The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce

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THE INAPPLICABILITY OF THE CONNECTING FACTOR OF NATIONALITY TO THE NEGOTIATING CAPACITY IN INTERNATIONAL COMMERCE

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I. Introduction

As an introduction, I must point out that the complex system of sources of international law, Community law, and Italian national rules on private international law provide four different rules regarding the law applicable to the negotiating capacity of natural persons. The first rule is of a general nature and concerns the general capacity to act. It submits this capacity to the national law of the person in question. This general rule is provided in Article 23(1) part 1 of the Italian Private International Law Statute, according to which ‘a natural person’s capacity to act is regulated by his national law.’ The same rule is also provided by the Geneva Convention of 7 June 1930, which provides a uniform law for bills of exchange and promissory notes, and of 19 March 1931, which provides a uniform law for cheques.∗

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The Convention was ratified (and entered into force) in Italy by Royal Decree on 25 August 1932, n.1130, converted into law on 22 December 1932, n.1941, Italian Official Yearbook of Private International Law, Volume 10 (2008), pp. 711-736 © sellier. european law publishers & Swiss Institute of Comparative Law Printed in Germany
A second rule concerns the uniform category of special capacities provided in Articles 20(2) and 23(1) part 2, which subjects these capacities to the *lex substantiae actus*, under the principle that ‘the special conditions for capacity provided for by the law applicable to a specific case are governed by that same law’ (the wording of Article 20(2) is partially different from that of Article 23(1) part 2, which states ‘where the law applicable to a specific case provides for special conditions regarding the capacity to act, these are governed by the same law’).

The third rule concerns the negotiating capacity for certain business transactions, subjecting it, under certain circumstances, to the *lex loci*. In Italy, the *lex loci* connecting factor for negotiating capacity is laid down in Article 2(2) of the Geneva Convention of 7 June 1930; in Article 2(2) of the Geneva Convention of 19 March 1931; in Article 11 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations³; in Article 13 of the EC Regulation 593/2008 on the law applicable to contractual obligations (Rome I); and last but not least in...
Articles 23(2), 23(3), and 23(4) of the Italian private international law statute of 1995.

In my opinion, however, there is also a fourth unwritten rule that applies to the negotiating capacity for business transactions in international commerce that subjects this capacity to the \textit{lex substantiae actus}, even where it does not qualify as special capacity. This study is dedicated to the demonstration of this thesis.

\footnote{The concept of transactions in international commerce is used for a subject that is different from that of capacity by \textsc{pocar f.}, ‘\textit{La codification européenne du droit international privé: vers l’adoption de règles rigides ou flexibles vers les États tiers?’}, in: \textit{Mélanges en l’honneur de Paul Lagarde}, Paris 2005, at 701.}

\footnote{The category of negotiating capacity in international commerce is not new. In the timely scope of application of the preliminary clauses of the Italian civil code of 1865, the leading doctrine distinguished between capacity regarding negotiations in international commerce and capacity relating to negotiations regarding personal status. It submitted the former to the law of the place of performance of the obligation in question according to Article 58 of the Italian commercial code of 1882, pursuant to which ‘the form and the essential prerequisites of the commercial obligations […] are regulated respectively by the law or the usages of the place where the obligation has to be performed’. It submitted the latter to the \textit{lex patriae} according to Article 6 of the preliminary clauses of the Italian civil code of 1865. See \textsc{diena g.}, \textit{Trattato di diritto commerciale internazionale. Ossia il diritto internazionale privato commerciale}, Firenze 1900, at 27; \textsc{id.}, ‘\textit{La capacité de la femme mariée d’après la nouvelle législation italienne et les conflits de lois éventuels’}, in: \textit{Clunet}, 1920, at 74-80; \textsc{cavaglieri a.}, \textit{Il diritto internazionale commerciale}, Padova 1936, at 97; \textsc{fedozzi p.}, \textit{Il diritto internazionale privato – Teorie generali e diritto civile}, Padova 1935, at 373; \textsc{gemma s.}, \textit{Appunti di diritto internazionale privato}, Padova 1936, at 237; \textsc{bosco g.}, \textit{Corso di diritto internazionale privato}, Roma 1939, at 206; \textsc{formaggioni a.}, ‘L’art. 58 codice di commercio e la nuova legislazione cambiaria’, in: \textit{Riv. dir. int.} 1937, at 39; \textsc{amati r.}, ‘\textit{Les nouvelles règles italiennes de droit international privé’}, in: \textit{Clunet} 1940-1945, at 335. As regards case-law, see App. Milano 1 July 1914, in: \textit{Riv. dir. int.} 1914, at 610 on which see \textsc{anzilotti d.}, in: \textit{Riv. dir. int.} 1914, at 614. Against the application of the \textit{lex patriae} to the capacity regarding commercial negotiations see \textsc{esperson p.}, \textit{Intelligenza dell’articolo 58 del nuovo codice di commercio}, Roma 1886, at 1-63; \textsc{pacchioni g.}, \textit{Elementi di diritto internazionale privato. Corso di lezioni tenute alla Reale università egiziana del Cairo negli anni 1927-28 e 1928-29}, Padova 1930, at 272; \textsc{calamandrei r.}, \textit{La cambiale: commento al libro primo titolo 10 del Nuovo Codice di Commercio italiano}, Torino 1896, at 316, according to whom the capacity relating to international commerce should also be regulated by the \textit{lex patriae}. The Italian commercial code was abrogated by Article 112 of the Royal Decree of 24 April 1939 n.640, and the negotiating capacity in international commerce was subsumed under the rules of the Italian international private law, i.e. under general capacity first in Article 6 of the commencement clauses of the Italian civil code of 1865 and later in Article 17 of the commencement clauses of the Italian civil code of 1942. See: \textsc{amati r.}, (this note), at 330 and 756.}
II. The Community Principle of Non-Discrimination

The principle of non-discrimination has been a basic principle in EU for a long time. This principle is established in Article 12 (former Article 6) EU, according to which ‘within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’ The principle of non-discrimination prohibits different treatment in situations that are alike and those that are analogous, except for determinate aspects that the constitutional principle of non-discrimination does not deem sufficiently relevant. According to the ECJ’s interpretation, the prohibition on

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7 For the general history and contents of the principle of equality, see \(\text{UBERTAZZI G.M.}, \) ‘Règles de non-discrimination et droit international privé’, in: Recueil des Cours 1977-IV, at 343.


discrimination contained in Article 12 EU not only refers to direct and obvious discrimination but also to ‘factual’ or indirect discrimination arising from provisions that seem neutral in the abstract but whose application ‘requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified’; it instead allows disparate treatment in situations that differ from each other due (e.g.) to the element of nationality, when the different treatment is based on ‘objective connecting factors’ (ECJ’s judgment in *Walt Wilhelm* of 13 February 1969).

The ECJ’s complex jurisprudence demonstrates that Article 12 EU prohibits any disparate treatment mandated by a Member State’s national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified.

In this framework, the doctrine has raised the question of whether the adoption of the nationality connecting factor as part of the neutral rules of conflict is

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compatible with the Community principle of non-discrimination. This topic has already been deeply examined: it has been particularly analyzed (1) in the Walt Wilhelm judgment; (2) by scholars like Drobnig and the Max Planck Institute in Hamburg in the seventies; (3) and (3) in Italy by Ballarino since the beginning of the eighties. The latter, as well as other previous studies, were published in a period when the establishment of the Community structure had substantially just begun.

To date, the topic has come to the ECJ’s attention in a series of judgments, starting with Micheletti on 7 July 1992 and continuing with judgments in the nineties until completed with Avello in 2003 and Grunkin in 2008. Academics on the other

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hand began returning to the topic in the nineties by publishing several important studies.19


The general topic is certainly interesting. The demarcation of the topic in this study prevents me from fully investigating the issue, forcing me to examine it...
with regards to only the aspects concerning the specific problem of the capacity of natural persons. Let me state right away that from my point of view it is impossible to reach a single uniform solution, even in the restricted scope I examine. I will thus focus on two different situations, namely the capacity forming part of personal status, as opposed to negotiating capacity in international commerce. I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law’s provision on personal status.\(^2\) In contrast, I believe that by analysing the negotiating capacity in international commerce anew, it is possible to agree with and maintain the idea that applying the connecting factor of nationality to negotiating capacity is incompatible with the Community principle of non-discrimination.\(^2\)

III. Discriminations Inherent in the Effects of the Connecting Factor of Nationality and in the Content of the \textit{Lex Causae}

In order to show the types of discrimination that are possibly created by the use of nationality as a connecting factor, it seems useful to employ a few examples.

\(^2\) See \textsc{Ballarino T.} / \textsc{Ubertazzi B.} (note 18), at 100. See also \textsc{Jayme E.}, ‘Identité culturelle et intégration: le droit international privé postmoderne’, in: \textit{Recueil des Cours} 1995, t. 253, at 172; \textsc{Puljak M.P.} (note 19), \textit{passim}; \textsc{Kinsch M.P.}, ‘Principe d’égalité et conflits de lois’, in: \textit{Trav. Com. fr. dr. int. privé} 2002-2004, at 125; \textsc{Bertoli P.} (note 19), at 274; \textsc{Borras A.} / \textsc{González Campos J.D.}, ‘La loi nationale à l’heure de la réforme du droit international privé espagnol’, in: \textit{Mélanges Paul Lagarde} (note 5), at 141; \textsc{Pustorino P.} (note 19), at 120; \textsc{Picchio Forlati M.L.} (note 19), at 918; \textsc{DAVI A.} (note 20), at 313 and 318. Specifically, \textsc{Puljak M.P.} and \textsc{Pustorino P.} do not distinguish between personal and international commerce status, but rather hold that the connecting element of nationality used in neutral conflict of laws rules is always compatible with Community law. They hold instead that the connecting factor of citizenship is always unjustifiably discriminating. Also in matters relating to personal status, see the following authors: \textsc{Bergé J.S.}, \textit{La protection internationale et communautaire du droit d’auteur. Essai d’une analyse conflictuelle}, Paris 1996, at 366; \textsc{Juenger F.K.} (note 20), at 1536; \textsc{Basedow J.}, ‘The effects of globalization on Private International Law’, in: \textit{Basedow J. / Kono T.}, \textit{Legal Aspects of Globalization}, ’s-Gravenhage-London-Boston 2000, at 8; \textsc{Bogdan M.} (note 18), at 1286.

\(^2\) See \textsc{Drobnig U.} (note 13), at 636-662; \textit{Id.} (note 13), at 526-543; \textsc{Fallon M.} (note 19), at 128; \textsc{Sanchez Lorenzo S.} (note 19), at 73; \textsc{Bergé J.S.} (note 21), at 366; \textsc{Juenger F.K.} (note 20), at 1536; \textsc{Basedow J.} (note 21), at 8; \textsc{Bogdan M.} (note 18), at 1286.
An Italian Christian man wants to get married. He has a choice from among three different girls, one of whom is Italian, another Egyptian, and the third Iranian. All the three women are Muslims. The relevant national laws would give the man the capacity to get marry the Italian girl (notwithstanding her being Muslim) but not to the Egyptian or and Iranian girls (specifically because they are Muslims). The problems relating to religious faith pertain to the IPL category of the capacity to marry. The man doesn’t want to wait for permission to get married (‘nulla osta’) to come from the Islamic countries, which is necessary to get married in Italy (ex art. 116 of the Italian civil code), and he doesn’t want to wait for an Italian judgment declaring the Islamic State’s negotiation of marriage capacity contrary to Italian public order. Therefore he marries the Italian girl.

Another example involves an Italian antiques dealer who required to sell the same artistic object across a large distance to three different persons residing abroad, who are Italian, French, and Spanish citizens respectively. The three different possible clients’ capacity to stipulate the contract is determined by the law of their respective home States. The dealer reasonably knows the rules related to the capacity to act established by Italian law, but ignores the ones established by foreign laws. He doesn’t then want to take the risk of seeing his contract declared void by reason of the foreign client’s incapacity. Therefore he stipulates the agreement with the Italian citizen.

A final example is partially based on the issues examined by the European Court of Justice in the Boukhalfta decision. In this case, the German embassy in Algeria wants to hire an employee. The embassy has the choice of three persons residing in Algeria. Those three persons have three different nationalities, Belgian, Italian, and German, respectively. The embassy wants to enter into an employment agreement that contains a choice of law clause which submits the contract (and the related capacity to stipulate it) to German law. Nevertheless, German law regulates the German citizens’ capacity to conclude an employment contract with a German embassy, but doesn’t regulate the same capacity with respect of foreign citizens. The embassy knows the German discipline related to the capacity to work, but ignores the ones established by the foreign laws. The German embassy doesn’t then want to take the risk of seeing its employment contract declared void by reason of the foreign workers incapacity. Therefore the German embassy hires the German employee.

These examples show that the connecting factor of nationality can lead to three different types of discrimination. The first type of discrimination is indirect or factual. Notice that in all of the three of the above examples the factual situations have the same elements, except for individual nationalities of the persons involved, and yet they are not treated the same way by applying the same law but are treated differently because of the reference to different applicable laws. Here, the discrimination is specifically found in the abstract difference between the laws required to regulate the case.

On the Muslim incapacity to marry because of different religions, see paragraphs 25 and 30 of my monograph quoted under the asterisk that appears at the beginning of this study.
The second type of discrimination is also indirect or factual, but it arises from the effects of applying the connecting factor of nationality, which in some cases affirms and in other cases denies the capacity of a natural person: here, the discrimination is not caused by the mere difference of applicable laws like in the first kind of discrimination, but rather from the effects of the concrete application of the one or other laws referred to.

Last but not least, the third type of discrimination, which differs from the first two, is direct. It arises where the national law referred to by the provision of private international law only applies to citizens, not to aliens.

At this point, the three abovementioned types of discrimination, as well as their compatibility with the community principle of non-discrimination, must be examined. To simplify our analysis, it is conducive to start with the simplest hypothesis, the second one, and then to examine third one and first types of discrimination in that order.

The second type of discrimination, which consists in the effects of the concrete application of the one or other law referred to, is objectively justified due to the lack of uniformity between the substantive laws in the different Member States of the EU. Since the Walt Wilhelm case, the European Court of Justice has stated that ‘Article 7’ (now 12) ‘of the EEC Treaty prohibits every Member State from applying its law on cartels differently on the ground of the nationality of the parties concerned. However, Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various member States.’

The third type of discrimination arises where the PIL rule refers to a national law that has a discriminating content, as it provides for a different treatment of citizens and aliens. With regards to this type of discrimination, the ECJ expressly stated in the Walt Wilhelm case that ‘the laws of the various member States’ shall ‘affect all persons subject to them, in accordance with objective crite-

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24 Since the 1969 judgment in Walt Wilhelm, the ECJ has expressly stated that ‘Article 7 of the EC Treaty (now Article 12 EU) prohibits Member States from applying their laws on cartels differently on the ground of the nationality of the parties concerned. Article 7 is only concerned with disparities in treatment resulting for persons and companies subject to Community law from divergences in the laws of the Member States.’ See point 13 of the grounds in the judgment in Walt Wilhelm. See also point 15 of the ECJ’s judgment of 24 January 1991, C-339/89, Alsthom Atlantique, in: Rec., 1-107 on which see Hermitte M.A., ‘Note to Alsthom Atlantique’, in: Clunet 1991, at 488-489; Gonzalez Campos J.D., ‘La Cour de justice des Communautés européennes et le non-droit international privé’, in: Festschrift für Eric Jayme, München 2004, at 267; Ballarino T. / Ubertazzi B. (note 18), at note 59; Pustorino P. (note 19), at 121, note 23. See also point 17 of the ECJ’s judgment of 1 February 1996, C-177/94, Perfili, in: Rec., 1-161, and also the aforementioned references to jurisprudence. For this judgment see Aįdodati E., in: Dir. com. scambi int. 1996, at 337-338; Sanchez Lorenzo S. (note 19), at 73; Gonzalez Campos J.D. (this note), at 270.
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The problem becomes more complex as it turns to the first type of discrimination, i.e. the one that arises from the mere adoption of the connecting factor of nationality.

In this context, one opinion holds that the Community principle of non-discrimination does not operate at the level of a provision of private international law that contains the connecting factor of nationality, but rather at the different level of the application of the national law referred to: its objective is to bar the application of such law as far as this application would lead to discrimination. This first thesis obviously acknowledges that, according to the ECJ, the laws of each Member State must be applied to each person falling under the provision in accordance with objective connecting factors and without regard to nationality. According to the same opinion, although the ECJ apparently includes all types of national provisions in its reasoning, including those on private international law, so that the ECJ jurisprudence could be interpreted to prevent national provisions from employing connecting elements that are subjective or dependent on nationality, in reality, this was not the ECJ’s purpose. The ECJ did not use the expression ‘objective connecting factors’ to refer to the connecting element of nationality adopted in the PIL rules, but rather to refer to the criteria of application of the substantive law rules that limit (or do not limit) their application to only citizens. It follows that the objective connecting factors referred to by the ECJ do not include connecting elements of the

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25 See point 13 of the Walt Wilhelm judgment. This formulation is consistently used by the ECJ in its jurisprudence. See e.g. point 17 of the ECJ’s judgment in Perfili cited under note 22 and also the aforementioned references to jurisprudence.

26 E.g. provisions that are analogous to those in force in Belgium, according to which the existence of obligations arising from cheques and bills of exchange are regulated by national law or the lex loci, are incompatible with Article 12 EU. In this sense see Rigaux F., Droit international privé, I., Théorie générale, Bruxelles 1987, at 220; Rigaux F. / Fallon M., Droit international privé, II, Droit positif belge, Bruxelles 1993, at 579; Puljak M.P. (note 19), at 249; Bertoli P. (note 19), at 284.

27 See note 26.
conflict of laws rules of the Member States, but only the ‘connecting factors of application’ (i.e., the conditions of applicability) of the respective substantive national law of the Community States. This first opinion concludes that the use of the connecting factor of nationality in private international law rules of the States does not conflict with the Community principle of non-discrimination.28

This opinion is undoubtedly correct, so far as it holds that the application of national law to capacity discriminates in two ways: (1) by choosing the connecting factor of nationality to regulate certain cases, and (2) by creating discriminating effects that arise from the application of a substantive law that applies to only citizens. The first kind of discrimination consisting in choosing the connecting factor of nationality to regulate certain cases operates exclusively at an abstract level and is purely formal, whereas the second type of discrimination consisting in creating discriminating effects that arise from application of a substantive law that applies only to citizens operates at a concrete level and actually has a substantial nature. The opinion outlined here is then perfectly right when it highlights this last type of discrimination, since this is the more immediately relevant one. Nevertheless, the first discrimination consisting in choosing the connecting factor of nationality to regulate certain cases also constitutes a treatment differentiation, which is logically preliminary to any other discrimination so far considered here; therefore it is also necessary to examine whether also the choosing of the connecting factor of nationality to regulate certain cases is compatible with the Community principle of non-discrimination. I will now turn to this question.

For this purpose, I first observe that discriminations that arise from the connecting factor of nationality cannot be justified solely by the fact that they are pro-

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vided for by a private international law provision, more specifically by a neutral bilateral conflict of laws rule, rather then a substantive law norm.

First, the Community principle of non-discrimination is a general principle and has been formulated in a sufficiently broad way so as to apply to all types of discrimination, without regard to its legal source. Thus, it also applies when discrimination arises from a PIL rule.

Second, the ECJ principle that the Member State laws shall not be applied through subjective connecting factors or factors that depend on nationality is also formulated in such a broad way that it applies to all types of discrimination without regard to its legal source. As a result, it too applies where discrimination arises from a PIL rule.

Third, the ECJ has already, at least in the following cases, applied the Community principle of non-discrimination to some substantive State provisions that expressly limit their scope of application and, therefore, fall into the category of a self-limited norm: *Walt Wilhelm*, *Phil Collins*, and *Boukhalfta*. In all three cases (which are German), provisions that apply to only German citizens were in dispute. Specifically, all three judgments stated (in the context of preliminary ruling proceedings according to Article 234 EC Treaty) that the German provisions in question were contrary to the Community principle of non-discrimination. Now

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30 Supra note 10.


32 The above-mentioned case, *Walt Wilhelm*, is from 1969 and concerned the anti-trust law of the Federal Republic of Germany; the latter was exclusively applicable in the interest of German national companies. The ECJ has expressly stated that Article 7 is not concerned with disparities in treatment that can result from objective connecting factors. But at the same time, it has also stated that such objective connecting factors did not exist in the case at hand before the court seised. The second previously mentioned case (Phil Collins) is from 1993 and concerned, once again, German law, more specifically, a German law provision on author’s rights, whose protection was reserved for German citizens. The ECJ held that ‘precluding the legislation of a Member State from denying to authors and performers
self-limited provisions are within a conceptual framework which is related to the one of “imbalance” conflict of laws rules in favour of the lex fori as well as to the public policy one. Accordingly, the three ECJ judgments mentioned above show an infringement of Community law in a conceptual framework that is close to or even part of private international law and the connecting factor of nationality.

Even more interesting are the ECJ’s judgments concerning provisions that require aliens, wanting to enforce assets of the alleged debtor abroad, to provide a security deposit before they can bring proceedings in the forum. On this subject, in particular, the judgments in Hubbard of 1 July 1993 and Mund & Fester of 10 February 1994 have been issued on the basis of Article 234 EU and have declared from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory’ (conclusion of the judgment). The third abovementioned case (Boukahlfta) is from 1996 and once again concerns German law. More specifically, it dealt with a provision in German law that ‘governs, inter alia, the status of staff of diplomatic representations […] and distinguishes between local staff having German nationality and those not having German nationality’ (point 3 of the judgment). The German law at issue in this case stated that the German labour law rules relating to ‘all aspects of the employment relationships’ (point 1 of the judgment) were applicable exclusively to German citizens. The claim was that the abovementioned provisions could therefore not be applied to a Belgian citizen who worked for a German embassy, who was as a result subject to the national laws of the host country, in this case, Algerian law; the ECJ held that ‘the prohibition of discrimination based on citizenship […] applies to a national of a Member State who is permanently resident in a non-member country’ (point 1 of the judgment), in this case the Belgian citizen Boukahlfta. For more on this case and its relevance to maintaining the idea that neutral bilateral PIL rules can contain some kind of discrimination that is not justified according to Article 12 EU, see LHOEST O. (note 31), at 266; BERTOLI P. (note 19), at 283.

33 See MOSCONI F. / CAMPILGIO C., D.i.pr.. Parte generale e contratti, Torino 2004, at 190, according to whom ‘amongst the methods which the respective legal systems apply in order to regulate cross border issues there is also the material one which comprehend the adoption of substantive law rules’ that constitute mandatory provisions or ‘which determine their scope of application’. See also GARDEÑEZ SANTIAGO M. (note 28), at 877; FALLON M. / MEEUSEN J. (note 19), at 53.

34 See GARDEÑEZ SANTIAGO M. (note 28), at 877; FALLON M. / MEEUSEN J. (note 19), at 53.


German provisions of the abovementioned type contrary to the Community principle of non-discrimination on the basis of nationality. A well-established doctrine suggests that both rules regarding cautio indicatum solvi and preventive injunctions constitute PIL rules; it emphasizes that the ECJ held that they were incompatible with the principle of non-discrimination according to Article 12 EU and concludes that ‘les règles nationales de droit international privé n’échappent, en tant que telles, en aucune manière à l’emprise du droit communautaire, et doivent céder dans la mesure où elles sont incompatibles avec celui-ci.’ The above mentioned judgments thus demonstrate that the prohibition against discrimination on the basis of nationality directly affects the PIL rules of the States and, in particular, directly affects the PIL rules that operate on the basis of the connecting factor of nationality.

The ECJ’s judgments regarding the Member States’ conflicts of law rules that resolve positive conflicts of citizenship are even more interesting. On this subject, the judgments Micheletti and Avello were rendered in 1992 and 2003 respectively. Both judgments were concerned rules analogous to Article 19(2) of Italian private international law, according to which ‘where the person has various citizenships the law of the State is applied with which the person has the closest connection. Where one of the citizenships is Italian, it prevails.’ In both judgments, the Court held that the abovementioned PIL rules of the Member States were contrary to Community law. Ballarino and I have already dissected the content of the two judgments and have shown that according to the ECJ’s jurisprudence, Community law has a direct effect on national PIL rules and, in particular, directly affects PIL rules that are based on nationality.

Finally, it is extremely interesting to note that on October the 14th 2008, the ECJ held in the Grunkin case that a German private international law provision that adopted the connecting factor of nationality to determine a person’s surname was contrary to Community law when it obliges the national authorities to ‘refuse to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.’ With this judgment the ECJ maintained that the German PIL rule utilizing the connecting factor of nationality for the determination of a person’s surname should not be totally over-

See the conclusion of the Hubbard judgment. Moreover, this conclusion is also clear for the case Mund & Fester. As such, the rules that authorize the preventive injunction of an alleged debtor’s assets where the judgment has to be enforced abroad mostly affect foreigners, who typically have their assets abroad, and activates the connecting factor of nationality with regard to them.

See KOHLER C. (note 28), at 73. See also GARCIMARTÍN ALFÉREZ F.J. / HEREDIA CERVANTES I. (note 8), at 65; PUSTORINO P. (note 19), at 121.

Supra note 17.

Supra note 18.

See BALLARINO T. / UBERTAZZI B. (note 18), at 89.

Supra note 18.
come, as long as it also allows the application of a law different than the national law in ‘exceptional cases.’ This decision is therefore completely consistent with the thesis maintained here, since it demonstrates that according to the ECJ’s jurisprudence, Community law has a direct effect on national PIL rules and, in particular, directly affects PIL rules that are based on nationality.

V. The Objective Justification for this Last Discrimination with Regard to the Capacity Related to Personal Status

When the connecting factor of nationality is applied to capacity, it contains some discriminating elements that cannot be justified by the fact that they arise from rules of private international law. At this point, whether the application of the connecting factor of nationality to capacity can be objectively justified by other reasons remains to be seen. For this purpose, the capacity that falls under personal status and the capacity regarding international commerce have to be distinguished.

The application of the connecting factor of nationality to the capacity that falls under personal status seems to be objectively justified, above all, by the need to issue uniform decisions regarding the subjective conduct of a person, and thus, to apply a uniform rule of personal status to the same person. Consequently, application of the connecting factor to personal status capacity is also justified by the opportunity reasons that always suggested that States submit personal status to subjective connecting factors, such as nationality.43

The conclusion proposed here,44 on the other hand, seems to implicitly share the view expressed in the ECJ’s judgments that were not rendered on capacity

43 Due to the lack of space, I cannot at this point cover the historic and traditional outline of the application of the lex patriae in matters relating to capacity in Italian law, foreign laws, and conventions regarding PIL law. On this subject, I thus refer to Chapter 1 of my monograph quoted under the asterisk that appears at the beginning of this study.

44 There are two groups of authors who hold that the connecting factor of nationality is compatible with the Community principle of non-discrimination, where it is used in matters relating to personal status in a neutral way by bilateral conflict of law rules. The first group includes DROBNIG U. (note 13), at 538; FALLON M. (note 19), at 128; BALLARINO T. / UBERTAZZI B. (note 18), at 100; and holds that the connecting factor of nationality is contrary to Community law in only matters relating to international commerce, but not in matters of personal status. The second group includes JAYME E. (note 21), at 172; PULIJAČ M.P. (note 19), passim; KINSCH M.P. (note 21), at 125; BERTOLI P. (note 19), at 274; BORRAS A. / GONZALEZ CAMPOS J.D. (note 21), at 141; PUSTORINO P. (note 19), at 120; PICCHIO FORLATI M.L. (note 19), at 918; LAGRASSE P. (note 28), at 215; DAVI A. (note 20), at 313 and 318; and holds that the connecting factor of nationality used in bilateral conflict of laws provisions never is contrary to Community law. Dissenting BERGÉ J.S. (note 21), at 366; BOGDAN M. (note 18), at 1286 according to whom the connecting factor of nationality is always incompatible with Community law, even where it is used in neutral, bilateral
matters, but on other personal status ones in PIL law. Among these judgments are *Avello* and *Grunkin*, which concerned private international law rules relating to individual’s names – a concept of personal status – that, at the same time, referred to national law. These cases are obviously comparable to the negotiating capacity cases previously discussed that also referred to national law. In *Avello* and *Grunkin* the ECJ decided not to declare this reference totally incompatible with Community law. It is reasonable to imagine that it would adopt the same conclusion to the question of capacity relating to personal status.

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VI. The Lack of an Objective Justification for this Discrimination with Regard to the Negotiating Capacity in International Commerce and the Following Inapplicability of the Nationality Connecting Factor

The application of the connecting factor of nationality to the capacity regarding international commerce, however, does not seem objectively justifiable. This conclusion is based mainly on two principal collections of arguments.

The first collection of argument consists of opportunity reasons that, with regards to the negotiating capacity in international commerce, suggest that the lex substantiae actus should apply and, therefore, rejects the connecting factor of nationality. In particular:

(i) The provisions regarding negotiating capacity in international commerce that submit it to the lex substantiae actus allow for a uniform determination for different aspects of the same facts.48

(ii) The same provisions spare any recourse to the method of adaptation, which is difficult to apply but necessary where the capacity to act is made subject to a law different than the one applicable to the act itself.49

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47 See DROBING U. (note 13), at 650; ID. (note 13), at 526-543; FALLON M. (note 19), at 128; BERGÉ J.S. (note 21), at 366; SANCHEZ LORENZO S. (note 19), at 73.


49 For the adaptation method in private international law in general, see CANSACCHI G., Scelta e adattamento delle norme straniere richiamate, Torino 1939, passim; BOUZA...
(iii) In cases where the parties’ are allowed to choose the applicable law, submitting the capacity considered here to the *lex substantiae actus* also allows that the capacity regarding the principal transaction and the capacity necessary for the choice of law are subject to the chosen law. Viewed from this angle, this approach leaves the maximum space possible to private autonomy.50


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(iv) Submitting the here examined capacity to the *lex substantiae* overcomes the traditional difference between States that apply the connecting factor of nationality to personal status (and thus also to capacity) and those that instead use the connecting factor of domicile or residence.\(^5\) As a result, international harmonisation is increased and the way is paved for the introduction of uniform international PIL rules.\(^6\)

(v) The PIL systems of the civil law States usually subject the negotiating capacity to the *lex personae*,\(^7\) while common law States refer to the *lex contractus* or the *lex substantiae actus* and generally apply the principal of *favor actus* (Validity Rule). The common law States can therefore preserve the agreement or act when the *lex contractus* or the *lex substantiae actus* determine that the contractor lacks capacity, whereas the law of the person’s domicile qualifies the person as having capacity.\(^8\) The different orientations of the civil and common law can, in

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51 Due to reasons of space I cannot give an overview of the connecting factors used in matters relating to personal status by different States and by international conventions in this context. For this purpose I refer to Chapter 1 of my monograph quoted under the asterisk that appears at the beginning of this study.


54 See EHRENZWEIG A.A., ‘Contractual Capacity of Married Women and Infants in the Conflict of Laws’, in: *Minnesota Law Rev.* 1959, p. 899-905, at 901 according to which ‘were it not for a complex history of the problem reaching into a distant feudal past, and the more recent dogmatic deviation of our conflicts law, no one would doubt that the Rule of Validation is the law. Analysis of the case law governing contracts of married women and infants supports this proposition.’ See VON OVERBECK A.E. (note 53), at 3 ss.; GLENN H.P. (note 53), at 21 ss. and CARLIER J.-Y. (note 50), at 174. See also *Annuaire IDI* 1987, at 62, I,
the abstract, lead to the application of two different laws to the capacity to negotiate. This can create a situation where one of the laws determines that the person lacks capacity, while the other law determines that the person has capacity; consequently, the agreement or the act that is void in one State is valid in the other. This situation is unsatisfactory. Thus, a uniformly applicable law governing the capacity of a party to conclude an agreement or to perform an act must be determined. This is especially true when there is a uniform Convention that designates a certain law for a special matter and even allows a choice of the applicable law. In such a case, subjecting the capacity to conclude an agreement or to perform an act to the \textit{lex substantiae actus} seems necessary, as it would oblige all Contracting States to apply the same rules to both the act and the capacity to conclude and perform that act, or allow the parties to choose the law that would regulate it. This would maximise the unifying force of the Convention itself.\textsuperscript{55} 

(vi) In absence of an international convention, the reference to the \textit{lex substantiae actus} in the rules considered here overcomes the traditional differences between the States that apply the connecting factor of nationality/domicile/residence to determine the law governing capacity and those that refer instead to the \textit{lex substantiae actus}, thus contributing to international harmonisation.\textsuperscript{56} 

(vii) Where the PIL rule applies the \textit{lex substantiae actus} to maximize the protection provided to the weaker party,\textsuperscript{57} the corresponding rules on negotiating capacity in international commerce also subject the party’s capacity to the law that provides the weaker party with the most protection.

(viii) Application of national law creates obvious inconveniences with regard to long distance contracts between persons in different States when one contracting party does not have all the necessary time to trace back the national law applicable to the other contracting party’s capacity to act. It also creates problems in internet contracts, where it is impossible to even identify the nationality of the other contracting party, let alone to trace back the national law applicable to his observations by GANNAGÉ P., at 366 ss.; JAYME E., at 374 ss.; CARRILLO-SALCEDO J., at 361 ss.; GRAVESON R., at 372 ss.; LOUSSOUARN Y., at 335 ss.; CAPOTORTI F., at 356 ss.. 


\textsuperscript{56} See MOSCONI F. (note 48), at 13; Id. (note 48), at 220-221.

capacity to act. These inconveniences are countered by a reference to the *lex contractus* in the rules on negotiating capacity and, *a fortiori*, when the *lex contractus* is freely chosen by the parties.58

(ix) In the hypothesis considered above, the parties have the burden to reasonably inform themselves and to know the different laws applicable to the different elements of the act. This is of course a minor burden when all the elements of the contract are subject to the same legal provisions. On the other hand, the burden becomes greater when the different elements of the contract or act are subject to different laws, which, for example, happens when the law that applies to capacity is different from the law that applies to the substance. Subjecting the capacity to conclude a contract or to perform an act to the *lex substantiae actus* seems useful from this point of view, as it is successful in helping the parties meet their burdens.

(x) Businesses involved in international commerce are generally governed by the law chosen by the parties. According to several national (i.e. Article 23(2) and 23(3) of the Italian PIL statute) and international (Article 11 of the Rome Convention, Article 13 of the Rome I Regulation) PIL rules, ‘in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence’ (as such Article 13 of the Rome I Regulation). Those national and international PIL rules derogate from the *lex substantiae actus* or chosen law in favour of the *lex loci*,59 but their application requires one of the contracting parties to be unaware of the other party’s capacity. Nevertheless the party who chooses a law still the burden of reasonably informing itself beforehand about the law’s content. Consequently, it is possible that one party’s poor knowledge of the (provisions on capacity provided by) foreign law cannot be qualified as a ‘lack of awareness.’ Therefore, the rule submitting the negotiating capacity in international commerce to the law of the contractual relationship can rarely be derogated from on the basis of the national and international PIL rules under discussion. Applying the *lex substantiae actus* to negotiating capacity is therefore the general approach. From this point of view, submitting the capacity to conclude a contract or to perform an act to the *lex substantiae actus* seems useful, as it (1) broadens the scope of application of the general rule (regarding the submission of negotiating capacity to the *lex substantiae actus*) and (2) reduces the scope of application of the exception (regarding the submission of negotiating capacity to the *lex loci*). Accordingly, applying the *lex substantiae actus* provides legal certainty.60


59 For this derogation and its analogous application, see Chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.

(xi) Community law promotes the predictability of jurisdiction. Prorogation clauses allow the parties to choose the competent court. Subjecting the capacity to choose the competent court to the law applicable to the jurisdiction agreement or to the principal agreement in which the jurisdiction clause is included, and thus to a law which is predictable for the parties, serves two very connected functions. First, it allows the parties to pre-determine the validity of their jurisdiction agreement. Second, and in the same line of thought, it allows the parties to predetermine the jurisdiction of the court seized. Subjecting the necessary capacity to conclude a jurisdiction agreement to the lex substantiae actus is necessary, as it helps to ensure the predictability of the competent court and the ‘effet utile’ of Community law.61

In summary, applying the lex substantiae actus to determine capacity with respect to international commerce allows the above-mentioned objectives to be reached, at least in part. Furthermore, such an approach is very helpful and conforms to the development of private international law: hence, all the opportunity reasons discussed correspond to a progressive line of development in national and international PIL rules that tends toward the abandonment of the traditional private international law technique of dépeçage.

So far, this is the first collection of arguments showing that the discriminations arising from the connecting factor of nationality cannot be objectively justified. A second collection of arguments consists of all the other opportunity reasons that support applying the lex loci to the parties’ capacity to contract when they are both at the same location. The lex loci has been used to make this determination since the French cassation court’s Lizardi judgment in 1861.62 This same approach

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was later adopted by the already mentioned national (for instance Article 23(2) and 23(3) of the Italian PIL statute) and international (Article 11 of the Rome Convention, Article 13 of the Rome I Regulation) PIL rules. The Lizardi rule protects the local trader that has no knowledge of either the other party’s foreign nationality or, generally, the foreign law governing that party’s capacity to act. Overall, the Lizardi rule favours the validity of international agreements, legal certainty, and, last but not least, the efficiency of international transactions.

Both of the above arguments consider the aforementioned discriminations to be unreasonable: to the extent they arise from subjective connecting factors that lead to inappropriate and unreasonable discrimination and which prejudice the interests of both the public and individual persons. The same arguments also particularly relate to the balancing of the relevant interests involved. The argument that arises from this balancing is highly significant, as it is well established that when interpreting rules which are placed at a constitutional level (which also encompass the Community principle of non-discrimination outlined above), the jurisprudence of the higher courts typically try to balance the relevant interests.

It remains to be said that the conclusions proposed in this study cannot be contradicted by the fact that the ECJ has not yet had the opportunity to either expressly nor impliedly take a decision on the thesis advocated in this paper.

It is well known that the Community principle of non-discrimination is not only a programmatic rule but a rule that is immediately applicable and has direct effect. In matters relating to capacities connected to international commerce and services or goods that have their origin or destination within the Community territory, Community law prevails over the national Italian PIL law’s general rule in français’, in: Clunet 1909, at 636 according to whom ‘si des règles plus complètes sur des conflits des lois doivent être inscrites dans notre Code Civil, la théorie mesquine de l’intérêt français lésé doit en être bannie’.

Due to the lack of space, I can at this point neither make an evaluation of these rules nor determine their scope of application. For this purpose, I refer to Chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.


Article 23(1) part 1, which makes the general capacity to act subject to the connecting factor of nationality. In summary, and to be more specific, Community law renders inapplicable the Italian rule referring to the nationality as the connecting factor for the negotiating capacity of private persons related to international commerce.

67 See for all: UBERTAZZI G.M. (note 7), at 385 according to whom ‘au juge saisi s’offre la possibilité d’évincer une règle de conflit discriminatoire, à cause de son incompatibilité avec une règle d’égalité’ as it is art.12 TCE, ‘en faisant appel à la hiérarchie [...] de cette dernière. Le critère de hiérarchie joue notamment au niveau des interdictions de discriminer contenues dans la loi fondamentale, dans la mesure ou elles ne se bornent pas à énoncer un programme (ou, d’une manière plus contraignante, un ordre à l’intention du législateur) mais où elles sont immédiatement applicables’.

68 For the determination of the law to be then applied to this capacity in Italy, see chapter IV of my monograph quoted under the asterisk that appears at the beginning of this study.