Disconnection clauses

I. Introduction

The disconnection clause introduced by Member States of the European Community (EC) had the function of putting other parties to a Council of Europe Convention or other multilateral convention on notice that the Member States had concluded between themselves (further reaching) EC instruments on the same subject or could be expected to do so in the near future. Since in most cases the relevant conventions did not provide for the accession of the EC itself, the clause enabled the Member States to become parties to the convention without infringing EC law or hindering Community legislative autonomy. It made clear that as between Member States Community law would apply rather than the law of the multilateral Convention.

More recently, many international conventions allow the Community to become a party alongside its Member States, since the Community and Member States share competence in the field covered by the Convention. In such "mixed agreements" the nature and function of the clause changes fundamentally. As a party to the convention, the Community itself is bound by it: a reference to Community law may hence appear as invoking domestic law as ground for non-compliance, which plainly contradicts Article 27 of the Vienna Convention of the Law of Treaties.

Accordingly, the clause must leave no ambiguity about its purpose. It shall put the other parties of the Convention on notice that the convention will not create rights and obligations between the Member States for those parts of the convention that fall within Community competence. In this sphere, the Member States and the Community institutions will apply Community law as it covers the subject-matter of the convention. However, Community law will have to be designed in a way that it gives effect to the Community's obligations under the convention vis-à-vis non EC State parties.

Against this background, we have collected examples of disconnection clauses used in practice (II). Based on this survey, views are given on some open issues for discussion (III) before presenting tentative conclusions (IV).

II. Models of disconnection clauses

1. Council of Europe Conventions

If a Convention establishes minimum rules of substantial protection, a general disconnection clause may allow higher domestic law standards to be applied. That has been the technique in Conventions ETS 33 (1960) on the temporary importation, free of duty, of medical equipment[1] and in Convention ETS 176 (2000) on European landscape[2]. Sometimes, a Convention establishes minimum rules of procedural co-operation between the parties. In such a case, another general disconnection clause does not prejudge co-operation in the same subject matter on the basis of other international agreements. Examples of this technique can be found in Convention ETS 112 (1983) on the transfer of sentenced persons[3], in Convention ETS 127 (1998) on mutual administrative assistance in tax matters[4], or in Convention ETS 156 (1995) on Illicit Traffic by Sea implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[5]. A third general disconnection clause allows certain countries to rely on their already established uniform legislation or special treaty arrangements, in order to achieve the object of a Convention. That has been accepted in Convention ETS 30 (1959) on mutual assistance in criminal matters[6], in

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[1] The Community was allowed to become a party to that Convention in 1983 (see the participation clause in the Additional Protocol, ETS 110). The disconnection clause in Article 4 reads: "The provisions of this Agreement shall not prejudice more favourable provisions for the temporary importation of the equipment referred to in Article 1, contained in the laws or regulations of any Contracting Party or in any convention, treaty or agreement in force between two or more Contracting Parties".

[2] The Community can become a party upon invitation by the Committee of Ministers of the Council of Europe (Article 14). The disconnection clause in Article 12 reads: "The provisions of this Convention shall not prejudice stricter provisions concerning landscape protection, management and planning contained in other existing or future binding national or international instruments.

[3] Article 22 (2) of that Convention reads: "If two or more Parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention".

[4] The Community cannot become a party to this Convention. The disconnection clause in Article 27 reads: "The possibilities of assistance provided by this Convention do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between the Parties concerned or other instruments which relate to co-operation in tax matters".

[5] Article 30 (3) of that Convention reads: "It two or more Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Agreement or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Agreement, if it facilitates international co-operation.

[6] Article 26 (4) of that Convention reads: "Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly". A practical identical provision can be found in Article 37 of Convention ETS No. 51 (1964) on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; in Article 64 of Convention ETS No. 70 (1970) on the International Validity of Criminal Judgments; in Article 43 of Convention ETS No. 73 (1972) on the transfer of proceedings in criminal matters.

Convention ETS 52 (1964) on the Punishment of Road Traffic Offences[7], or in Convention ETS 117 (1985) on Offences relating to cultural property[8].

There are also more specific EC disconnection clauses. They exclude intra EC relationships from the scope of the convention in so far as there are EC rules on the same subject matter. The model was drafted by the CoE Secretariat and used in many Conventions. It reads:

"In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned".

Examples where this clause was accepted by CoE States, are Convention ETS No. 130/133 (1989) on insider trading[9], convention ETS No. 132 (1989) on transfrontier television[10], convention ETS No. 136 (1990) on certain aspects of bankruptcy[11], convention ETS No. 150 (1993) on civil liability for damage resulting from activities dangerous to the environment[12], convention ETS No. 153 (1994) on copyrights in the framework of transfrontier broadcasting by satellite[13]. More recent examples include the convention ETS No. 175 (2000) on the promotion of a transnational long-term voluntary service for young people[14], the convention ETS No. 178 (2001) on the legal protection of services based on, or consisting of conditional access[15], the convention ETS No. 183 on the Protection of Audiovisual Heritage[16], and the Convention No. 192 (2003) on the contact concerning children[17]. It should be noted that some of these Conventions did originally not provide for Community accession – only by way of a later protocol could the Community become a party, which did not, however, lead to a modification of the disconnection clause originally inserted into the Convention.

In 2005, this established clause was challenged by the Russian Federation during the negotiations on the Convention ETS No. 196 on the Prevention of Terrorism, the Convention ETS No. 197 against Trafficking in Human Beings and the Convention ETS No. 198 on financing of terrorism. After exchanges on ambassadorial level in the Council of Europe and discussions in COREPER, a new formula was agreed upon in these three conventions[18]. It reads as follows:

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[7] Article 27 (1) of that Convention reads: "If two or more Contracting Parties establish their relations on the basis of uniform legislation or on special arrangements for reciprocity, they shall have the option of regulating their mutual relations in the matter solely on the basis of such systems, notwithstanding the provisions of the present Convention".

[8] Article 34 (3) of that Convention reads: "However, if two or more Parties have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in the future do so, they shall be entitled to regulate those relations accordingly, notwithstanding the terms of this Convention".

[9] Article 16bis (2) added to the Convention by the Protocol.

[10] Article 27 (1) of the Convention.

[11] Article 38 (2) of the Convention.

[12] Article 25 (2) of the Convention.

[13] Article 9 (1) of the Convention.

[14] Article 19 (2) of the Convention.

[15] Article 11 (4) of the Convention.

[16] Article 21 of the Convention.

[17] Article 20 (3) of the Convention.

[18] Article 26 (3) of the Prevention of Terrorism Convention; Article 40 (3) of the Trafficking in Human Beings Convention; Article 52 (4) of the Financing of Terrorism Convention.

"Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties".

In addition, the European Community and its Member States made the following declaration upon adoption of these Conventions by the Committee of Ministers of the Council of Europe on 3 May 2005:

"The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection" clause is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of a transfer of sovereign powers from the Member States to the Community. This clause is not aimed at reducing rights or increasing the obligations of a non-European Union Party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to the Convention. The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties of the Convention on the other; the Community and the European Union Member States will be bound by the Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union Parties".

b) Other Conventions outside the Council of Europe framework

The Lugano Convention (1988) on jurisdiction and enforcement of judgements in civil and commercial matters contains a clause regulating the relationship of that Convention to the Brussels Convention (1968) with respect to enumerated specific aspects[19]. This case is

[19] Article 54ter of the Convention reads :
1. La présente convention n'affecte pas l'application par les Etats membres des Communautés européennes de la convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, signée à Bruxelles le 27 septembre 1968, et du protocole concernant l'interprétation par la Cour de justice de ladite convention, signé à Luxembourg le 3 juin 1971, tels que modifiés par les conventions relatives à l'adhésion à ladite convention et audit protocole des Etats adhérents aux Communautés européennes, l'ensemble de ces conventions et du protocole étant ci-après dénommé «la Convention de Bruxelles».
2. Toutefois, la présente convention s'applique en tout état de cause:
a) en matière de compétence, lorsque le défendeur est domicilié sur le territoire d'un Etat contractant à la présente convention qui n'est pas membre des Communautés européennes ou lorsque les art. 16 ou 17 de la présente convention confèrent une compétence aux tribunaux d'un tel Etat contractant;
b) en matière de litispendance ou de connexité telles que prévues aux art. 21 et 22 de la présente convention, lorsque les demandes sont formées dans un Etat contractant qui n'est pas membre des Communautés européennes et dans un Etat contractant qui est membre des Communautés européennes;
c) en matière de reconnaissance et d'exécution, lorsque soit l'Etat d'origine soit l'Etat requis n'est pas membre des Communautés européennes.
3. Outre les motifs faisant l'objet du titre III, la reconnaissance ou l'exécution peut être refusée si la règle de compétence sur la base de laquelle la décision a été rendue diffère de celle résultant de la présente convention et si la reconnaissance ou l'exécution est demandée contre une partie qui est domiciliée sur le territoire d'un Etat contractant qui n'est pas membre des Communautés européennes, à moins que la décision puisse par ailleurs être reconnue ou exécutée selon le droit de l'Etat requis.

particular, as the Brussels Convention does not form part of the Community legal order proper. However, the Brussels Convention is an international agreement between the Member States only with jurisdiction of the European Court of Justice by virtue of an additional protocol (and it has nowadays been converted into Community regulation 44/2001 adopted under Article 65 EC). The clause therefore bears the characteristic of protecting the integrity of the Brussels Convention as the relevant "intra-EC" legal norm.

Sometimes, other disconnection clauses protect Community law insofar as it contains specific rules on the subject covered by the Convention. This is the case for the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)[20], or the Chairman's Draft of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty "Liability Arising from Environmental Emergencies"[21].

The UN Economic Commission for Europe (UNECE) drafted a Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003) that contains a disconnection clause restricted to certain of its articles only[22]. A rather uncommon formulation is used in Article 3 (2) of the Convention concerning International carriage by Rail (COTIF)[23]. In the 2005 negotiations on the UNESCO Convention on cultural diversity, another broad type of disconnection clause was proposed[24] (and eventually rejected by the other negotiators).

Finally, one case of a disconnection statement may be cited. When the member States signed the Chemical Weapons Convention (1993) – to which the Community is not party – they made a declaration to the effect that they will comply with CWC obligations by taking account of their EC obligations resulting from the internal market. That effectively meant that no border controls for chemical weapons are in carried out between the Member States although the CWC generally requires from contracting parties to establish such border controls.

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[20] Article 13 (3) reads: „In their relations with each other, Contracting States which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules".

[21] The draft clause reads: "State Parties which are members of the European Community shall not apply the provisions of this Article insofar as Community rules on jurisdiction in civil and commercial matters apply".

[22] Article 20 (2) of this Protocol reads: "In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18".

[23] Article 3 (2) of COTIF reads: „The obligations resulting from § 1 for the Member States, which are at the same time Members of the European Communities or States parties to the European Economic Area, shall not prevail over their obligations as members of the European Communities or States parties to the European Economic Area". The Council Legal Service advised Member States to ask the Commission clarifying the meaning of this provision when negotiating the accession of the Community to COTIF.

[24] Article 29bis of the Draft Convention, as proposed by the European Commission on the basis of the negotiating directives issued by the Council read: "Notwithstanding the rules of the present Convention, those parties which are member of a regional economic integration organization constituted by sovereign States to which their member States have transferred competence over matters governed by this Convention, shall apply in their mutual relations the common rules in force in that regional economic integration organization".

III. Open issues

1. Denomination

One of the problems with the clause may be its unfortunate denomination. "Disconnection" may have been appropriate when preserving the Community's legal against Member States' unilateral commitments. But this denomination is a misnomer especially when the Community becomes a party next to its Member States. In such a situation, it seems to be more appropriate to refer to a "transparency clause", since it only explains to other Parties how implementation of Convention obligations would function in a "mixed" situation.

2. Compatibility with the object and purpose of a Convention

Is it compatible with the object and purpose of a Convention that EU Member States apply Community law between themselves rather than the Convention rules? It would seem to the Commission that the answer depends on the obligations set out by the very Convention in question, as compared with the relevant Community law at the time.

If, in a given case, existing Community law fell below the Convention standards that would create two standards, possibly at odds with the object and purpose of the Convention. For example, in relation to a modern human rights treaty granting certain rights to nationals of all State Parties, one could ask the question whether EU Member States are allowed to apply between themselves the (purportedly) lower Community standard, while being obliged to apply vis-à-vis other State Parties and their nationals the higher Convention standard. Such a system could run against the object and purpose of the Convention to establish the same human rights protection in the legal order of all Parties, including the Community. Accordingly, the Community must show to other State Parties during the negotiations that such incompatibility does not exist, since the existing Community law is well in line with the Convention standards, or even more protective. Such exercise may convince other State Parties that the application of Community law as between Member States does not threaten the integrity of the Convention. Once all negotiators accept to introduce such a clause into the convention, there can be no reason for claiming that it would amount to an illegal reservation.

3. Legal situation in the absence of a treaty clause

What happens if no disconnection clause is inserted into the text? For sure, such situation must be avoided, if only Member States become a party to the convention in question. Otherwise, they would be bound to apply Convention law instead of Community law by international law (Article 27 of the Vienna Convention). Such international commitments by Member States may jeopardize the integrity and development of Community law in the area covered by the Convention, unless they are countered by a disconnection clause in the Convention itself[25].

Does the same danger exist, if both the Community and the Member States become party to a Convention? It seems that this situation has arisen during the 1990s as regards some UN conventions. In particular, in the environmental field, the Community (as a "regional economic integration organization") and the Member States are parties to several global instruments. For example, "mixed participation" exists as regards the Vienna Convention

[25] Compare ECJ, Case C-222/94, Judgement of 10 September 1996, ECR 1996 I-4025, paras, 52-53. In an infringement case, the Commission claimed that the UK had not properly implemented Council Directive 89/552 ("television sans frontiers'). The UK defence relied, inter alia, on the Council of Europe Convention of 1989. The Court rejected that argument by pointing to the disconnection clause in Article 27 of the Convention.

(1985) and the Montreal Protocol (1987) as regards the protection of the ozone layer[26]. The same is true for the Convention on Climate Change (1992)[27] and its Kyoto Protocol (1997)[28], as well as the Basle Convention on Transboundary Deportation of Hazardous Waste (1989)[29], the Biodiversity Convention (1992)[30], and the Convention against Desertification (1994)[31].

In all these cases no disconnection clause was inserted into the UN convention, although Community law existed, covering at least some fields of the international convention. Rather, the Community was required to make a "declaration of competences" upon ratification. Such declarations are intended to provide the other parties to the Convention with an overview of the division of competences between the Community and its Member States with respect to the obligations under the Convention. Such declarations explain that the Community would implement the Convention in the specific areas covered by Community law, whereas the Member States would do so in the remaining fields. Pointing to Community implementation in areas of Community competence these declarations - implicitly – put the other State parties on notice that no treaty relations between the Member States in these areas are created. Hence, there is no need to stress this detail by another "disconnection" clause in the text of the Convention. At the outset, a unilateral declaration at the time of ratification would have satisfied the need of other State parties in this respect[32].

IV. Conclusion

In sum, the the following tentative conclusions may be drawn:

1. Disconnection clauses are useful in a situation where only Member States are parties to a Convention which relates to areas of actual or potential Community competence.

2. Transparency clauses are useful in a situation when both the Community and Member States are parties to a Convention, in so far as no declaration of competences is required from the Community (Council of Europe practice). In such a case the Community should convince other parties during the negotiations that Community law is in line with the object and purpose the future Convention, so that its application between Member States does not impair the Convention's standards. Technically, a disconnection clause should underline that the Convention rules are not applied between the Member States. This is clearly laid down in the established model used in the 1990s. It can also be derived from new 2005 version, which stresses that Member States apply between themselves Community law (implying that they do not apply Convention law).

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[26] Council Decision 88/540/EEC of 14.10.1988, OJ 1988, L 297, p. 8.
[27] Council Decision 94/69/EC of 15.12.1993, OJ 1994, L 33, p. 11-12.
[28] Council Decision 2002/358/EC, OJ 2002, L 130, p. 1.
[29] Council Decision 93/98/EEC of 1.2.1993, OJ 1993, L 39, p. 1.
[30] Council Decision 93/626/EC, OJ 1993, L 309, p. 1.
[31] Council Decision 98/216/EC of 9.3.1998, OJ 1998, L 83, p. 1.
[32] There is one example where a declaration of competence was complemented by a transparency declaration. As regards the Espoo Convention on transboundary environmental impact assessement, ratified by the Community in 1997, the following declaration was made (alongside the usual declaration on competences under Article 17 (5) of that Convention): "2. Declaration on other aspects of the application of the Convention:
"The European Community reiterates its statement presented at the signature of the Convention. In fact, it is understood that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments made to those rules".

3. Transparency clauses seem less necessary in a situation when both the Community and Member States are parties to a Convention under the condition that the Community delivers a declaration of competence (UN practice). Such declaration may satisfy the need to inform partners how implementation in a "mixed" situation functions, implying that Member States would not apply between themselves Convention rules in areas of Community competence. In such a case, a unilateral "transparency statement" may be sought of along the declaration of competence, to be delivered by the Community at the time of ratification.