interpretation, it should recognize the full implications of such an approach before selecting it as a solution to the problem of defining the term “agreement” under article 17 of the Convention on Jurisdiction.

Geoffrey D. Oliver