ARTICLE 23 OF THE BRUSSELS I REGULATION: A COMPREHENSIVE CODE FOR JURISDICTION AGREEMENTS?

LOUISE MERRETT*

Abstract Article 23 of the Brussels I Regulation gives effect to exclusive jurisdiction agreements and also sets out certain requirements which must be satisfied in relation to such agreements. The precise role of these formality requirements, however, remains controversial. In particular, the extent to which Article 23 itself sets out an exclusive and comprehensive code is unclear. The purpose of this article is to argue that the requirements of Article 23 are both necessary and sufficient conditions for the material validity of jurisdiction agreements in Brussels I Regulation cases.

I. INTRODUCTION

Jurisdiction agreements are one of the most important sources of jurisdiction in commercial cases. In the context of the Brussels I Regulation, party autonomy is recognized in Article 23. But the Regulation also recognizes and reflects other aims and principles, particularly uniformity and certainty. How these underlying aims influence the recognition and enforcement of jurisdiction agreements under Article 23 is as yet unclear.

Article 23 provides:

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or courts of a Member 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 jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing; or
> (b) in a form which accords with practices which the parties have established between themselves; or
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Article 23 accordingly gives effect to exclusive jurisdiction agreements. Where the parties, one of whom is domiciled in a Member State, agree that the courts of a Member State shall have exclusive jurisdiction, then, regardless of

* Trinity College, Cambridge and Fountain Court Chambers. lm324@cam.ac.uk

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which State or States would otherwise have jurisdiction under the rules of the Brussels I Regulation, that court and only that court will have jurisdiction to hear the case.[1]

Article 23 also serves another function as it goes on to set out certain requirements which must be satisfied in relation to the jurisdiction agreement. It is this aspect of Article 23 on which this article focuses, and, in particular, on the controversial question of the extent to which Article 23 itself sets out an exclusive and comprehensive code for the enforceability of jurisdiction agreements in Brussels I Regulation cases:

> Whilst it is clear that the Brussels regime determines the formal validity of a jurisdiction agreement, the question of the extent to which it also regulates questions of material validity is more uncertain.[2]

To take a simple example: according to Article 23(1)(a), the agreement conferring jurisdiction will be effective if it is 'in writing or evidenced in writing'. But what does this mean? Most importantly, if there is an agreement in writing is that the end of the matter? Is there any room for allegations of fraud, misrepresentation, duress or mistake? If an agent has signed the agreement is it necessary to enquire further whether that agent did so with actual or apparent authority?

Before turning to consider these questions, it is important to set out certain points which are clear about the operation of Article 23. First, it is clear that national laws may not supplement the provisions of Article 23 to override an actual or admitted agreement. For example, there is no scope for an additional formal requirement, derived from national law, that the jurisdiction agreement must be expressed in a particular language.[3] The problem considered here arises where one party contends that he simply did not consent to the jurisdiction agreement.[4]

Secondly, and conversely, it is clear that national law still has an important role to play in the operation of Article 23 because questions as to *interpretation*,

[1] The only exception to the exclusivity of the jurisdiction of the chosen court is Article 22.

[2] J Hill *International Commercial Disputes in English Courts* (3rd edn, Hart, 2005) [5.3.37]. The Schlosser Report (prepared by the Committee of experts convened to work on a draft of what became the 1978 Accession Convention whereby the UK, Denmark and Ireland agreed to become parties to the Brussels Convention) [1979] OJ C59/71, noted that 'this is not the place to pass comment on whether questions of consensus other than the matter of form should be decided according to the national laws applicable or to unified EEC principles' [179]. The question 'how far does the Judgments Regulation allow a reference to a national law in order to determine consent between the parties' was also raised in the recent expert report on the working of the Brussels I Regulation (Hess, Pfeiffer & Schlosser, Report on the Application of Regulation Brussels I in the Member States, Study JLS/C5/2005/03, September 2007 [375]: the conclusions reached in the report as to that question will be discussed further below.

[3] Case 150/80 *Elefanten Schuh v Pierre Jacqmain* [1981] ECR 1671 [26].

[4] A Briggs, L Collins, J Harris, CGJ Morse, J Hill, D McClean and C McLachlan *Dicey Morris & Collins on The Conflict of Laws* (14th edn, Sweet & Maxwell, London, 2006) [12-108].

and therefore the scope of the jurisdiction agreement, remain a question of national law, namely the applicable law.[5]

The difficult question, which this article seeks to explore, is the extent to which Article 23, and only Article 23, governs the material validity of the jurisdiction clause. Two related but distinct issues are raised; first, the role of the 'formal' requirements in Article 23, and, secondly, the principle of severability. Before turning to consider Article 23 in detail, it is useful to consider, briefly, how these two issues are dealt with at common law.

II. THE APPROACH AT COMMON LAW

A. Formal, Essential and Material Validity and the Construction of Jurisdiction Agreements at Common Law

At common law, a distinction is drawn between four separate questions. Issues relating to the *enforceability* of the agreement (including, for example, whether there has been an offer and acceptance, avoidance issues such as misrepresentation, duress or undue influence, whether consideration need be given etc) are governed by the putative proper law, ie the law which would govern the jurisdiction agreement[6] were it to be valid.[7] Similarly, questions of *construction* (including, for example, whether a particular dispute falls within the scope of the jurisdiction agreement) are also governed by the applicable law.[8] Questions of *formality*, eg requirements as to notice, language etc, are usually dealt with by a combination of the applicable law and the law of the country where the agreement was entered into.[9] Overlying all such issues is the general principle that questions of *procedure*, such as the standard of proof required in interlocutory proceedings, are always a matter for the lex fori.[10]

[5] Case 214/89 *Powell Duffryn Plc v Petereit* [1992] ECR I-1745.

[6] Not the contract as whole, since the jurisdiction agreement is to be considered as a separate agreement.

[7] Rome Convention Article 8(1) 'the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid' (now Article 10[1] of the Rome I Regulation). Although the Rome Convention does not apply to agreements on the choice of court (Article 1[d] and Rome I Regulation Article 1[2][e]) this rule reflects what would be the position at common law (Briggs et al (n 4) [12-090] and [12-097]).

[8] Rome Convention Article 10(1)(a) (now Rome I Regulation Article 12[1][a]) provides that the applicable law shall govern interpretation, again this is also the case at common law (Briggs et al (n 4) [12-090]).

[9] Rome Convention Article 9 (Rome I Regulation Article 11) and at common law (Briggs et al [n 4][32–177] and [32–178]).

[10] Since the question of whether the court has jurisdiction arises on an interlocutory basis before trial, in England it has been held that any fact or matter on which the assumption of jurisdiction depends must be tested according to a 'good arguable case'. See *Canada Trust v Stolzenburg (No 2)* [1998] 1 WLR 547, approved in connection with Article 23 by the Privy Council in *Bols Distilleries v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12 and applied by the Court of Appeal in *Deutsche Bank v Asia Pacific Broadband Wireless* [2008] EWCA 1091 [16] and [17].

B. Severability at Common Law

The essence of the doctrine of severability is that jurisdiction (and arbitration) agreements are separate from the 'host' agreement in which they are found, which means that even if the substantive obligations of the contract are void or voidable, that does not *of itself* destroy the associated procedural obligations.[11] The jurisdiction agreement can only be invalidated on a ground which relates to the jurisdiction agreement itself and not merely as a consequence of the invalidity of the main agreement. Some challenges by their very nature may go both to the jurisdiction clause and the main contract, particularly those which amount to an allegation that the contract was void (rather than simply voidable) but it is clear that the jurisdiction agreement itself must be *directly* impeached as a distinct agreement. Lord Hoffmann in *Fiona Trust & Holding Corp v Privalov* put it as follows:

> Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to do anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement' was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, this is an attack on both the main agreement and the arbitration agreement.[12]

But he went on to draw a distinction between arguments like these which may directly impeach the arbitration agreement (such as that the document was forged or someone who had no authority whatsoever had signed the agreement) and other arguments which do not:

> On the other hand, if (as alleged in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main

[11] Although the idea developed in the context of arbitration agreements (and is now reflected in s 7 Arbitration Act 1997) the courts have held that the principle should now be applied in the same manner to jurisdiction clauses: see Briggs et al (n 4) [12-099], cited with approval by Longmore LJ in *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 [27]. This was a case which itself concerned a dual arbitration/jurisdiction clause (per Lord Hoffmann at [2007] UKHL 40, [2007] 4 All ER (Comm) 891 [4]).

[12] [2007] EWCA Civ 414 (HL), [2007] 4 All ER 95 [17].

> agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement.[13]

The principle of severability means that, in practice, the grounds on which the validity of a jurisdiction clause can be challenged are much more limited than at first appears and, in particular, will be much more limited than the grounds on which the underlying or host agreement could be challenged.

III. ARTICLE 23 : THE ROLE OF THE 'FORMAL' REQUIREMENTS

Put simply, the question which arises under the Brussels I Regulation is whether Article 23 envisages a two-stage process or a single question. Does the court have to consider, first, whether one of the formality requirements has been satisfied and, secondly, whether there is 'an agreement'? Or is the question simply whether there is an agreement which satisfies one of the three tests laid down in Article 23 itself?

One view is that the requirements of Article 23 are simply formality requirements and that establishing consensus is a separate question potentially subject to further requirements of either national[14] or Community law. Proponents of this view rely on two main arguments: one theoretical and one more practical. First, it is argued that as a matter of principle the need to show an agreement and the need to demonstrate its satisfaction of the formalities must be distinct issues.[15]

Secondly, taking account more practical considerations, it is said that Article 23 cannot be comprehensive as that would exclude the court from considering issues such as fraud and duress. This seems to be the view taken in Briggs et al's *Dicey, Morris and Collins on the Conflict of Laws*:

> [T]he agreement on jurisdiction may fully comply with the requirements on form, yet if the national court is not entitled to examine the essential validity of the agreement, the fundamental purpose of the Article may be frustrated. Whether any such examination should be founded on national law, or derived from an autonomous interpretation of the concept of agreement is not clear. . . .

[13] [2007] 4 All ER 95 [18].

[14] If national law is to have a role, an additional question arises as to which national law to apply. The three main possibilities are: (a) the law of the forum; (b) the law of the chosen forum; or (c) the applicable law. If the latter, further complications arise. The law applied would be that applicable to the jurisdiction agreement itself not the underlying contract. That law would be have to be determined by applying national private international law rules, not the Rome Convention (or now Rome I Regulation) because agreements on choice of forum are excluded from the scope of those rules (Article 1[2][d]).

[15] A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, Oxford, 2008) [7.12]. 'The law set out in the Article renders the requirements of agreement and formality separate and distinct . . .it is not enough, or so it seems, that the requirements of formality appear to be satisfied if there was no agreement ([7.10]). See further [7.25] where the satisfaction of the formality requirements is described as a 'necessary, but not a sufficient, component of prorogation of jurisdiction'.

> [R]ecourse only to the formality provisions of Art 17, or Art 23, cannot provide a sufficient response to the use of fraud or duress. It is submitted that it should be held contrary to the requirements of good faith for one party to seek to invoke a jurisdiction agreement procured by such means—whether or not in writing.[16]

Such considerations also seem to be the basis for the following statement:

> [O]ne should notice how the ECJ has persisted in its insistence—which cannot be taken wholly seriously—that the formalities required by Article 23(1) are themselves a full, perfect and sufficient guarantee of the existence of consent or consensus. . . . If this means that the bare existence of an apparent agreement in writing precludes any reference to any other rule of law it is absurd: a written 'agreement' obtained by extreme duress or the grossest fraud may comply with Article 23(1).[17]

In this article, it will be argued that the correct approach is that there is simply one question and that the requirements of Article 23 are both necessary and sufficient conditions for the enforceability of the jurisdiction agreement. There is simply no role for national law[18] or indeed any additional Community idea of 'consensus' separate from that set out in the Article 23 requirements themselves.

A. The Case Law

The ECJ has repeated, on a number of occasions, the following general approach to Article 23:[19]

> [T]he requirements set out in Article 17[20] governing the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether

[16] Briggs et al (n 4) [12-108].

[17] A Briggs and P Rees, *Civil Jurisdiction and Judgments* (4th edn, LLP, London, 2005) [2.105].

[18] The two English cases cited in Hill (n 2) [5.3.39] in support of the alternative view ie that the national governing law applies provide little assistance. Both concerned incorporation of terms (an issue which has been considered on a number of occasions by the ECJ as will be considered further below). In the first, *AIG Europe (UK) v The Ethniki* [2000] 2 All ER 566, although both the Court of Appeal and the judge below considered the question to be one of construction, governed by the proper law (English law), the Court of Appeal noted 'It would perhaps be more correct to interpret and apply article 17 in accordance with Community law, but the result would be the same' ([41]). Similarly, in *LAFI Office and International Business SL v Meriden Animal Health Ltd* [2001] ILPr 237, it was not suggested that the judge should apply anything other than English law and again the result was the same according to the European cases cited.

[19] The majority of the cases in fact deal with Article 17 of the Brussels Convention which was the predecessor of Article 23. The nature of the formality requirements themselves have developed and been subject to a number of changes, but the basic approach for the purposes of the points under discussion here is the same.

[20] Article 17 of the Brussels Convention became Article 23 of the Brussels I Regulation.

> the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.[21]

It is, therefore, essential that the court establishes the existence of a consensus between the parties, but that is the purpose of the formality requirements. Once the formality requirements are satisfied the court can also be sure, for these purposes at least, that consensus exists. Thus in *Estasis Salotti v RUWA*,[22] having outlined the general approach in the terms set out above, the issue was whether a German court had jurisdiction by virtue of a German jurisdiction clause contained in the claimant's standard terms and conditions. The contract was entered into in writing and the terms and conditions were printed on the back but were not referred to in the contract itself. The ECJ held that Article 17 of the Brussels Convention (now Article 23) was not satisfied because 'where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, *the requirement of writing under the first paragraph of Article 17 of the Convention* is fulfilled only if the contract signed by both parties contains an express reference to those general conditions' (emphasis added).

There was, accordingly, on the facts, simply one question: was there an agreement in writing? If the written contract itself refers to the standard terms and conditions, which themselves contain a jurisdiction agreement, there will be an agreement in writing and consensus will be established; if not, there is no agreement in writing, no consensus, and Article 23 cannot apply.

This interpretation of the decision in *Estasis Salotti* is confirmed in two subsequent English Court of Appeal decisions. *Credit Suisse Financial Products v Société Generale d'Enterprises*[23] was another incorporation case. It concerned a contract in writing which referred to a Master Agreement which itself contained, inter alia, an English jurisdiction clause. The judge at first instance had held that as the defendant did not have a copy of the Master Agreement readily available the case did not fall within Article 17. The Court of Appeal disagreed. The court applied the decision in *Estasis Salotti* and held that as there was an express reference to the general agreement that was sufficient. Saville LJ held:

> [T]here is nothing in Salotti which begins to suggest that where in the written contract itself there is an express incorporation by reference of other written terms, no consensus is established unless the profferee signing the contract has

[21] Case 25/76 *Galeries Segoura SPRL v Firma Rahim Bonakdarian* [1976] ECR 1851; Case 24/76 *Estasis Salotti v RUWA* [1976] ECR 1831 [7] cited with approval by the ECJ in Case C-106/95 *MSG v Les Gravieres* [1977] ECR 911 [15] and Case C-387/98 *Coreck Maritime GmbH v Handelsveem* [2000] ECR 9337 [13].

[22] Case 24/76 *Estasis Salotti v RUWA* [1976] ECR 1831.

[23] [1997] CLC 168 CA.

> been supplied with a copy of those terms . . . It seems to me to be clear from the judgment in Salotti that the court considered that a *'guarantee' of real consent does exist* where there is an express reference in the written contract itself by way of incorporation of other written terms which include a clause conferring jurisdiction. *Indeed, given such an express reference, it seems to me self evident that the profferee of the written contract, by signing without reservation, has agreed in writing the incorporated terms (and thus the clause conferring jurisdiction) for the simple reason that the very words of the signed written contract itself are to that effect* . . . by signing the confirmation, [the defendant] did agree in writing that the terms of the master agreement formed part of the contract he was making. . . . *To my mind the consensus is incontrovertibly established by the express reference in the written contract itself* (emphasis added).[24]

In *7E Communications Ltd v Vertex Antennentechnik GmbH*[25] the Court of Appeal applied *Salotti*, as interpreted in *Credit Suisse*, Clarke MR stating:

> In that passage Saville LJ thus emphasised two points which are of some importance in the instant case. The first is that what the court in the Salotti case had called . . . *a guarantee that the relevant party has 'really consented to the clause' exists where there is an express reference to the terms and conditions which include the jurisdiction clause.* It is not necessary for there to be a specific reference to the jurisdiction clause itself. The second is that the fact that the relevant party does not have a copy of the terms and conditions or the jurisdiction clause in his possession is not relevant . . .
>
> *If both parties had signed the original quotation as evidencing the contract between them, there can be no doubt that the principles stated above would apply and that the quotation would be, in the words of the Court of Justice, 'a writing' evidencing a contract on the terms of the defendant's terms and conditions, including the German jurisdiction clause, and that both parties including the claimant would be bound by the clause* (emphasis added).

In both of these cases, the Court of Appeal held that as there was an agreement in writing (according to the rules laid down in *Estasis Salotti*) it followed that consensus was established for the purposes of Article 23.[26] In other words, as Advocate General Lenz in *Custom Made Commercial Limited v Stawa Metallbau*[27] confirmed:

> The formal requirements set out in Article 17 do not have an aim in themselves, but perform the function of ensuring that the consensus between the parties is in fact established . . . [96]

[24] [1997] CLC 168 171–172.

[25] [2007] EWCA Civ 140, [2007] 1 WLR 2175 [32].

[26] See also the Court of Appeal in *Deutsche Bank v Asia Pacific Broadband Wireless* [2008] EWCA 1091 [30] referring to *Salotti* as being 'authority for the proposition that if the formal requirements are established (eg that the clause is in writing) that will be enough to ensure that consensus is established for the purpose of enabling the case to be determined.

[27] Case C-288/92 *Custom Made Commercial Limited v Stawa Metallbau* [1994] ECR 2913. The ECJ itself did not need to consider the point because of its findings on Article 5(1).

> [T]he Court has viewed the formal requirements laid down in the first two hypotheses in Article 17 [sub-paras (a) and (b)] as guaranteeing actual consensus and has accordingly laid down certain independent requirements regarding consensus itself'[104]'.

It is also clear from the case law on Article 23(1)(c) that any other reading of Article 23 would deprive this sub-paragraph of its intended effect. Article 23 has developed significantly from its beginnings in Article 17 of the Brussels Convention. In its original form it required the jurisdiction agreement to be in writing or evidenced in writing. In 1978, when the UK became a party to the Brussels Convention, Article 17 was amended to allow cases where, in international trade or commerce, the agreement was in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware. This relaxation of the formal requirements was the basis for what is now Article 23(c) of the Brussels I Regulation.[28] The change was intended to allow evidence of international trade practice to make it easier to meet the formal requirements. But if the change was read as *only* a relaxation of the formal requirements there would still be no actual consensus and the hoped for change/relaxation would not have been achieved. For that reason, fulfilling the requirements of Article 23(1)(c) not only satisfies the formality requirement, it also establishes the necessary consensus to the clause.[29] In *MSG v Les Gravières*[30] the ECJ put it as follows:

> To take the view, however, that the relaxation thus introduced relates solely to the requirements as to form laid down by article 17 by merely eliminating the need for a written form of consent would be tantamount to disregarding the requirements of non-formalism, simplicity and speed in international trade or commerce and to depriving that provision of a major part of its effectiveness. Thus, in the light of the amendment made to article 17 *consensus on the part of the contacting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware* (emphasis added).

The same view was taken by the ECJ in *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*,[31] a case which concerned the validity of an exclusive jurisdiction clause in favour of the English courts which was

[28] A further amended form was agreed as part of the Lugano Convention in 1988 and this altered form found its way into the version of the Brussels Convention amended on the accession of Spain and Portugal in 1989. This introduced agreements 'in a form which accords with practices which the parties have established between themselves' which is now found in Article 23(b) of the Brussels I Regulation.

[29] The early cases talk in terms of a presumption that consensus exists, but the current version of the article may even dispense with the presumption that parties are bound (Briggs and Rees [n 17] [2.95]).

[30] Case C-106/95 *MSG v Les Gravières* [1997] ECR 911 [18–19].

[31] Case C-159/97 *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR 1597.

printed on the reverse side of a bill of lading. On the face of the bill there was a reference to the conditions set out on the reverse side. A number of questions were referred to the ECJ including whether Article 17 of the Brussels Convention, as it then was, always presupposes the need to check that the parties agreed to the jurisdiction clause even where the claimant relies on international usages. The ECJ held:

> As the Court held in Case 150/80 *Elefanten Schuh v Jacqmain*, Article 17 is intended to lay down itself the condition as to form which jurisdiction clauses must meet, so as to ensure legal certainty and to ensure that the parties have given their consent [34].
>
> It follows that the validity of a jurisdiction clause may be subject to compliance with a particular condition as to form only if that condition is linked to the requirements of Article 17 [35].
>
> It follows that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17 [49].
>
> For the same reasons, in a situation such as that in the main proceedings, any further review of the validity of the clause and of the intention of the party which inserted it must be excluded and substantive rules of liability applicable in the chosen court must not affect the validity of the jurisdiction agreement [51].

The effect of the European case law was summarized in the recent expert report on the workings of the Brussels I Regulation in the following terms:

> Article 23 JR is phrased in a way that seemingly only mentions formalities of the consent. However, a closer look at the ECJ case law. . . reveals that Article 23 JR itself requires a certain quality of the consent so that there is little space left, if any, for an application of national rules concerning consent.[32]

B. The Purposes which Article 23 Seeks to Achieve

This interpretation of Article 23 is crucial if the aims of the Regulation are to be achieved. Those aims have been summarized as follows:

> The objectives of the Convention include unification of the rules on jurisdiction of the Contracting States' courts, so as to avoid as far as possible the

[32] Hess, Pfeiffer & Schlosser Report, 2007 376. The National Report submitted by England and Wales as part of the review was even more categorical stating: 'It should be immediately noted that, technically, it is neither the lex causea nor the lex fori that should determine the substantive validity of a choice of forum agreement; Article 23 is viewed by the ECJ as a complete set of rules for establishing validity, and no reference to any national law is needed' ([2.2.25.2]). However, it is noted in the Report itself that Member States' practice, as shown by other national reports, revealed widespread reference to national law (at [376]). One example is *Re a Shop Fitting Contract* [1993] ILPr 395, where the Court of Appeal, Saarbrűcken, applied national German law to a question of incorporation (this case is referred to in Hill [n 2] [5.3.39]).

> multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.
>
> It is also consonant with that aim of legal certainty that the court seized should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.[33]

In the context of jurisdiction agreements, those aims mean that Article 23 must be construed in accordance with the following principles:

1. The purpose of Article 23 is procedural

The Brussels I Regulation seeks to unify rules of jurisdiction. Article 23 deals only with the question of which of the Member States' courts should hear a case.[34] It is essential that such procedural questions can be dealt with expeditiously. Furthermore, it is important to remember that any apparent hardship caused to a party who is unable to make all the arguments he wishes to make at this stage are perhaps less than might at first sight appear. He can still raise all such arguments at the substantive hearing which it can be guaranteed will take place before the courts of one of the Member States.[35] Because the whole purpose of Article 23 is procedural, the normal clear distinction between formality requirements on the one hand, and the existence of consent on the other, does not apply. It is interesting to note, in this regard, the following comments from the Giuliano-Lagarde Report explaining why agreements on choice of court were excluded from the scope of the Rome Convention:

> The majority in the end favoured exclusion for the following reasons: the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority) . . .

It was also pointed out that so far as concerns relationships within the Community, the most important matters (validity of the clause and form) are governed by Article 17 of the [Brussels] Convention. The outstanding points, notably those relating to consent, do not arise in practice, having regard to the fact that Article 17 provides that those agreements shall be in writing.[36]

[33] Case C-169/95 *Benincasa v Dentalkit Srl* [1997] ECR I-3767 [26]–[27].

[34] 'A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction' *Benincasa* [25].

[35] 'In a cruel world there are far greater hardships than having to litigate a commercial matter in a Member State other than one which a party would have preferred' Briggs (n 15) [7.19].

[36] [1980] OJ C 282 1–50, comments on Article 1(2)(d).

2. It is essential that the rules set out in Article 23 are clear and certain

The parties must be able to foresee before which court the case will be heard and the court must be able to apply the rules quickly and with the minimum of fuss. It is essential, in particular, that jurisdiction can be allocated without the need to consider the substance of the case.[37]

3. The rules must be applied in as uniform a way as possible

The use of national law undermines the uniformity which the Brussels I Regulation seeks to achieve.[38] Thus the role of national law in Article 23 must be kept to a minimum.[39] For all of these reasons, Article 23 *itself* sets out how consensus is to be established in order to allocate jurisdiction in Brussels I Regulation cases. There can be no role for national law.

A number of the ECJ cases referred to above were considered by Aikens J in *Provimi Ltd v Roche Products Ltd*.[40] In relation to a Swiss jurisdiction clause, subject to the Lugano Convention, he held:

> Article 17 of the Lugano Convention is concerned with what English lawyers would probably call the 'formal' and 'material' validity of a jurisdiction clause. It is clear that *art 17 defines the necessary and sufficient requirements for formal and material validity of jurisdiction clauses.* Those requirements replace any requirements imposed by the various national laws' [59]. (emphasis added).

In relation to German jurisdiction clauses, governed by Article 23 of the Brussels I Regulation, he referred to the passages in the *Hugo Trumpy* case referred to above and said:

> As I read those passages they state that *the material validity of a jurisdiction clause has to be determined exclusively by reference to the terms of art 23.* Thus there has to be an 'agreement conferring jurisdiction' which is one to settle any dispute 'which have arisen or which may arise in connection with a particular

[37] 'It is in keeping with the spirit of certainty, which constitutes one of the aims of the Convention, that the national court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case' Case C-159/97 *Trasporti Castelletti v Hugo Trumpy* [1999] ECR I-1597 [48] and the cases cited therein.

[38] 'It is important that, in order to achieve as far as possible the equality and uniformity of the rights arising out of the Convention for the Contracting States and the persons concerned, the concept should not be interpreted simply as referring to the national law of one or other of the States concerned' *Powell Duffryn v Wolfgang Peterit* [1992] ECR 1745 [13].

[39] *Estasis Salotti* URUWA [1976] ECR 1831 itself where the courts at first instance had applied national law, an approach rejected by the ECJ. See also *Transporti Castelletti Spedizioni Internationali SpA v Hugo Trumpy SpA* [1999] ECR 1597, 'any further review of the validity of the clause and of the intention of the party which inserted it must be excluded and substantive rules of liability applicable in the chosen court must not affect the validity of the jurisdiction agreement.'

[40] *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm) [2003] 2 All ER (Comm) 683.

> legal relationship'. In [*Powell Duffryn*] the European Court held that the phrase 'agreement conferring jurisdiction' had an autonomous meaning, so was not to be interpreted according to national laws. . . . Given these pronouncements of the European Court I must conclude that when a jurisdiction clause is subject to art 23, then the court seized of the issue of whether it is valid and applicable in the instant case must not apply national laws at all to the issue of the validity of the clause (emphasis added) [80–82].

C. Additional Community Requirement of Consensus

Even if there can be no role for *national law* in assessing material validity under Article 23, it is nonetheless often asserted that there must be some separate *Community* notion of 'agreement' additional to the formality requirements set out in Article 23 itself which has to be satisfied.[41] In particular, as has been outlined above, it is said that otherwise a court faced with an 'agreement in or evidenced in writing' would be prevented ever from taking into account questions of fraud, duress, misrepresentation, mistake, frustration or any other allegedly vitiating factors.[42]

But it will argued here, that not only is this approach inconsistent with the ECJ case law already referred to, and with the aims and principles which underlay Article 23, it is undesirable in principle and unworkable in practice.[43] Rather, Article 23, which has a procedural purpose, itself defines which is meant by 'consensus' for these purposes. As will be explored further below, if necessary, issues such as fraud and duress are much better dealt with by the separate community notion of good faith.

[41] See, for example, the English national report submitted as part of the Hess review of the Brussels I Regulation which states: On the assumption, however, that some law must be used in order to assess, for example, whether there has been duress, or fraud, or mistake, three possibilities would seem to exist: 1) the national conflicts rules of the court seised; 2) the national conflicts rules of the court chosen; 3) an autonomous European definition of 'agreement'. In *IP Metal v Route OZ SpA* [1994] 2 Lloyd's Rep 560, the court held that consensus as to the validity of the jurisdiction clause 'in the light of community law' was required. This would seem to be the best evidence in favour of the third possibility, and that is the one most favoured by academics too ([2.2.25.2]).

[42] See Briggs and Rees (n 17) [2.105] 'a requirement of writing provides no guarantee that there was no duress, no fraud, no mistake; it is disreputable to suggest the contrary and frankly embarrassing to keep having to hear its repetition'; see also A Briggs (n 15) [7.12] and Briggs et al (n 2) [12-108].

[43] See Hill (n 2) [5.3] where he states that the major problem with the autonomous meaning approach is practical rather than theoretical. Until appropriate European principles have been established by the ECJ a national court has little guidance as to what the European standard should be. It is possible that in the long run, the planned Common Frame of Reference for European Contract Law if accepted could be used for the purposes of Article 23 (see the Hess, Pfeiffer & Schlosser, Report on the Application of Regulation Brussels I in the Member States, at [387]), but no such principles currently exist.

The difficulties of finding an independent Community meaning of 'consensus' (outside that set out in Article 23 itself) can be illustrated by considering the example of how to deal with 'mistake'. It is well established in *English law* that a subjective mistake by one of the parties as to the terms of the contract does not prevent a contract being entered into. For example, the fact that one of the parties mistakenly thinks he is buying something he is not, does not matter if it was clear from the particulars of sale what was and was not included. When considering the written contract of sale the actual intentions of the parties as to the meaning of the document are irrelevant.[44] But the answer might be different if the buyer knew or should have known that the seller did not intend to give a term in the contract its usual meaning. So if a seller offers to sell hare skins to a buyer at so much per *pound* but it was clear that the buyer knew that the seller had meant this to be the price per *piece*, the purported acceptance did not create a contract at that price.[45] No contract comes into existence even though both parties knew subjectively what was intended because that was not reflected in the terms of the agreement. In cases of mistaken identity, traditionally a contract is formed if the mistake relates only to the attributes of the party. In a face to face contract each party is assumed to contract with the person in front of them whereas in a contract in writing there may well be a mistake as to identity which means that there is no consensus ad idem.[46]

Even in English contract law it is hard to see how these questions could be answered simply by asking was there sufficient consensus between the parties. It is almost impossible to imagine that there could be a common European answer to that question. Even in an apparently easier case, such as duress, it has hard to imagine how a European definition of consensus could answer the question which might arise. Clearly the party has agreed to contract (albeit under sufferance) but may not be held to that consent in some cases (where he is in fear for his life, for example) whereas in others he will (where he is 'only' in fear of economic ruin, for example).[47]

[44] *Tamplin v James* (1880) 15 Ch D 215.

[45] *Hartog v Colin & Sheilds* [1939] 3 All ER 566.

[46] See *Cundy v Lindsay* (1878) 3 App Cas 459 cf *Lewis v Avery* [1972] 1 QB 198 (HL). The approach in *Cundy v Lindsay* was confirmed by a narrow three to two majority by the House of Lords in *Shogun Finance v Hudson*[2003] 62 (HL) [2004] 1 AC 919.

[47] In *Carnoustie Universal SA v International Transport* [2002] 2 All ER (Comm) 657 it was alleged that a jurisdiction agreement was unenforceable because of economic duress (in the form of industrial action). Because the judge (Richard Siberry QC) held that the alleged jurisdiction agreement did not apply he did not need to deal with the question of duress but he commented as follows: 'If the above conclusions are incorrect, and the Settlement Agreement, whether read together with or separately from the Collective Bargaining Agreement, contains a jurisdiction clause which on its true construction applies to the dispute the subject of the claimants' claims, interesting questions would arise as to whether a jurisdiction 'agreement' procured by duress falls within the scope of Art 17, if not, what system of law governs the issue of whether there has been duress which vitiates the jurisdiction 'agreement', and whether the claimants have made out a good arguable case (by reference to whatever is the applicable system of law) that their agreement to the jurisdiction clause(s) in question was indeed procured by duress. Although it would in my

The solution, it is suggested, is to accept that once there is an agreement in writing (or one of the other requirements of Article 23 satisfied) a valid jurisdiction clause for the purposes of Article 23 is established. The procedural question of which court should hear the case is answered. However, it is possible that there might be circumstances where it would be against good faith for a party to rely on the procedural rights granted by Article 23.

D. Community Concept of Good Faith

Rather than attempting to deal within questions of fraud, duress, mistake etc, through a separate Community notion of consensus, such issues, if relevant at all, are part of a general requirement of good faith.[48] The idea that there are different vitiating factors which might need to be taken into account (fraud, undue influence, duress, misrepresentation, etc) is essentially a common law rather than civil law concept. English law, in particular, while rejecting any general notion of good faith has developed various legal doctrines which clearly govern the behaviour of those who make contracts and put limits on the absoluteness of contractual obligations and has used these piecemeal solutions to achieve many of the results which good faith is perceived to require.[49] In most other European jurisdictions, the question of how to deal with issues such as fraud, duress, mistake or frustration would simply not arise, rather all such issues would be encompassed in a general requirement of good faith.[50] In other words, the fundamental basis on which those who question whether the requirements in Article 23 can really be sufficient to ensure consensus (that is, that Article 23 fails to deal with duress, mistake, fraud etc) falls away. To even ask the question of how to deal with such factors approaches the problem from a purely English (or at least common law) perspective.

The ECJ has recognised a role for good faith in Article 23. In *Berghoefer GmbH & Co v ASA SA*[51] the claimant sought to rely on a jurisdiction agreement which it was alleged had been agreed orally between the parties.

view be surprising if a jurisdiction clause to which one party's 'agreement' was procured by duress could be said to be the subject of consensus between the parties, as apparently required for the purposes of Art 17, neither this question, nor the issue (if relevant) as to the applicable system of law, has been dealt with in the authorities ([107]).

[48] 'For some Western European legal systems the principle of good faith has proved central to the development of their law of contracts, while in others it has been marginalized or even rejected.' Introduction to R Zimmerman and S Whittaker, *Good Faith in European Contract Law* (Cambridge University Press, Cambridge, 2000).

[49] ibid (n 48) 47.

[50] For example, in German law, the doctrine of the collapse of the underlying basis of the transaction (frustration in English law) has been developed under cover of the general good faith requirement in § 242 BGB (see Zimmermann and Whittaker (n 48) 557).

[51] Case 221/84 *Berghoefer GmbH & Co v ASA SA* [1985] ECR 2699. Good faith was also referred to by the ECJ in Case C-71/83 *Partenreederei M/S Tilly Russ v Haven & Vervoerbedrijf Nova* [1984] ECR 2417 and Case C-25/76 *Galeries Segoura v Firma Rahim Bonakdarian* [1976] ECR 1851.

The claimant said that it sent the defendant written confirmation of this oral agreement and that the defendant never disputed its contents. The question for the ECJ was whether this agreement was evidenced in writing so as to satisfy the requirements of Article 23. The court held that it was:

> If it is actually proved that jurisdiction was conferred by an oral agreement relating expressly to this point and if the confirmation of the oral agreement given by one of the parties was received by the other, who raised no objection in reasonable time . . .. *It would then be contrary to good faith for the party which raised no objection to dispute application of the oral agreement* [15] (emphasis added).

In this case, arguments of good faith were made in support of a jurisdiction agreement, that is, it was bad faith to rely on the formality requirements to deny the agreement. But there would be no reason why good faith could not be used the other way round, that is, to prevent reliance on agreement which otherwise appears to comply with the formality requirements.

Nor is the idea of good faith too uncertain.[52] It is much more likely that there is a Community meaning of good faith rather than any general notion of consensus. The draftsman of the Principles of European Contract law appear to have regarded 'good faith' as part of the common core of European contract law as they included in their principles a general promise according to which each party must act in accordance with good faith and fair dealing.[53] If the party seeking to rely on the jurisdiction clause is himself guilty of fraud or extreme duress, it may be against the principle of good faith for him to exercise his rights under Article 23.

Furthermore, the recognition of a general good faith requirement would not lead to unacceptably wide or frequent challenges to jurisdiction clauses because this whole discussion also needs to take into account the principle of severability.

IV. OVERLAP WITH SEVERABILITY

The ECJ in *Benincasa* v *Dentalkit*[54] expressly applied the doctrine of severability to a jurisdiction agreement under Article 23. A dispute arose under a franchising contract which contained a jurisdiction clause in favour of the Florence courts. Proceedings were brought in Munich seeking to have the franchising contract declared void under German law. The court in Munich referred to the ECJ the question of whether the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded in

[52] Briggs and Rees (n 17) [2.105].
[53] Principles of European Contract Law Part 1 Article 1.106 (see Zimmerman and Whittaker (n 48) 14).
[54] Case C-269/95 *Benincasa* v *Dentalkit* [1997] ECR I-3767.

writing shall also have exclusive jurisdiction where the action seeks a declaration that the contract containing that clause is void.

The ECJ held that '[a] distinction must first be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated [24]'.

As to what requirements must be satisfied in relation to that clause, the court went on:

> Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law' [29].

This decision seems to reflect a notion of severability which is very similar to that which has been adopted at common law (described in Part II above).[55] If so, the doctrine will entail similar consequences and will mean that the grounds on which good faith operates will be much more limited than would at first sight appear. The requirement would be that it must be against good faith to rely *specifically on the jurisdiction itself* not the underlying agreement. Thus, whether or not it would be bad faith to rely on the underlying agreement where there has been an unforeseen change in circumstances (akin to frustration in English law) or because of a mistake about the underlying transaction, in neither case is it likely to constitute bad faith to rely on the separate procedural jurisdiction agreement. Even questions of duress and fraud may be more limited than might at first sight appear because it will not be in all (or perhaps many) cases that it will be bad faith to rely on the separate jurisdiction agreement even if there is a suggestion that the underlying host agreement is itself voidable on these grounds.

V. AGENCY

The facts of *Deutsche Bank v Asia Pacific Broadband Wireless*[56] raise a particularly difficult issue in this context. All the parties accepted that there was a written contract, a credit agreement, signed[57] by the chairman of the defendant Taiwanese company, which contained an exclusive jurisdiction clause in favour of England. In its defence, the defendant alleged lack of authority on

[55] See *Deutsche Bank v Asia Pacific Broadband Wireless* [2008] EWCA 1091 [24].

[56] [2008] EWCA 1091.

[57] The agreement was accompanied by a board minute with the personal seal of the chairman and the corporate seal of the defendant company confirming that the chairman was authorised to enter into the agreement.

behalf of the chairman and that the loan agreement was void as it was not in the best interests of the company. Both were contentions of Taiwanese law. The claimant sought to amend its claim, on the basis that if those contentions were made out they would assert an alternative claim for misrepresentation and/or restitution of sums paid under the agreement. The question was whether the English court had jurisdiction in relation to those claims. This, in turn, depended on whether the claimant could establish a good arguable case that the jurisdiction agreement applied, despite the defendant's allegations of Taiwanese law and the nature of the alternative claims.

Mr Justice Flaux, at first instance, refused permission to amend to add the alternative claims.[58] Despite the fact that the jurisdiction clause appeared in a contract signed by the chairman of the defendant company, he held that there had been no clear demonstration of consensus between the parties in relation to the alternative claims where those claims were predicated in the agreement being unauthorized and void.[59] He also expressly stated that consensus was not demonstrated by merely showing outward indicia of consent, the mere fact that the agreement was in writing forming part of an agreement ostensibly signed by both parties was not enough.[60]

This decision was reversed by the Court of Appeal. Longmore LJ, delivering the judgment of the court, considered the issue in stages. First, did the jurisdiction agreement apply to the claim for repayment under the loan.[61] As to that question, he held:

1) As a matter of English and European law the principle of severability means that a jurisdiction agreement can apply even if the dispute concerns the validity of the underlying agreement—here whether or not the loan agreement was entered into with authority;[62]
2) Although not strictly relevant, as a matter of *English* law, and applying the decision of the House of Lords in *The Fiona Trust* (and particularly the speech of Lord Hoffmann referred to above), it is likely that even if the underlying agreement was entered into *in excess of authority* the jurisdiction agreement will apply unless the agent had no authority to conclude a jurisdiction agreement in any circumstances;[63]
3) The importance of severability is that it shows that it cannot be every claim based on the contract being void which must fall outside the terms of a jurisdiction agreement. The conclusion that the judge reached, namely that the claim was covered as a matter of construction but there was no consent,

[58] [2008] EWHC 918 (Comm), [2008] 2 Lloyd's Rep 177.
[59] ibid [30].
[60] ibid [34].
[61] Although on the facts the defendants had submitted to this claim.
[62] [2008] EWCA 1091 [24].
[63] ibid [27]. The Court of Appeal held that the case clearly fell into the second of Lord Hoffmann's categories and that as a matter of English law would no doubt be covered by the principle of severability.

was the very conclusion the doctrine of severability was designed to avoid.[64]

For those reasons, primarily an application of the doctrine of severability, Longmore LJ held that the primary claim was covered by the jurisdiction agreement.

Having decided the first question on the basis of severability, there was no need for the Court of Appeal to decide whether the fact that there was an 'agreement in writing' was sufficient in any event for Article 23.[65] But the same result would be reached on this basis. Based on the analysis above, in these circumstances there was clearly an agreement in writing which, absent bad faith (which was not alleged), is sufficient to satisfy the requirements of Article 23.

The second question addressed by Longmore LJ was whether the arguments should be any different in relation to the alternative claims. The defendants argued that, because in order for the alternative claims to be relevant there would have been a finding that the underlying agreement was void as being made without authority, it would be impossible to establish consensus in relation to those claims. The Court of Appeal rejected this argument. First, any other result would be 'little short of absurd'.[66] The English court would be able to decide whether or not the transaction was binding, but could not then order the return of the capital borrowed if it was otherwise right to do so. If that were the case, the court agreed by the parties for the resolution of their dispute could not give full and effective relief. Secondly, the Court of Appeal pointed out that it would be a curious conclusion if there was sufficient consensus that the primary dispute could be resolved, but not in relation to a dispute about whether the money should be returned. 'To require separate consensuses for separate claims is an artificial concept which is most unlikely to accord with contracting parties' intentions and is unlikely to have commended itself to the framers of the Regulation'.[67]

It is clear that the Court of Appeal felt that applying the notion of severability as a matter of English law the alternative claims should clearly be covered. Once it was decided that the claim would be covered as a matter of English law, there is no reason why a narrower result should be reached under Community law. If anything, the arguments are stronger under European law. It is not necessary to show a binding contract valid under national law in order to show the required consensus.[68] Here the defendant had received copies of the contract and had drawn down on the loan and paid interest in accordance

[64] ibid [25–26.]

[65] Although there were indications that this might well have been enough in any event, see for example para 23.

[66] ibid 25.

[67] ibid 31.

[68] For example in Case C-214/89 *Powell Duffryn Plc v Wolfgang Petereit,* [1992] ELR 1745 shareholders were held to have agreed to the provisions in the company's articles whether or not this was a contract in national law.

with that agreement, it must be held to have tacitly accepted the jurisdiction agreement contained therein which is enough according to the European case law.[69] Thus the notion of consensus is wider than a contract binding as a matter of national law.

Thus, severability, as in the case of *Deutsche Bank*, is very often the answer to any attempt to challenge the material validity of a jurisdiction agreement. The allegation that the agent lacked authority to sign the underlying agreement was no answer to the jurisdiction agreement itself whether under English common law or under Article 23 of the Brussels I Regulation. Most cases of fraud or duress would also fail at the hurdle of severability. The narrowness of the permitted challenges to jurisdiction agreements reinforces the argument that challenges under Article 23 can be based only on a narrow conception of good faith.

VI. CONCLUSION

The case law of the ECJ and the English courts contains clear indications that the requirements laid down in Article 23 are both necessary and sufficient conditions for the material validity of jurisdiction agreements under the Brussels I Regulation. If an agreement is in writing or evidenced in writing, Article 23 will be satisfied and the chosen court will have jurisdiction. Such an interpretation of Article 23 is also essential if the aims of the Regulation are to be achieved. Nor is the result of such an interpretation likely to lead to results which are in any way surprising in practice. Indeed the resulting position will be broadly similar that what which applies in English law because of the doctrine of severability and the policy of holding parties to the objective appearance of agreement. Even an allegation of fraud, duress etc in connection with the underlying agreement is not necessarily enough to impeach a jurisdiction agreement contained in that agreement. Similarly, simply alleging that an agent acted without authority in entering into the underlying transaction does not, without more, impeach a jurisdiction agreement found in the underlying contract. If any other tool is needed to deal with cases where the jurisdiction agreement itself is directly impeached, a Community notion of good faith is the appropriate way to deal with such cases.

[69] See Case C 313/85 *Iveco Fiat SpA v Van Hool* [1986] ECR 3337. A written contract containing a jurisdiction agreement had expired and contrary to the terms of the agreement had not been renewed in writing. But as the parties continued to deal on the basis that it governed their relationship and had therefore consented to the jurisdiction agreement.